



*and Modified Sources*,” published at 85 Fed. Reg. 57,018 (Sept. 14, 2020) (the “2020 Rule”).

## **BACKGROUND**

The petitioners in these consolidated cases seek a stay, review, and summary vacatur of the 2020 Rule. On September 17, 2020, this Court issued a per curiam order (Doc. 1861977) administratively staying the 2020 Rule in order to consider the September 15, 2020 “Emergency Motion for Stay Pending Review; Motion for Summary Vacatur” filed in 20-1359 (*see* Doc. 1861564) – an action filed by certain environmental groups to seek review and summary vacatur the 2020 Rule – and which has been consolidated with this case. (The governmental and environmental petitioners from the cases consolidated hereunder are collectively referred to as “Petitioners”.)

The 2020 Rule reflects various changes to its 2016 precursor, entitled “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule” published at 81 Fed. Reg. 35,824 (June 3, 2016) (“2016 Rule”). The 2016 Rule was itself issued as part of a lengthy reconsideration process initiated by EPA in response to petitions from states (including North Dakota) and both industry stakeholders and environmental groups, following rules issued by EPA in 2012, 2013, and 2014 (collectively, the “Prior Rules”). *See* 77 Fed. Reg. 49,490 (Aug. 16, 2012) (the “2012 Rule”); 78

Fed. Reg. 58,416 (Sept. 23, 2013) (the “2013 Rule”); 79 Fed. Reg. 79,018 (Dec. 31, 2014) (the “2014 Rule”). The State of North Dakota is currently a petitioner in various litigation pending before this Court regarding the 2016 Rule and Prior Rules. *See Am. Petroleum Inst. v. EPA*, D.C. Cir. No. 13-1108, consolidated with D.C. Cir. Nos. 13-1289, 13-1290, 13-1292, 13-1293, 13-1294, 15-1040, 15-1041, 15-1042, 15-1043, 15-1044, 16-1242 (State of North Dakota’s original petition), 16-1257, 16-1262, 16-1263, 16-1264, 16-1266, 16-1267, 16-1269, and 16-1270.

The 2020 Rule is partly a result of years of commenting upon, administrative reconsideration of, and judicial challenges to the 2016 Rule – a long process in which North Dakota has continuously participated. In summary, the 2020 Rule: (1) removes sources in the transmission and storage segment from the source category, rescinding the New Source Performance Standards (“NSPS”) (including both the volatile organic compounds (VOC) and methane requirements) applicable to those sources, and (2) rescinds the methane-specific requirements of the NSPS applicable to sources in the production and processing segments. *See* 85 FR 57018/1. On the policy side, the 2020 Rule also clarifies that EPA interprets Section 111 of Clean Air Act to require EPA to “determine that the pertinent pollutant causes or contributes significantly to dangerous air pollution” as a predicate to promulgating NSPS for certain air pollutants. *Id.*

Petitioners' request for summary vacatur of the 2020 Rule would result in the reinstatement of the 2016 Rule, thereby erasing years of interim reconsideration of that rule, and nullifying the corresponding efforts by the State of North Dakota (and others) in that years-long process.

## **ARGUMENT**

In support of its Motion, the State of North Dakota states as follows:

### **I. The State of North Dakota Satisfies the Standards for Intervention**

Federal Rule of Appellate Procedure 15(d) requires that a party moving to intervene set forth its interest and the grounds for intervention. Intervention under Rule 15(d) is granted where the moving party's interests in the outcome of the action are direct and substantial. *See, e.g., Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (intervention allowed under Rule 15(d) because petitioners were "directly affected by" agency action); *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with "substantial interest in the outcome"). The decision to allow intervention is guided by practical considerations and the "need for a liberal application in favor of permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 700, 702 (D.C. Cir. 1967). Although Rule 15(d) does not provide clear criteria for intervention, Federal Rule of Civil Procedure 24(a) and the "policies underlying intervention" in federal district courts provide guidance. *See Int'l Union U.A.W. v. Scofield*, 382

U.S. 205, 216 n.10 (1965); *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) (per curiam).

The State of North Dakota may intervene as of right pursuant to Federal Rule of Civil Procedure 24(a) because: (1) the intervention motion is timely, (2) North Dakota has legally cognizable interests in the case, (3) North Dakota's absence from the case will impair its ability to protect its interests, and (4) North Dakota's interests are inadequately represented by the existing parties. *See Williams & Humbert, Ltd. v. W&H Trade Marks (Jersey)*, 840 F.2d 72, 74 (D.C. Cir. 1988).

#### **A. The State of North Dakota's Application is Timely**

Pursuant to Federal Rule of Appellate Procedure 15(d), this Motion has been timely filed within 30 days after Petitioners filed their petition for review. *See* Petition for Review, Doc. 1861232 (September 14, 2020), and is within the 60 day period for challenging the 2020 Rule under Section 307(b)(1), 42 U.S.C. § 7607(b), of the Clean Air Act. Finally, this Motion is also timely as Petitioners' initial filings are not yet due, and therefore the State of North Dakota's intervention will not unduly delay or prejudice any party and will not interfere with any schedule set by the Court.

#### **B. The State of North Dakota Has Legally Cognizable Interests in This Case and Its Absence from These Consolidated Case Will Impair Its Ability to Protect Those Interests**

The State of North Dakota has participated extensively in the regulatory and judicial proceedings leading up to EPA's promulgation of the 2020 Rule, including the litigation challenging the 2016 Rule and Prior Rules. For example, North Dakota participated in the notice and comment process during EPA's promulgation of the 2016 Rule and Prior Rules. *See* North Dakota Department of Health, Comments Re; proposed "Oil and Natural Gas Sector: Emission Standards for New and Modified Sources," Docket ID No. EPA-HQ-OAR-2010-0505-6928 (December 3, 2015); and Industrial Commission of North Dakota, Comments Re; 2015 Proposed Rules and Draft Control Technique Guidelines for the Oil and Natural Gas Industry, Document ID EPA-HQ-OAR-2010-0505-6977 (December 4, 2015) (submitted by then Governor Jack Dalrymple, Attorney General Wayne Stenehjem, and Agricultural Commissioner Dough Goehring). North Dakota later submitted its own administrative petition for reconsideration of various aspects of the 2016 Rule. *See* Docket No. EPA-HQ-OAR-2010-0505; North Dakota's Petition for Review, D.C. Cir. No. 16-1242 (July 15, 2016). North Dakota then continued to participate and play a leading role in the consolidated litigation challenging the validity of the 2016 Rule. *See See Am. Petroleum Inst. v. EPA*, D.C. Cir. No. 13-1108 (as consolidated). Finally, North Dakota participated in the notice and comment process for the 2020 Rule, raising the same issues at play in the litigation over the 2016 Rule. *See* Industrial Commission of North Dakota,

Comments Re; EPA Proposed Amendments to the 2016 New Source Performance Standards for the Oil and Natural Gas Industry, Document ID EPA-HQ-OAR-2017-0757-1993 (November 29, 2019).

Throughout the State of North Dakota's comments, and in the issues raised in challenges to the 2016 Rule in the Court of Appeals for the District of Columbia, North Dakota was one of the principal proponents of the argument that the 2016 Rule (and Prior Rules) violated the Tenth Amendment and the cooperative federalism required by the Clean Air Act by usurping North Dakota's sovereign authority to set state specific gas capture rules. *See State of North Dakota v. EPA*, Petitioner State of North Dakota's Statement of Issues to Be Raised, Doc. 1631518, at p. 3, Case No. 16-1242 (as later consolidated with D.C. Cir. No. 13-1108) (raising the issue of "[w]hether the [2016 Rule] violates the Tenth Amendment, principles of cooperative federalism, and the CAA by neglecting North Dakota's state regulations and commandeering North Dakota's state-delegated programs."); Industrial Commission of North Dakota, Comments Re; 2015 Proposed Rules and Draft Control Technique Guidelines for the Oil and Natural Gas Industry, at p. 2 (noting cooperative federalism concerns); Industrial Commission of North Dakota, Comments Re; EPA Proposed Amendments to the 2016 New Source Performance Standards for the Oil and Natural Gas Industry, at p. 2 (noting North Dakota's strong state regulatory programs and North Dakota's

intent to “defend its sovereign jurisdiction over oil, gas, and environmental regulation.”)

The petitions for review in these consolidated cases implicate the same issues, as many Petitioners would have this Court invalidate the 2020 Rule and reinstate regulatory overreaches in the 2016 Rule and Prior Rules, thus reinstating many of North Dakota’s key concerns with the 2016 Rule and Prior Rules.

**C. The State of North Dakota’s Interests are Not Adequately Represented by Existing Parties**

The State of North Dakota’s interests are not adequately represented by other parties to these consolidated cases. First, North Dakota has a unique sovereign interest in protecting its own state regulations and state-delegated programs as authorized under the Clean Air Act. Currently, there is no other State moving to intervene as a Respondent in support of the 2020 Rule. Therefore, there is no other entity that can adequately represent the State’s sovereign perspective on the requirements of the Tenth Amendment and principles of cooperative federalism required by the Clean Air Act.

Second, North Dakota is the second largest producer of oil in the nation, and the thirteenth largest natural gas producer. North Dakota therefore has a vested interest in the regulation, protection and development of those resources. The North Dakota Department of Environmental Quality has extensively regulated these sources of methane emissions, including recently establishing NSPS for



methane in the NSPS Quad-O/Oa rulemakings establishing emission standards and compliance schedules for the control of greenhouse gases, including methane. *See* North Dakota Department of Environmental Quality, NSPS OOOO/OOOOa (Quad-O/Oa) Status (available at <https://deq.nd.gov/aq/OilGas/QuadO.aspx>). Petitioners' attempts to vacate the 2020 Rule would leave North Dakota's extensive NSPS rulemakings in regulatory limbo and could usurp North Dakota's sovereign authority recognized by Section 111 of the Clean Air Act to regulate greenhouse gases.

North Dakota therefore faces significant regulatory, economic, and political implications from the outcome of this litigation that are not represented by existing parties to these consolidated cases. These interests do not always align with EPA, nor do they align with the many Intervenors on behalf of Respondents, who to date are industry groups who have separate perspectives and goals from the sovereign State of North Dakota.

Further, even to the extent that North Dakota's prior challenges to the 2016 Rule and Prior Rules, and defense of the 2020 Rule, may overlap with some of the Intervenors-Respondents seeking leave to intervene in these cases, none of those Intervenors-Respondents can adequately represent North Dakota's interests. To date, no other pending Intervenor-Respondents are a State, but instead are non-governmental organizations, industry groups, or cooperatives from across the

country that represent their individual constituents. North Dakota has a unique interest in protecting its own state sovereignty that those pending Intervenor-Respondents simply cannot represent.

For the foregoing reasons, North Dakota respectfully requests that this Court grant its motion to intervene.

Dated: October 14, 2020	Respectfully submitted,  STATE OF NORTH DAKOTA WAYNE STENEHJEM ATTORNEY GENERAL  <i>s/ Paul M. Seby</i> _____ Paul M. Seby Special Assistant Attorney General Greenberg Traurig, LLP 1144 15 <sup>th</sup> Street, Suite 3300 Denver, CO 80202 Telephone: (303) 572-6584 Fax: (720) 904-6151 sebyp@gtlaw.com  <i>Counsel for Petitioner State of North Dakota</i>
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 27(d)(1)(D) and Circuit Rules 27(a)(1) and 27(d)(2), the foregoing Motion complies with the type volume limitation of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because it contains 1,918 words, excluding parts exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, according to the count of Microsoft Word, and is therefore within the word limit of 5,200 words. The foregoing motion also complies with Rules 27(d)(1)(E), 32(a)(5), and 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in 14-point Times New Roman type.

### **CERTIFICATE OF PARTIES**

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), North Dakota furnishes this list of parties, intervenors, and amici curiae that have appeared before this Court in this case, D.C. Cir. No. 20-1357 (and consolidated cases) as an addendum to its motion to intervene.

**Petitioners:** The Petitioners are the State of California, by and through Attorney General Xavier Becerra, and the California Air Resources Board; State of Colorado, by and through Attorney General Philip J. Weiser and the Colorado Department of Public Health and Environment; State of Connecticut; State of Delaware; State of Illinois; State of Maine; State of Maryland; State of Michigan; State of Minnesota; State of New Jersey; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; Commonwealth of Virginia; City of Chicago; District of Columbia; and City and County of Denver.

**Respondents:** The Respondents in this Case are the United States Environmental Protection Agency and Andrew R. Wheeler, in his capacity as Administrator of the EPA.

**Intervenors-Respondents:** The Intervenors-Respondents are the American Petroleum Institute; Western Energy Alliance; GPA Midstream Association; Independent Petroleum Association of America; Domestic Energy Producers Alliance; Eastern Kansas Oil & Gas Association; Illinois Oil and Gas Association; Independent Oil and Gas Association of West Virginia, Inc.; Indiana Oil and Gas Association; Kansas Independent Oil and Gas Association; Kentucky Oil and Gas Association; Michigan Oil and Gas Association; Ohio Oil and Gas Association; Pennsylvania Independent Oil & Gas Association; Texas Alliance of Energy Producers; Texas Independent Producers and Royalty Owners Association; and West Virginia Oil and Natural Gas Association

**Movant-Intervenors:** Motions to Intervene for Respondents were filed by the International Association of Drilling Contractors, National Stripper Well Association, North Dakota Petroleum Council, the Petroleum Alliance of Oklahoma. To the knowledge of the State of North Dakota, this Court has not yet granted these motions to intervene as of the time of this filing.

**Amici Curiae:** To the knowledge of the State of North Dakota, there are no amici curiae as of the time of this filing.

Dated: October 14, 2020

Respectfully submitted,

*s/ Paul M. Seby* \_\_\_\_\_

Paul M. Seby

Special Assistant Attorney General

State of North Dakota

***Counsel for Petitioner State of North  
Dakota***

**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2020, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

*s/ Paul M. Seby* \_\_\_\_\_

Paul M. Seby

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***Counsel for Petitioner State of North  
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