ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, **Petitioner,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and, ANDREW WHEELER, Administrator, United States Environmental Protection Agency,** **Respondents.**	)	**No. 20-1149**

MOTION OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AMERICAN PETROLEUM INSTITUTE, AMERICAN FUEL AND PETROCHEMICAL MANUFACTURERS, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO INTERVENE AS RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the Interstate Natural Gas Association of America ("INGAA"), American Petroleum Institute ("API"), American Fuel and Petrochemical Manufacturers ("AFPM"), National Rural Electric Cooperative Association ("NRECA"), and Chamber of Commerce of the United States of America ("Chamber") (collectively, "Movant-Intervenors") respectfully move for leave to

intervene as Respondents in the above-captioned case. On May 8, 2020, Petitioner filed a petition for review challenging a final action of the United States Environmental Protection Agency ("EPA" or "Agency") under the Clean Air Act ("CAA" or "Act") titled "National Emission Standards for Hazardous Air Pollutants: Stationary Combustion Turbines Residual Risk and Technology Review; Final Rule" published at 85 Fed. Reg. 13,524 (Mar. 9, 2020) ("Rule"). Pursuant to Federal Rule of Appellate Procedure 15(d), this motion to intervene has been timely filed within 30 days after Petitioner filed its petition for review. Counsel for Movant-Intervenors have contacted counsel for the other parties in this case. Counsel for Petitioner states that they reserve their right to oppose this motion until after evaluating it. Counsel for EPA has stated that they do not oppose this motion.

BACKGROUND

INGAA represents the vast majority of the interstate natural gas transmission pipeline companies in the United States; its members operate almost 200,000 miles of natural gas pipeline, serving as an indispensable link between natural gas producers and consumers. API represents over 630 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly $2 trillion in U.S. capital projects to

advance all forms of energy, including alternatives. AFPM is a national trade association whose members comprise most U.S. refining and petrochemical manufacturing capacity. NRECA is the service organization for America's cooperatives and works to promote and support co-ops and to champion their business model in the electric industry that supports more than 7 million U.S. jobs. The Chamber is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interest of more than three million companies and professional organizations of every size, in every industry sectors, and from every region of the country. Many members of these organizations own and operate stationary combustion turbines and, thus, are directly impacted by the Rule at issue here.

The CAA requires that each national emission standards for hazardous air pollutants ("NESHAP") be periodically evaluated in what is referred to as the "residual risk and technology review" process. *See* CAA § 112(d)(6), (f)(2)(A); 42 U.S.C. § 7412(d)(6), (f)(2)(A). The Rule includes the results of the residual risk and technology review process for the NESHAP applicable to the stationary combustion turbines source category. In short, the Rule left unchanged the NESHAP for this source category, after EPA determined that the existing NESHAP provides an ample margin of safety to protect the public health and prevents an adverse environmental effect, and that it was not necessary to revise

the NESHAP in light of developments in practices, processes, and control technologies.

On May 8, 2020, Petitioner filed suit to challenge the Rule. Movant-Intervenors are requesting leave to intervene as respondents to protect their interests in ensuring that the Rule be upheld.[1]

ARGUMENT

The Court should allow Movant-Intervenors to intervene as respondents because, for the reasons discussed below, they meet the standard for intervention in petition for review proceedings in this Court.

I. The Standard for Intervention.

Intervention in petition for review proceedings in this Court is governed by Federal Rule of Appellate Procedure 15(d), which provides that a motion for leave to intervene "must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the

[1] In the same Federal Register Notice as the Rule, EPA deferred decision on whether to lift the stay of the NESHAP for some combustion turbines, explaining that EPA wanted to further consider comments related to the time needed for such combustion turbines to demonstrate compliance and in light of a petition to delist the stationary combustion turbine category from regulation under Section 112 of the Clean Air Act. *See* 85 Fed. Reg. at 13,525. To the extent Petitioners intend to challenge EPA's decision to defer decision on the stay, which is likely not reviewable as it is not final agency action, Movant-Intervenors would oppose such request because an immediate removal of the stay would cause substantial harm to members who own and operate natural gas-fired combustion turbines.

grounds for intervention." Fed. R. App. P. 15(d). This rule "simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought." *Synovus Fin. Corp. v. Board of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991).

The policies supporting district court intervention under Federal Rule of Civil Procedure 24, while not binding in cases originating in courts of appeals, may inform the intervention inquiry under Federal Rule of Appellate Procedure 15(d). *See, e.g., Int'l Union, United Auto., Aerospace & Agric. Implement Works of Am. 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 requirements for intervention of right under Federal Rule of Civil Procedure 24(a)(2) are that: (1) the application is timely; (2) the applicant claims an interest relating to the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) existing parties may not adequately represent the applicant's interest. *See, e.g., Fund for Animals, Inc. v. Norton,* 322 F.3d 728, 731 (D.C. Cir. 2003). This Court has stated that an applicant for intervention that meets the test for intervention of right also thereby demonstrates Article III standing. *See Roeder v. Islamic Republic of Iran,* 333 F. 3d 228, 233 (D.C. Cir. 2003).

As discussed below, Movant-Intervenors meet the elements of this intervention-of-right test and thereby satisfy any applicable standing requirements.[2]

Groups such as INGAA, API, AFPM, NRECA, and the Chamber have standing to participate in litigation on their members' behalf when:

> (a) [their] members would otherwise have standing to sue in their own right; (b) the interests [they] seek[] to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested required the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977); *see also, e.g., Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). For reasons discussed herein, the interests of members of INGAA, API, AFPM, NRECA, and the Chamber have in affirmation upholding the Rule will be harmed if Petitioner prevails in its challenge. Members of Movant-Intervenors therefore would have standing to intervene in their own right. Further, the interest that Movant-Intervenors seek to protect are germane to their purpose of participating in proceedings and related litigation that affect their members. Finally, participation

[2] While this Court has previously required intervenor-respondents to demonstrate standing, *see NRDC v. EPA*, 896 F.3d 459, 462-63 (D.C. Cir. 2018), the Supreme Court recently clarified that an intervenor who is not invoking the Court's jurisdiction need not demonstrate standing. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Regardless, Movant-Intervenors have standing.

of individual members from either INGAA, API, AFPM, NRECA, and the Chamber in this litigation is not required.

In addition, Movant-Intervenors meet prudential standing requirements because their members, as the parties directly regulated by the rule at issue here, have interests "within the zone of interests to be protected or regulated by the [CAA]." *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam) (internal quotation marks and citation omitted). The members of INGAA, API, AFPM, NRECA, and the Chamber own and operate hundreds, if not thousands, of stationary natural gas-fired combustion turbines that are the subject of the Rule.[3] Indeed, combustion turbines are ubiquitous throughout American industry: combustion turbines are used for compressor stations along gas transmission lines and for liquefied natural gas facilities; they are used to generate electricity; and they are used in refineries and other industrial

[3] Comments of INGAA, EPA-HQ-OAR-2017-0688-0112 ("INGAA's members operate nearly 200,000 miles of pipelines that include stationary combustion turbines at compressor stations located along the pipelines. Some INGAA members also operate turbines at compressor stations located along the pipelines."); Comments of API, EPA-HQ-OAR-2017-0688-0100 ("our members own and operate a large population of combustion turbines which are critical to the safe and reliable operation of their facilities."); Comments of AFPM, EPA-HQ-OAR-2017-0688-0118 ("Some of our members use stationary combustion turbines to provide energy for production processes and will be affected by the proposed changes to the rule."); Comments of NRECA, EPA-HQ-OAR-2017-0688-0111 ("NRECA has member cooperatives with combustion turbines affected by this rulemaking.").

facilities to provide energy and for a variety of other uses. Movant-Intervenors have been actively involved in this rulemaking proceeding as well as the original NESHAP rulemaking for this source category at 40 C.F.R. 63, Subpart YYYY.[4]

II. Movant-Intervenors Meet the Standard for Intervention.

A. The Motion Is Timely.

Movant-Intervenors meet the timeliness requirement because this motion is being filed, in compliance with Federal Rule of Appellate Procedure 15(d), within 30 days after Petitioner filed its petition for review on May 8, 2020. *See* Fed. R. App. P. 26(a)(1)(C) (stating where last day of period is a weekend or holiday, period continues to run until next business day). Moreover, because this motion is being filed at an early stage of the proceeding and before the parties' initial submission or establishment of a briefing schedule, granting this motion will not disrupt or delay any proceedings. If granted intervention, Movant-Intervenors will comply with any briefing schedule established by the Court.

[4] *See* note 2, *supra; see also* Memorandum: Technology Review for Stationary Combustion Turbines Risk and Technology Review (RTR), EPA-HQ-OAR-2017-0688-0066 (EPA contractor for rulemaking noting combustion turbines operated by some Movant-Intervenor members); Summary of Public Comments and Responses on Proposed Rules (84 FR 15046, April 12, 2019), EPA-HQ-OAR-2017-0688-139.

B. Movant-Intervenors and Their Members Have Interests That Will Be Impaired If Petition Prevails.

This litigation threatens the interests of Movant-Intervenors and their respective members. Key elements of the Rule supported by Movant Intervenors – including EPA's decision to leave unchanged the existing NESHAP – could be lost if Petitioners prevail in this litigation. Thus, if the interest prongs of Federal Rule of Civil Procedure 24 are relevant, Movant-Intervenors clearly meet them here.

The interest test for intervention, under this Court's standard, is flexible and "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). Where parties are the subject of governmental regulation, as INGAA, API, AFPM, NRECA, and Chamber members are with respect to the Rule, "there is ordinarily little question that the action or inaction has caused [them] injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Further, a legally protectable interest may exist where an intervenor-applicant demonstrates that it stands to "gain or lose by the direct legal operation and effect of the judgment." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (internal quotation marks and citation omitted). This Court has held that "[t]he 'threatened loss' or [a] favorable action [by an agency] constitutes a 'concrete and imminent injury'" justifying intervention. Order, *New York v. EPA*, NO. 17-1273 (D.C. Cir. Mar 14, 2018) (per curiam)

(ECF No. 1722115) (quoting *Fund for Animals*, 322 F.3d at 733) (granting group's motion to intervene in challenge to EPA denial of rulemaking petition that would have subjected group's members to more stringent regulation).

In the present case, a ruling that the Rule is unlawful or should otherwise be revised would present a "concrete and imminent injury" to members of INGAA, API, AFPM, NRECA, and the Chamber that own and operate stationary combustion turbines subject to the NESHAP addressed in the Rule.

In the Rule, EPA decided to retain without change key provisions of the relevant NESHAP supported by Movant-Intervenors and their members, including numerical emissions limits and the Agency's risk assessment. Vacatur of these provisions could increase the regulatory burdens for INGAA, API, AFPM, NRECA, and Chamber members subject to this rule. If Petitioners prevail in this case, facilities owned by Movant-Intervenors' members will face a new round of rulemaking that would create significant regulatory uncertainty and result in more stringent and costly regulatory requirements. Accordingly, Movant-Intervenors have an interest in defending the EPA action that Petitioners challenge here, and disposition of this case may impair their ability to protect that interest.

C. Existing Parties Cannot Adequately Represent Movant-Intervenors' Interests.

Under Federal Rule of Civil Procedure 24(a)(2), the burden of showing inadequate representation in a motion for intervention "is not onerous" and "[t]he

applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Assuming *arguendo* that inadequate representation is an applicable test for intervention under Federal Rule of Appellate Procedure 15(d),[5] Movant-Intervenors meet that criterion here.

The interests of Petitioners are adverse to those of Movant-Intervenors' interests in this case. Petitioners are challenging the Rule, whereas Movant-Intervenors support the Rule's decision to not revise the existing NESHAP as a result of EPA's risk and technology review. Thus, Petitioners cannot adequately represent interests of Movant-Intervenors or their members.

EPA also cannot adequately represent Movant-Intervenors' interest here. As a governmental entity, EPA necessarily represents the broader "general public interest." *Dimond*, 792 F.2d at 192-93 ("A government entity … is charged by law with representing the public interest of its citizens. … The [government entity] would be shirking its duty were it to advance th[e] narrower interest [of a business concern] at the expense of its representation of the general public interest."); *Fund*

[5] Federal Rule of Civil Procedure 24(a)(2)'s "adequate representation" prong has no parallel in Federal Rule of Appellate Procedure 15(d), but Movant-Intervenors address it here to inform the Court fully.

for Animals, 322 F.3d at 736 (this court "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors").

This Court has recognized that, "[e]ven when the interests of EPA and [intervenors] can be expected to coincide, … that does not necessarily mean that adequacy of representation is ensured . …" *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). In *NRDC*, after rubber and chemical manufacturers had sought unsuccessfully to intervene in the district court in support of EPA, this Court on appeal reversed the denial of intervention. Because the companies' interests were narrower than those of EPA and were "concerned primarily with the regulation that affects their industries," the companies' "participation in defense of EPA decisions that accord with their interest may also be likely to serve as a vigorous and helpful supplement to EPA's defense." *Id*. at 912-13 (emphasis omitted). Here, unlike EPA, Movant-Intervenors each have a specific, focused interest in avoiding unwarranted or supported imposition of potentially burdensome and costly emission control obligations on their respective members that will supplement EPA's position to retain the Rule. In sum, the existing parties do not and cannot adequately represent Movant-Intervenors' interests in this case.

CONCLUSION

For the foregoing reasons, Movant-Intervenors INGAA, API, AFPM, NRECA, and the Chamber respectfully request leave to intervene as respondents.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, **Petitioner,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and, ANDREW WHEELER, Administrator, United States Environmental Protection Agency,** **Respondents.**	**No. 20-1149**

RULE 26.1 DISCLOSURE STATEMENT OF MOVANT-INTERVENOR-REPONDENTS INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AMERICAN PETROLEUM INSTITUTE, AMERICAN FUEL AND PETROCHEMICAL MANUFACTURERS, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Movant-Intervenors the Interstate Natural Gas Association of America ("INGAA"), American Petroleum Institute ("API"), American Fuel and Petrochemical Manufacturers ("AFPM"), National Rural Electric Cooperative Association ("NRECA"), and Chamber of Commerce of the United States of America ("Chamber") file the following statements:

INGAA is an incorporated, not-for-profit trade association representing virtually all of the interstate natural gas pipeline companies operating in the United States. INGAA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Most INGAA member companies are corporations with publicly traded stock.

API is a national trade association representing all aspects of America's oil and natural gas industry. API has more than 630 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of industry. API has no parent company, and no publicly held company has a 10 percent or greater ownership in API.

AFPM is a national trade association whose members comprise most U.S. refining and petrochemical manufacturing capacity. AFPM members supply consumers with a wide range of products and services that are used daily in homes and businesses. AFPM has no parent company, and no publicly held company has a 10 percent or greater ownership interest in AFPM.

NRECA is the national association of rural electric cooperative. NRECA represents more than 900 consumer-owned, not-for-profit electric cooperatives, public power districts, and public utility districts in the United States. NRECA

members operate power plants and other facilities that generate electricity for residential, commercial, industrial, institutional, and governmental customers. NRECA has no parent corporation. NRECA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in NRECA.

The Chamber is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interest of more than three million companies and professional organizations of every size, in every industry section, and from every region of the country. The Chamber is a "trade association" within the meaning of Circuit Rule 26.1(b). The Chamber has no parent company, and no publicly held company has a 10 percent or greater ownership interest in the Chamber.

Respectfully submitted,

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Dated: June 8, 2020

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
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SIERRA CLUB, **Petitioner,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and, ANDREW WHEELER, Administrator, United States Environmental Protection Agency,** **Respondents.**	)	**No. 20-1149**

CERTIFICATE OF MOVANT-INTERVENOR-REPONDENTS INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AMERICAN PETROLEUM INSTITUTE, AMERICAN FUEL AND PETROCHEMICAL MANUFACTURERS, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AS TO PARTIES AND *AMICI CURIAE*

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), Movant-Intervenor-Respondents certify that the parties, including intervenors, and *amici curiae* in this case are as set forth below. Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), disclosure statements for Movant-Intervenors as required by Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 are being filed herewith. Because

this case involves direct review in this Court of agency action, the requirement to furnish a list of parties, including intervenors, and *amici curiae* that appeared below is inapplicable.

Petitioner: Sierra Club is the petitioner.

Respondents: U.S. Environmental Protection Agency and Andrew Wheeler, Administrator, U.S. Environmental Protection Agency are the Respondents.

Intervenors: There are no intervenors at the time of this filing.

***Amici Curiae*:** There are no *amici curiae* at the time of this filing.

Respectfully submitted,

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Dated: June 8, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(f) and (g), I hereby certify that the foregoing motion complies with the type volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,613 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Times New Roman font.

Respectfully submitted,

/s/ Makram B. Jaber

Dated: June 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of June 2020, I am causing the foregoing motion and accompanying documents to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

/s/ Makram B. Jaber
Makram B. Jaber