IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Iowa Citizens for Community Improvement, Animal Legal Defense Fund, Association of Irritated Residents, Institute for Agriculture and Trade Policy, Waterkeeper Alliance, Inc., Waterkeepers Chesapeake, *Plaintiffs*, v. Council on Environmental Quality *and* Mary Neumayr, in her official capacity as Chair of the Council on Environmental Quality, *Defendants*, American Farm Bureau Federation, American Forest Resource Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Road & Transportation Builders Association, Chamber of Commerce of the United States of America, Federal Forest Resource Coalition, Interstate Natural Gas Association of America, Laborers' International Union of North America, and National Cattlemen's Beef Association, *Proposed Intervenors.*	No. 1:20-cv-02715 Hon. Timothy J. Kelly

PROPOSED INTERVENORS' RESPONSE TO COMPLAINT

The Proposed Intervenors hereby respond to the complaint as follows:

A. No answer is required

The complaint in this case challenges a final rule of the Council on Environmental Quality (CEQ) titled "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," and published at 85 Fed. Reg. 43,304 (July 16, 2020). Plaintiffs assert causes of action under the Administrative Procedure Act only.

APA lawsuits like this one do not implicate the district court's role as a factfinding tribunal. Rather, a district court presented with a complaint under the APA assumes the role of an appellate court, reviewing the agency's decisionmaking on a fixed administrative record. *See, e.g.*, *Olenhouse*

v. Commodity Credit Corp., 42 F.3d 1560, 1580 (10th Cir. 1994) ("Reviews of agency action in the district courts must be processed *as appeals*.").

Accordingly, the factfinding procedures applicable in ordinary federal civil litigation do not apply here. *Olenhouse*, 42 F.3d at 1580. "Ordinarily, courts confine their [APA] review to the administrative record." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (quotation marks omitted). Stated another way, "in an APA case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision." *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (quotation marks omitted).

Answers in APA cases like this one are therefore inapt. "The purpose of the answer is . . . only to determine which of plaintiff's [factual] allegations defendants dispute." 5 Fed. Prac. & Proc. Civ. § 1182 (3d ed.). But the outcomes of APA lawsuits do not turn on the parties' disputes of factual allegations before the district court; they turn only on whether the agency's decision is rationally grounded in the administrative record and statutory text, and otherwise whether the agency followed the necessary rulemaking procedures. An answer to a complaint sheds no light on those singularly pertinent issues.

From this perspective, an APA complaint is better understood, not as a "complaint" in a civil action, but as a "petition for review of agency action." *Forest Guardians v. U.S. Fish and Wildlife Serv.*, 611 F.3d 692, 702 n.12 (10th Cir. 2010); *WildEarth Guardians v. U.S. Forest Serv.*, 668 F. Supp. 2d 1314, 1323 (D.N.M. 2009). No less in a district court than in a court of appeals, petitions for review do not call for the filing of answers. *See, e.g., Dine Citizens Against Ruining Our Env't v. Jewell*, 2015 WL 4997207, at *14 (D.N.M. 2015), *aff'd*, 839 F.3d 1276 (10th Cir. 2016) (no answers filed by either the agency or defendant-intervenors, including one of the Proposed Intervenors, in APA lawsuit concerning NEPA); *San Diego Cattlemen's Coop. Ass'n v. Vilsack*, 2015 WL 12866452 (D.N.M. 2015) (denying motion to require the filing of an answer).

Parties commonly forego answers in APA cases for the reasons just given. *E.g.*, *WildEarth Guardians v. U.S. Army Corps of Eng'rs*, 947 F.3d 635, 640 (10th Cir. 2020) (appellate review of APA case in which neither the government defendants nor the intervenor-defendants filed answers, without objection). To a substantial degree, the complaint comprises statements that characterize case law, statutes, regulations, and other legal documents—more akin to a legal brief than a complaint in a civil case. The assertions properly characterized as allegations of historical fact cannot and do not bear on the merits of plaintiffs' causes of action under the APA; at most, they bear on the question of standing, which are now the subject of separate motion-to-dismiss briefing. In these circumstances, requiring defendants and the Proposed Intervenors to respond line-by-line to the complaint would waste party and judicial resources and serve no practical purpose.

B. General denial

If the Court nevertheless deems an answer necessary, the Proposed Intervenors—while reserving all rights—state as follows:

Pursuant to Federal Rule of Civil Procedure 8(b)(3), the Proposed Intervenors specifically admit the factual allegations appearing in Paragraphs 12, 26, 27 (the first sentence only), 28, 31, 34-36, 39, 44, and 46 of the complaint.

As for the remaining allegations, either the Proposed Intervenors deny such allegations, no response is required to such allegations pursuant to Rule 8(b)(6), or the Proposed Intervenors lack sufficient information to admit or deny such allegations pursuant to Rule 8(b)(5). The Proposed Intervenors therefore generally deny, pursuant to Rule 8(b)(3), any and all allegations not specifically admitted above.

Dated: December 10, 2020

Respectfully submitted,

/s/ *Michael B. Kimberly*

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