ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AIR ALLIANCE HOUSTON, *et al.*, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency, *Respondents*.	Case No. 19-1260 Consolidated with 20-1005

UNOPPOSED MOTION FOR LEAVE TO INTERVENE ON BEHALF OF RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and the Chamber of Commerce of the United States of America ("Movants") respectfully move for leave to intervene in support of Respondents U.S. Environmental Protection Agency and Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency

("EPA" or "Agency"), in this case. Movants are associations whose members include companies regulated by the final rule that the Petition for Review in this case seeks to challenge. And Movants have participated not only in the administrative proceedings leading to the rule at issue, but also as intervenors in challenges to related rules. Counsel for Respondents and for Petitioners have indicated they do not oppose this motion.

The Petition for Review challenges a final rule that EPA promulgated under the Clean Air Act's ("CAA" or "Act") Section 112 Risk Management Program ("RMP"). *See* Accident Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 84 FR 69,834 (Dec. 19, 2020) ("RMP Reconsideration Rule" or "Rule"). The RMP's requirements generally apply to all facilities whose processes include more than a threshold quantity of certain regulated substances. And these regulated processes are commonly present in certain industrial sectors, including chemical manufacturing, petrochemical manufacturing, refining, petroleum products manufacturing, and petroleum and petroleum products wholesale. *See* 84 FR at 69,835–36. Movants are trade associations whose members

operate in precisely those industry sectors directly regulated by the challenged Rule.

Moreover, Movants have been actively involved in various proceedings leading to the Rule being challenged. Movants not only participated in the regulatory proceedings that led to the 2017 RMP rule (a predecessor to the current Rule),[1] but also sought reconsideration of[2] and challenged that rule in this Court.[3] Movants also submitted comments on EPA's proposed reconsideration of the 2017 rule,[4] urging EPA to improve the RMP regulations to provide a clear pathway for enhanced process safety.[5]

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[1] Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act, 82 FR 4,594 (Jan. 13, 2017).

[2] *See* RMP Coalition, Petition for Reconsideration, EPA-HQ-OEM-2015-0725-0759 (Feb. 28, 2017).

[3] Movants' challenge to the 2017 rule is currently being held in abeyance. Abeyance Order, *Am. Chem. Council v.* EPA, No. 17-1085 (D.C. Cir. Apr. 4, 2017), Doc. No. 1669461.

[4] Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act, 83 FR 24,850 (May 30, 2018).

[5] *See* Am. Chem. Council, Comments on Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act, Proposed Rule (Aug. 17, 2018), Docket ID No. EPA-HQ-OEM-2015-0725-1628; Am. Fuel & Petrochem. Mfrs., Comments on Accidental Release Prevention Requirements: Risk Management Programs under

The result of these regulatory proceedings is the RMP Reconsideration Rule being challenged here. The Rule clarifies the obligations of Movants' members in addressing process safety management and risk management, in coordinating with emergency response personnel in the event of an accidental release, and in handling sensitive information in the interest of public safety and national security. In other words, the Rule provides clarity in an area of considerable importance to Movants' members: the safety of their workers, facilities, and communities.

Movants undoubtedly meet the standards for intervention in support of EPA in this case: (1) the request is timely; (2) Movants have

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the Clean Air Act, Proposed Rule (Aug. 23, 2018), Docket ID No. EPA-HQ-OEM-2015-0725-1924; Am. Petrol. Inst., Comments on Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act, Proposed Rule (Aug. 23, 2018), Docket ID No. EPA-HQ-OEM-2015-0725-1865; and U.S. Chamber of Commerce *et al.*, Comments on Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act, Proposed Rule (Aug. 23, 2018), Docket ID No. EPA-HQ-OEM-2015-0725-1952. *See also* Am. Chem. Council, Public Hearing Statement (June 14, 2018), Docket ID No. EPA-HQ-OEM-2015-0725-0964; Am. Fuel & Petrochem. Mfrs., Public Hearing Statement (June 14, 2018), Docket ID No. EPA-HQ-OEM-2015-0725-0970; and U.S. Chamber of Commerce, Public Hearing Statement (June 14, 2018), Docket ID No. EPA-HQ-OEM-2015-0725-0937.

material interests related to the Rule, as their members include facilities directly regulated by the RMP Reconsideration Rule and are thus directly affected by the Rule; (3) disposition of the Petition may impair those interests, as any relief Petitioners might obtain might be borne directly by Movants' members; and (4) neither Petitioners nor EPA can adequately represent Movants, whose members have direct commercial interests in the final Rule. For similar reasons, Movants' standing is self-evident as they represent entities directly regulated by the rule being challenged in this case. Accordingly, the Court should grant Movants' request to intervene in this case.

BACKGROUND

Clean Air Act Section 112 authorizes EPA to issue RMP regulations for facilities with processes that have more than a threshold quantity of certain regulated substances ("covered processes"). These regulations are meant to address the prevention and detection of accidental releases of certain hazardous substances from certain covered processes, and to govern a facility's related response.

Movants are trade associations who represent owners and operators of facilities that have covered processes and that are subject

to the RMP regulations, including the RMP Reconsideration Rule.

Movants are:

- Movant American Chemistry Council ("ACC"). ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®; common sense advocacy designed to address major public policy issues; and health and environmental research and product testing. The business of chemistry is a $553 billion industry and a key element of the nation's economy. It is among the largest exporters in the nation, accounting for ten percent of all U.S. goods exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure. ACC's members own and operate facilities with covered processes and are subject to RMP regulations, including the RMP Reconsideration Rule.

- Movant American Fuel & Petrochemical Manufacturers ("AFPM"). AFPM is a national trade association whose members include over 300 refiners and petrochemical manufacturers, encompassing most of the refining capacity and virtually all petrochemical manufacturers in the United States. AFPM's refining and petrochemical manufacturing members work with complex equipment and hazardous materials in covered processes subject to RMP regulations, including the RMP Reconsideration Rule.

- Movant American Petroleum Institute ("API"). API is a national trade association representing all facets of the oil and natural gas industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service

and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 45 million Americans. As such, API and its members are significantly affected by EPA's RMP regulations, including the RMP Reconsideration Rule.

- Movant Chamber of Commerce of the United States of America ("Chamber"). The Chamber is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber's members include companies in all of the industry sectors potentially subject to the Rule—chemicals, refiners, petrochemicals, petroleum, forestry, wood products, batteries, electronics, and electricity, among many others. These entities work with covered processes and are subject to RMP regulation, including the RMP Reconsideration Rule.

Historically, EPA's RMP regulations have been one piece of a larger performance-based network of regulations that were designed to enhance safety for workers and the public. In early 2017, however, the departing Administration rushed out changes to this established and complex regulatory landscape through amendments to the then-existing RMP regulations. These amendments created costly and confusing new requirements that ignored fundamental engineering practices for process safety, introduced security risks for sensitive information, and undercut worker and public safety.

Movants sought reconsideration of the 2017 rule and also challenged that rule in this Court. Petition for Review, *Am. Chem. Council v.* EPA, No. 17-1085 (D.C. Cir. Mar. 13, 2017), Doc. No. 1666100. This Court has held Movants' challenge in abeyance pending the reconsideration process. *See* Abeyance Order.

Movants have also participated in ancillary proceedings related to the 2017 rule. To further its reconsideration process, EPA issued a "Delay Rule," which sought to delay the effective date of certain obligations under the 2017 rule. That Delay Rule was challenged in this Court by many of the Petitioners here, and Movants were permitted to intervene on behalf of EPA in that case. *See* Order Granting Intervention, *Air Alliance Houston v. EPA*, No. 17-1155 (D.C. Cir. July 11, 2017), Doc. No. 1683419.

On December 19, 2019, EPA finalized its reconsideration of the 2017 rule. The result is the RMP Reconsideration Rule at issue. This Rule retains certain requirements of the 2017 rule, but makes certain other important changes. For example:

- The Rule removes a new requirement from the 2017 rule to conduct a complex engineering analysis that evidence suggests would not result in safety benefits. *See* 84 FR at 69,859.
- It clarifies that audits, including representative audits, may be used to demonstrate regulatory compliance at covered processes. *See* 84 FR at 69,882–83.
- It removes a requirement for assessing incidents that that duplicate existing federal requirements under the Occupational Health and Safety Administration's Process Safety Management regulations. *See* 84 FR at 69,883.
- It incorporates protections for classified and restricted information. *See* 84 FR at 69,886–87.

The final Rule also sets forth various other requirements, with the aggregate effect of substantially improving safety for employees and the public compared to the 2017 rule.

Movants' members invest significant resources in their personnel, facilities, work processes, equipment, procedures, and compliance to enhance the safety of their employees, facilities, and communities. The

RMP Reconsideration Rule directly informs the compliance obligations relevant to these efforts.

ARGUMENT

I. Movants Satisfy the Standard for Intervention.

Because the RMP Reconsideration Rule directly regulates their members, Movants easily satisfy the standard for intervention. The standard for intervention under Federal Rule of Civil Procedure 24 informs the "grounds for intervention" under Federal Rule of Appellate Procedure 15(d). *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir 1985) (per curiam); *see Int'l Union, United Auto Workers of Am., Local 283 v. Scofield*, 382 U.S. 205, 216 n.10 (1965). Accordingly, to intervene as of right, an applicant must: (1) file a timely application; (2) claim an interest relating to the subject of the action; (3) show that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect the interest; and (4) demonstrate that 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). Movants satisfy each element.

A. The Motion to Intervene is Timely.

Movants' motion is timely because it was filed within 30 days after the filing of the Petition on December 19, 2019. *See* Fed. R. App. P. 15(d).[6] Movants are seeking to join this case at the earliest possible stage, before Petitioners' initial filings are due and before the Court has established a schedule and format for briefing.

B. Movants Have Interests Relating to the Subject of This Proceeding That May As a Practical Matter Be Impaired By the Outcome of This Petition.

Movants have direct and substantial interests in the outcome of this case that may be impaired or impeded if Petitioners prevail. *See Karsner v. Lothian*, 532 F.3d 876, 885–88 (D.C. Cir. 2008). The RMP Reconsideration Rule clarifies the requirements with which facilities must comply to enhance process safety and risk management, and it removes redundant or harmful requirements. Among other things, the Rule also changes the compliance dates for certain requirements. Movants' members own or operate facilities subject to these various regulations. The Rule, thus, establishes the obligations of Movants'

[6] Movants note that a second petition for review of the Rule was filed on January 8, 2020. The Court consolidated the petitions. ECF No. 1823193 (Jan. 8, 2020); *see* Fed. R. App. P. 15(d), Circuit Rule 15(b).

members and informs the various investments they must undertake to comply with RMP regulations. Furthermore, granting the Petition for Review in this case in whole or in part could dictate whether these entities would be required to make additional investments to address any new requirements, above and beyond the significant resources they already spend on process safety and risk management.

In addition, Movants are associations who represent companies that are directly regulated by the Rule and thus fall within the class of parties that this Court routinely allows to intervene in cases reviewing final agency action. *See, e.g.*, *Fund for Animals*, 322 F.3d at 735; *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (association whose members produced military munitions and operated military firing ranges permitted to intervene in a challenge to EPA's Munitions Rule); *see also Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 318 (D.C. Cir. 2015) (advocacy organization permitted to intervene in judicial challenge to agency decision denying a complaint against that organization).

Further, the outcome of this case could impair Movants' ability to protect their interests. *See Roane v. Leonhart*, 741 F.3d 147, 151 (D.C.

Cir. 2014) (impairment where the litigation "could establish unfavorable precedent that would make it more difficult for [the intervenor] to succeed" in any future suit to enforce its rights); *NRDC v. Costle*, 561 F.2d 904, 909–11 (D.C. Cir. 1977) (industry members' interests practically impaired if not permitted to intervene in proceedings that would determine which rulemakings EPA would initiate over which pollutants). The Petition in this case could ask this Court to address important issues of statutory construction, which could affect Movants' arguments before EPA or this Court in future proceedings. Additionally, if this Court were to grant the Petition in any respect, EPA might promulgate a new rule to address the Court's concerns, which could result in new or different regulatory requirements for Movants' members.

Movants undoubtedly have an interest in the subject of this proceeding.

C. Existing Parties Cannot Adequately Represent Movants' Interests.

Movants' interests will not be adequately represented by the existing parties. The burden of showing that the existing parties will not adequately support a movant's interest is "minimal," and a movant

need only show that representation of its interests "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). This factor is easily satisfied here.

Petitioners cannot adequately represent Movants' interests because Petitioners' interests are directly opposed to Movants'. EPA likewise cannot adequately represent Movants' interests because EPA is a government agency necessarily focused on a broad "representation of the general public interest," not the particular interests that motivate Movants. 792 F.2d at 192–93. Movants represent entities who have direct and substantial financial interests in this proceeding. This Court has long recognized the "inadequacy of governmental representation" when the government has no financial stake in the suit, but a private party does. *See e.g.*, *id.* at 192; *Fund for Animals*, 322 F.3d at 736; *Costle*, 561 F.2d at 912 & n.41.

II. Movants Have Standing to Intervene.

Movants have standing to intervene in support of EPA in this proceeding because, as discussed, they represent entities directly

regulated by the Rule being challenged.[7] An association has standing to intervene on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). In this Circuit, "[t]he standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015).

Movants satisfy each of these elements. First, "at least some of the [Movants'] members would have standing to [intervene] in their own right." *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 899 (D.C. Cir. 1996). As explained, the RMP Reconsideration Rule directly

[7] Although 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, *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950–51 (2019). Regardless, Movants have standing.

regulates Movants' members. These entities would have standing for the same reasons they fulfill the grounds for intervention. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("any person who satisfies Rule 24(a) will also meet Article III's standing requirement").

Because these entities' facilities are subject to RMP regulation, and the Rule finalizes changes to the RMP regulations, there is "little question" that these entities have standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992) (a party who "is himself an object of [the governmental] action (or forgone action) at issue" has standing); *cf. Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012) (parties "easily" establish standing when agency action imposes "regulatory restrictions, costs, or other burdens" on them). Movants' standing is thus "self-evident." *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002); *see also Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013) (trade association had an "obvious interest in challenging [Federal Motor Carrier Safety Administration] rulemaking that directly—and negatively—impact[ed] its motor carrier members").

Second, the interests that Movants seek to protect are germane to their organizational purposes. Movants' purposes include representing their members' interests in matters before Congress, the Executive Branch, and the courts. And as explained above, the challenged Rule directly regulates Movants' members.

Finally, the participation of individual member companies, individuals, or member associations is unnecessary. Petitioners request the Court to overturn a final rule applicable to entire industry sectors. This final agency action does not depend on the circumstances of any specific entity.

For these reasons, Movants have Article III standing.

III. Alternatively, Movants Should be Granted Permissive Intervention.

Although Movants clearly satisfy the standards for intervention as of right, they also qualify for permissive intervention. This Circuit authorizes permissive intervention when, on a timely motion, a movant shows that its claim or defense has a question of law or a question of fact in common with the main action. *E.g.*, *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (supporting flexible reading of Rule 24(b)). Permissive intervention requires neither a

showing of the inadequacy of representation, nor a direct interest in the subject matter of the action.[8]

This motion is timely, and if permitted to intervene, Movants will address the issues of law and fact that Petitioners present on the merits. Because Movants and Petitioners maintain opposing positions on these common questions, and because permissive intervention would contribute to the just and equitable adjudication of the questions presented, it should be permitted.

CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court grant their motion to intervene in support of Respondents.

[8] This Circuit has not decided whether standing is needed for permissive intervention. *E.g., In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972 (D.C. Cir. 2013). Under the recent *Virginia House of Delegates* decision from the Supreme Court, standing should not be required here. Regardless, Movants have standing. *See supra*, Part II.

Dated: January 17, 2020

Respectfully submitted,

/s/ Ryan C. Morris

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and the Chamber of Commerce of the United States of America respectfully submit this Corporate Disclosure Statement and state as follows:

1. The American Chemistry Council ("ACC") states that it has no parent companies, and no publicly-held company has a 10% or greater ownership interest in ACC.

2. The American Fuel & Petrochemical Manufacturers ("AFPM") states that it has no parent companies, and no publicly-held company has a 10% or greater ownership interest in AFPM.

3. The American Petroleum Institute ("API") states that it has no parent companies, and no publicly-held company has a 10% or greater ownership interest in API.

4. The Chamber of Commerce of the United States of America (the "Chamber") states that it has no parent companies, and no publicly-held company has a 10% or greater ownership interest in the Chamber.

Dated: January 17, 2020

Respectfully submitted,

/s/ Samina M. Bharmal
Samina M. Bharmal

Counsel for the American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Chamber of Commerce of the United States of America

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CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), the American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and the Chamber of Commerce of the United States of America ("Movants") hereby state as follows:

Petitioners in this matter are Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana

Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, Utah Physicians for a Healthy Environment, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO/CLC. Respondents are the U.S. Environmental Protection Agency ("EPA") and EPA Administrator Andrew Wheeler. The Movants are not aware of any *amici* in this matter.

Dated: January 17, 2020

Respectfully submitted,

/s/ Samina M. Bharmal
Samina M. Bharmal

Counsel for the American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2) and 32(g), and D.C. Circuit Rules 27(a)(2) and 32(a), the undersigned certifies that the accompanying Motion for Leave to Intervene has been prepared using 14-point, Century Schoolbook typeface and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the document is proportionally spaced and contains 3,380 words exclusive of the accompanying documents excepted from the word count by Rule 27(a)(2)(B), (d)(2).

/s/ Samina M. Bharmal
Samina M. Bharmal

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to Intervene will be served, this 17th day of January 2020, through the Court's CM/ECF system on all registered counsel.

/s/ Samina M. Bharmal
Samina M. Bharmal