UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Alliance of Nurses for Healthy Environments, *et al.*, Petitioners, v. United States Environmental Protection Agency, *et al.*, Respondents.	Nos. 17-1926 & Consolidated Cases (MCP No. 149)

MOTION OF AMERICAN CHEMISTRY COUNCIL ET AL. FOR LEAVE TO INTERVENE ON BEHALF OF RESPONDENT

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Local Rule of Appellate Procedure 12(e), the American Chemistry Council, American Coatings Association, American Coke and Coal Chemicals Institute, American Fuel & Petrochemical Manufacturers, American Forest & Paper Association, American Petroleum Council, Battery Council International, Chamber of Commerce of the United States of America, EPS Industry Alliance, IPC International, Inc., doing business as IPC – Association Connecting Electronics Industries, National Association of Chemical Distributors, National Mining Association, Polyurethane Manufacturers Association, Silver Nanotechnology Working Group, Society of Chemical Manufacturers and Affiliates, Styrene

Information and Resource Center, and the Utility Solid Waste Activities Group (collectively, "Movants"), by and through undersigned counsel, respectfully move to intervene in support of Respondents the U.S. Environmental Protection Agency ("EPA") and its Administrator in each of the petitions for review consolidated under the lead case *Alliance of Nurses for Healthy Environments, et al. v. EPA*, No. 17-1926 ("Petitions").

These Petitions were originally filed in three separate courts of appeals and were recently consolidated before this Court by the United States Judicial Panel on Multidistrict Litigation. Consolidation Order at 1, MCP 149 (Sept. 1, 2017) (Doc. No. 3). The consolidated Petitions seek review of the "Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act," 82 Fed. Reg. 33,726 (July 20, 2017); 40 C.F.R. § 23.5(a) ("Risk Evaluation Rule"), a rule promulgated by EPA under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2697, the primary federal statute that regulates the manufacturing, processing, distribution, and use of chemical substances and mixtures in the United States.

Movants' timely request to intervene in support of EPA's final rule should be granted. Movants are associations that represent industries directly regulated and affected by the Risk Evaluation Rule, because they manufacture, process, distribute or use chemicals, and the procedures and criteria EPA has set in the Risk

Evaluation Rule will ultimately affect what chemicals their members may manufacture, process, transport and use, and under what restrictions, if any. Petitioners object to the approach EPA has taken and a ruling by this Court, the practical effect of which would be expanding the chemicals and uses that would be covered and restricted by the risk evaluation process and otherwise negatively affecting the market prospects of existing chemicals. Hence, the consequences of any relief Petitioners might obtain would be borne directly by Movants' members, for whom chemicals regulated by TSCA are essential to the very conduct of their businesses. As such, Movants have direct, substantial, and legally protectable interests in the outcome of these consolidated petitions, which seek to overturn the Risk Evaluation Rule. These are interests that Respondents do not adequately represent.

Counsel for Movants contacted counsel for the each of the Petitioners and for Respondents in these consolidated cases. *See* Local Rule 27A. All of the parties responded that they take no position on the motion at this time.[1]

[1] Specifically, counsel for Respondents stated that "EPA will reserve taking a position until after reviewing the potential intervenors' motion." Counsel for Alliance for Nurses for Healthy Environments, et al. stated that "Alliance of Nurses for Healthy Environments, Cape Fear River Watch, and Natural Resources Defense Council take no position on the motion at this time, but reserve their right to oppose the motion based on its content." Counsel for the Environmental Defense Fund stated that "[t]he Environmental Defense Fund takes no position on this motion at this time."

BACKGROUND

TSCA was amended in 2016 to require EPA to select a minimum number of chemicals in commerce for risk evaluations. The amended statute requires EPA to promulgate three regulations to achieve its mandate, *see* 15 U.S.C. § 2605(b)(1), (4), all of which have now been promulgated. The first (known as the "Inventory Reset Rule"[2]) sorts the master list of chemicals, called the TSCA Inventory, based on whether the chemicals are active or inactive in commerce. The second (known as the "Prioritization Rule"[3]) sets out procedures for the agency's designation of High Priority chemicals for purposes of risk evaluation. The third (the "Risk Evaluation Rule" at issue here) mandates a risk-based determination for the evaluated chemicals. Although these rules are separate, they are designed to function together; for example, the risk evaluation process cannot start until chemicals are prioritized. Although only the Risk Evaluation Rule is at issue in the instant matter, all three rules are described below for context to evaluate this Motion.

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[2] TSCA Inventory Notification (Active- Inactive) Requirements, 82 Fed. Reg. 37,520 (Aug. 11, 2017). Environmental Defense Fund has separately petitioned for review of this rule. *Envtl. Def. Fund v. EPA*, No. 17-1201 (D.C. Cir.).

[3] Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act," 82 Fed. Reg. 33,753 (July 20, 2017). Petitioners here have separately petitioned to review this rule. *See Safer Chemicals Healthy Families, et al. v. EPA, et al.*, No. 17-72260 and consolidated cases (9th Cir.) (MCP No. 148).

Inventory Reset Rule. The Inventory Reset Rule establishes the procedures EPA will follow to "reset" the TSCA chemical inventory. Only chemicals listed on the TSCA inventory are legal for use in the United States. Under the new rule, EPA has directed chemical manufacturers to identify the chemicals they manufacture that are currently in commerce. If a chemical is not identified as active, it will be listed as "inactive." Only active chemicals would be subject to prioritization and, potentially, EPA's risk review procedures.

Prioritization Rule. The Prioritization Rule establishes the procedures and criteria EPA will use to designate "High-Priority Substances" for risk evaluation, or "Low-Priority Substances" for which risk evaluations are not necessary until such time as determined by the Administrator. This Rule "describes the processes for formally initiating the prioritization process on a selected [chemical substance], providing opportunities for public comment, screening the [substance] against certain criteria, and proposing and finalizing designations of priority." 82 Fed. Reg. at 33,753. The Prioritization Rule also clarifies EPA's authority to determine what "conditions of use"[4] of a chemical are appropriate for risk evaluation.

[4] "[C]onditions of use" is a term of art, *see* 15 U.S.C. § 2602(4) (the term "means the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of") and is not the same as the term "use."

Risk Evaluation Rule. A risk evaluation cannot occur until a chemical has been designated High Priority. In its Risk Evaluation Rule, EPA establishes the procedures and criteria it will use when conducting those risk evaluations to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use for that chemical. The Risk Evaluation Rule specifies procedures for the following steps of the risk evaluation process that must be followed: scoping, hazard assessment, exposure assessment, risk characterization, and finally a risk determination. Subsequent risk management action may result in new requirements being placed on the use of a chemical based on the risk determination. EPA has further elaborated on the risk assessment in guidance.

The Movants are associations that represent industries and members that the Risk Evaluation Rule directly regulates and affects, because they manufacture, process, distribute or use chemicals that will be affected by the Risk Evaluation Rule and the related Prioritization Rule. These include:

- Movant American Chemistry Council ("ACC"). ACC represents a diverse set of nearly 150 leading companies engaged in the business of chemistry, including by participating on behalf of its members in administrative proceedings before EPA and in litigation arising from those proceedings that affects member company interests. The business of chemistry is a $797 billion enterprise and a key element of the nation's economy.

- Movant American Coatings Association ("ACA") is the national nonprofit trade association working to advance the paint and coatings

industry and the 287,000 professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals who produce over $30 billion in paint and coating product shipments. ACA members use and produce chemicals subject to regulation under TSCA, including the Prioritization and Risk Evaluation Rules.

- Movant American Coke and Coal Chemicals Institute ("ACCCI") is an association for the metallurgical coke and coal chemicals industry. ACCCI members include U.S. merchant coke producers and integrated steel companies with coke production capacity, as well as the companies producing coal chemicals in the U.S. Coke and coals chemicals are subject to regulation under TSCA, including the Prioritization and Risk Evaluation Rules.

- Movant American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association whose members include over 400 refiners and petrochemical manufacturers that produce gasoline, diesel, jet fuel, other fuels and home heating oil, as well as the petrochemicals. AFPM members use and produce chemicals subject to regulation under TSCA, including the Prioritization and Risk Evaluation Rules.

- Movant American Forest & Paper Association ("AF&PA") serves the sustainable pulp, paper, packaging, tissue and wood products manufacturing industry in the United States. AF&PA member companies make products essential for everyday life from renewable and recyclable resources. The forest products industry accounts for approximately four percent of the total United States manufacturing Gross Domestic Product, manufactures over $200 billion in products annually, and employs approximately 900,000 men and women. AF&PA's members use chemical substances subject to TSCA to manufacture or process their products, including chemicals subject to the Prioritization and Risk Evaluation Rules.

- Movant American Petroleum Institute ("API") is a national trade association representing all aspects of America's oil and natural gas industry. API has more than 625 members, from the largest major oil companies 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's members are involved in all major points of the chemical supply chain—from natural gas and crude oil production, to refinery production of fuels and other products, to service companies using chemicals. API's members are affected by all of EPA's activities under TSCA, both directly as companies subject to regulation and indirectly as customers of regulated companies. API members manufacture and use chemicals subject to the Prioritization and Risk Evaluation Rules.

- Movant Battery Council International ("BCI") promotes the interests of the battery industry whose members include lead battery manufacturers and recyclers, marketers and retailers, and suppliers of raw materials and equipment. Components used by the industry are subject to regulation under TSCA, including the Prioritization and Risk Evaluation Rules.

- Movant Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 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 sectors covered by each of the other intervenors—chemicals, coatings, refiners, petrochemicals, petroleum, forestry, wood products, batteries, electronics, energy, and electricity, among many others. These companies use chemicals subject to regulation under TSCA, including the Prioritization and Risk Evaluation Rules.

- Movant EPS Industry Alliance represents manufacturers of expanded polystyrene ("EPS"). EPS and the chemistries used to produce it are subject to TSCA jurisdiction, including the Prioritization and Risk Evaluation Rules.

- Movant IPC International, Inc., doing business as IPC – Association Connecting Electronics Industries ("IPC"), is a not-for-profit association consisting of 4,200 member facilities that manufacture electronics or supply equipment and materials to industries manufacturing electronics. The majority of IPC members use chemicals to manufacture products or sell products containing chemicals, but a small percentage manufacture and/or distribute chemicals to electronics manufacturers. As manufacturers, distributors and users of chemicals, IPC members are

affected by TSCA rulemaking. The Risk Evaluation and Prioritization Rule proscribe the process under which the chemicals used by our members will be regulated in the future. The development and manufacture of electronics is directly affected by restrictions on the chemical used to manufacture them and thus effect IPC members.

- Movant National Association of Chemical Distributors ("NACD") is an association of chemical distributors and their supply-chain partners. NACD's members process, formulate, blend, repackage, warehouse, transport, and market chemical products for over 750,000 customers. The chemical distribution industry represented by NACD employs over 70,000 people and generates $5.14 billion in tax revenue for local communities. The products distributed by NACD members are subject to EPA's TSCA jurisdiction, including the Prioritization and Risk Evaluation Rules.

- Movant National Mining Association ("NMA") is a national trade association that represents the interests of the mining industry—including the producers of most of America's coal, metals, and industrial, and agricultural minerals, as well as the manufacturers of mining and mineral processing machinery, equipment, and supplies—before Congress, the administration, federal agencies, the judiciary, and the media. NMA has more than 300 members, many of which manufacture, process, and/or use chemical substances subject to TSCA, including the Prioritization and Risk Evaluation Rules.

- Movant Polyurethane Manufacturers Association ("PMA") is the association dedicated to the advancement of the cast polyurethane industry. Its members include processors, suppliers and other members in the cast urethane industry. The chemicals which are used to manufacture polyurethanes are substances subject to EPA's TSCA jurisdiction, including the Prioritization and Risk Evaluation Rules.

- Movant SOCMA – Society of Chemical Manufacturers and Affiliates ("SOCMA") is the U.S.-based trade association dedicated solely to the specialty chemical industry. SOCMA's 200 members produce intermediates, specialty chemicals and ingredients used to develop a wide range of industrial, commercial and consumer products. SOCMA's manufacturing members all produce chemicals subject to regulation under TSCA that could be addressed by the Prioritization and Risk

Evaluation Rules, and all of its members could be impacted by EPA's actions under the rules. SOCMA was actively involved in the legislative and rulemaking processes leading to issuance of the Prioritization Rule and the Risk Evaluation Rule, filing comments on the proposed versions of both.

- Movant Silver Nanotechnology Working Group ("SNWG") is an industry-wide effort to advance the science and public understanding of the beneficial uses of silver nanoparticles in a wide-range of consumer and industrial products. Silver nanotechnology is subject to EPA's TSCA jurisdiction, including the Prioritization and Risk Evaluation Rules.

- Movant Styrene Information and Resource Center ("SIRC") is a nonprofit trade association that collects, develops, analyzes, and communicates information to guide industry and government on health and environmental issues associated with styrene and ethylbenzene. Member companies manufacture or process styrene and ethylbenzene. Associate member companies fabricate styrene-based products. Styrene and ethylbenzene are chemical substances subject to TSCA, including the Prioritization and Risk Evaluation Rules.

- Movant Utility Solid Waste Activities Group ("USWAG") is responsible for addressing solid and hazardous waste and chemical management issues on behalf of the utility industry. USWAG was formed in 1978, and is a trade association of over 130 utility operating companies, energy companies and industry associations. USWAG engages in regulatory advocacy pertaining to TSCA, among other policy areas. The industry uses substances subject to the requirements of TSCA, including the Prioritization and Risk Evaluation Rules.

ARGUMENT

I. Movants Satisfy the Standards for Intervention as of Right

In this Circuit, a court shall grant intervention as of right if an intervenor makes a timely motion and can show (1) an interest in the subject matter of the action, (2) that the protection of this interest would be impaired by the disposition

of this action, and (3) that the interest is not adequately represented by existing parties to the litigation. *See* Fed. R. Civ. P. 15(d); Fed. R. Civ. P. 24(a); *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991) ("must show interest, impairment of interest, and inadequate representation"); *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (*citing Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)). These requirements should be interpreted broadly, as "liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986).[5]

[5] Although this Court has not resolved the issue, a majority of the courts of appeal has correctly held that intervenors are not required to satisfy the requirements for Article III standing, so long as they are not seeking additional relief and satisfy the requirements for intervention as of right under Rule 24(a). *See e.g., King v. Governor of the State of New Jersey*, 767 F. 3d 216, 246 (3d Cir. 2014) (parties seeking to intervene as of right need not have independent standing so long as another party with standing on the same side as the intervenor is in the case, citing case law); *accord Town of Chester v. Laroe Estates*, 137 S. Ct. 1395 (2017) (requiring standing when intervenor sought relief different from plaintiff). *But see Jones v. Prince George's County, Maryland*, 348 F. 3d 1014, 1017 (D.C. Cir. 2003). This Court need not resolve the issue, because Movants have Article III standing to intervene here. Movants' members would have standing (as members of the regulated community directly impacted by the rules at issue who stand to be injured by this litigation), the subject of the litigation is germane to the Movants' interests, and no individual member's participation is necessary for the litigation. *See* Declaration of Michael P. Walls (Attachment A) ("Walls Decl."); Declaration of Jim McCloskey (Attachment B) ("McCloskey Decl.); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977).

Here, Movants satisfy these requirements, and this Court should grant this Motion so that they may protect their important interests.

A. The Motion to Intervene is Timely

Petitioners in this consolidated case filed their petitions for review on August 10 and August 11, 2017. This motion is therefore timely because Movants filed within the time allotted by the Federal Rules. Fed. R. App. P. 15(d) (requiring parties to move for intervention within 30 days of the filing of a petition for review) and 26(a)(1) (when, as here, a deadline lands on a weekend, the filing is on the "next day that is not a Saturday, Sunday, or a legal holiday"). In addition, allowing Movants to intervene will not, as a practical matter, disrupt the proceedings or prejudice the parties because they are seeking to join this case at the earliest possible stage. *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014) (timeliness based on "how far the underlying suit has progressed" and whether the other parties would suffer "prejudice").

B. Movants Have a Significant Protectable Interest in the Subject of the Petitions

The Federal Rules do not define what "interest" is required to support intervention of right. In the Fourth Circuit, for an interest to be "protectable," it must be a "significantly protectable interest." *Teague*, 931 F. 2d at 261 (finding significant interest because the intervenors "stand to gain or lose" by outcome); *see also Sierra Club*, 945 F.2d at 779 (environmental group had protectable interest in

subject matter of waste management company's challenge to state rule restricting new waste treatment, storage or disposal facility); *United Guar. Residential Ins. Co. of Iowa v. Phila. Sav. Fund Soc'y*, 819 F. 2d 473, 475 (4th Cir. 1987) (interest in insurance rights sufficiently significant).

Here, unquestionably, Movants have a significantly protectable interest in the subject matter of these consolidated Petitions. Movants' members manufacture, process, distribute, or use chemicals that are essential to their industries and businesses and are subject to the Risk Evaluation Rule. *See, e.g.*, Walls Decl. ¶¶ 5. 20(a)-(p); McCloskey Decl. ¶¶ 4-5, 8. After determining the priority of chemicals for evaluation, EPA will follow the process and criteria in the Risk Evaluation Rule for high priority chemicals to determine whether the chemical presents an unreasonable risk of harm to health or the environment under any foreseeable conditions of use, the result of which determination could lead to restrictions on such chemical's use, up to and including a ban. These same procedures and criteria must be followed when manufacturers request an EPA-conducted risk evaluation of any existing or new chemical substance.

Accordingly, Movants potentially "stand to lose" access to chemicals that are at the core of their operations, or to have that access restricted, depending upon the results of EPA's evaluations under the Risk Evaluation Rule. Likewise, Movants could lose millions of dollars and years of research invested in a

chemical, if an EPA risk evaluation ultimately results in restrictions. Further, enormous uncertainty could be created if the Petitioners were to prevail and would affect users' confidence in planning new uses for existing substances. Thus, how EPA conducts these risk evaluations, including what conditions of use of a particular chemical EPA must assess during these evaluations, are crucial to Movants. Movants have a direct interest in Petitioners' challenge, which seeks to overturn the process set by the Risk Evaluation Rule and expand the conditions of use that EPA would be required to consider in a risk evaluation.

Movants have also demonstrated the significance of their direct and protectable interest in the Risk Evaluation Rule by participating in the rulemaking that culminated in the final rule.[6] When a group seeking intervention had participated "in the administrative process leading to the governmental action," the group has a direct and substantial interest in the litigation. *Michigan State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1245-46 (6th Cir. 1997).

In sum, Movants have the significant interest needed to intervene.

[6] *See*, *e.g.*, Walls Decl. at ¶ 13; McCloskey Decl. at ¶ 6. Other examples can be found at www.regulations.gov, docket number EPA–HQ–OPPT–2016–0654.

C. The Disposition of These Consolidated Petitions Could Impair or Impede Movants' Ability as a Practical Matter to Protect Their Significant Interests in the Risk Evaluation Rule

Further, resolution of these consolidated Petitions could impair or impede Movants' ability to protect their interests in the Risk Evaluation Rule. In this Circuit, it is sufficient that a judgment "would impair or impede the … Intervenors' ability to protect their interest in the subject matter of th[e] litigation." *Teague*, 931 F.2d at 261 (the intervenors' significant interest in recovery would be impaired even if still retained rights of action and potential effect was contingent in part on other litigation); *United Guar.*, 819 F. 2d at 475 (sufficient impairment if disposition of the pending case "might well" deprive the proposed intervenors of a significant insurance benefit). Moreover, it is sufficient that the outcome could "as a practical matter" impair or impede the proposed intervenor's interests in a separate administrative proceeding. *Sierra Club*, 945 F.2d at 779 (if court were to enjoin certain sections of regulation, it "will impede Sierra Club's ability to protect its interest in the administrative proceeding").

As detailed above, Movants' members manufacture, process, distribute, use and otherwise rely on chemicals in the conduct of their businesses, and Petitioners seek a court order that would require EPA to change the process and criteria established in the Risk Evaluation Rule to make the process more onerous for Movants in order to impose additional restrictions on how chemicals are

manufactured, processed, distributed and used. Movants' interests in sustaining their members' operations could be impeded or impaired if the disposition of this action results in the changes in the Risk Evaluation Rule that Petitioners are pursuing here. Only if this Court allows Movants to participate in this action will Movants be able to protect fully their interests in the evaluation approach in the Risk Evaluation Rule.

D. Existing Parties Do Not Adequately Represent Movants' Interests

The existing parties do not adequately represent Movants' interests in this case. In general, the Supreme Court has held that a movant seeking to intervene as of right need only show that representation of its interests "may be" inadequate, and the burden of showing so is "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972); *see Sierra Club*, 945 F.2d at 779-80 (citing *Trbovich* for adequacy standard, emphasizing that this requirement is met if applicant shows "representation of its interest *may be* inadequate") (emphasis in original); *Teague*, 931 F.2d at 262 (citing *Trbovich* for adequacy standard); *see also United Guar.*, 819 F.2d at 475 (same). In *Sierra Club*, for example, this Court found an organization that supported the state agency's defense of its regulation was not adequately represented by the preexisting parties, because while the state agency ostensibly represented "all of the citizens," the organization represented "only a subset of citizens concerned" with the subject matter of the action and did

"not need to consider the interest of all … citizens." 945 F.2d 780 (reversed denial of intervention as of right, even though interests of Sierra Club and state agency "may converge"). The same is true here. *See also, Sierra Club v.* EPA, 557 F.3d 401 (6th Cir. 2009); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003); *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998); *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 41-44 (1st Cir. 1992). *But see Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013).[7]

Here, Movants are not represented at all by the Petitioners, who are directly adverse to Movants. Nor do Respondents adequately represent Movants' interests, as EPA does not represent the distinct private interests of Movants and their members. Movants exist in part to ensure that the companies they represent are able to manufacture, process, distribute, or use chemicals as needed, and thereby operate the nation's manufacturing and energy facilities, preserve and create jobs, and produce successful businesses, all in an environmentally sound manner.

[7] *Stuart* involved intervention in a district court case concerning the constitutionality of a state statute where intervention could have significantly increased the burdens on the government and the court. *Id.* at 350-51 ("motions to intervene can have profound implications for district courts' trial management functions;" additional parties would "complicate the discovery process," and "complicate the government's job" due to the "prospect of a deluge of potential intervenors"). By contrast, the Court here will decide the Petitions based on EPA's administrative record at the appellate level. Movants would not unduly complicate the litigation process and have made a significant, and we believe successful, effort to join interested industry participants in a single motion.

Movants cannot rely solely on a public agency to safeguard these narrower concerns. *See Sierra Club*, 945 F.2d at 780. EPA may well be focused to a greater extent than Movants on issues of administrative convenience and flexibility. Likewise, Movants are likely to be focused to a greater degree than EPA on the potentially deleterious consequences that particular agency actions may have on Movants' members' chemicals or operations.

Indeed, as other courts have held, EPA's more expansive obligation under federal laws like TSCA is to represent the general public interest, not the private interest of Movants' members. *See, e.g.*, *Fund for Animals*, 322 F.3d at 736 ("[W]e have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors."); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973-74 (3d Cir. 1998) (federal agency and private businesses seeking to intervene had "interests inextricably intertwined with, but distinct from" each other and, thus, agency could not adequately represent private interests); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (industry intervention allowed because "[t]he government must represent the broad public interest, not just the [concerns of the industry group]").

Thus, Movants and their members have significant interests distinct from the EPA's more general mandate that could be impaired or impeded by the disposition

of these Petitions.[8] Accordingly, Movants urge this Court to grant them leave to intervene as of right to represent fully their legitimate interests.

II. In the Alternative, the Court Should Grant the Movants Permissive Intervention Under Rule 24(b)

In the alternative, Movants seek leave for permissive intervention. Fed. R. Civ. P. 24(b)(1) authorizes permissive intervention when a party files a "timely motion" and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1); *see Sierra Club*, 945 F.2d. at 779 ("in exercising its discretion, the court shall consider whether the intervention would unduly delay or prejudice the adjudication of the rights of the original parties"). Permissive intervention neither requires a showing of the inadequacy of representation, nor a direct interest in the subject matter.

Movants clearly also satisfy the standard for permissive intervention. First, as demonstrated above, Movants' motion to intervene is timely, as Movants filed

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[8] Because Petitioners have not yet identified the precise arguments they intend to raise, it is premature to offer definitive examples of actual differences between Movants' arguments here and those of Respondents. In addition to jurisdictional arguments, examples of potential divergence or emphasis may include issues of statutory interpretation and the scope of agency deference, and, more specifically: Movants' interests in the manufacturer-requested risk evaluation process (where EPA's interests are likely to minimize the number of such manufacturer requests because of the resource implications in managing them, even though Congress addressed that issue); and Movants' interest in the application of the definitions of "best available science" and "weight-of-the-scientific evidence" in risk evaluations (where EPA's interests in policy and/or political decisions may influence the view of what constitutes such scientific information or evidence).

within the required timeframe established by the Federal Rules. Fed. R. App. P. 15(d). Second, if allowed to intervene, Movants will address the issues of law and fact that the Petitioners present on the merits and detail why the Risk Evaluation Rule satisfies TSCA and is otherwise lawful. Because Movants and Petitioners maintain opposing positions on these common questions, Movants meet the standards for permissive intervention as well. Third, permitting intervention will not "unduly delay or prejudice the adjudication of the original parties' rights," as no such delay or prejudice will occur if the Court permits intervention at this early juncture in these Petitions. With the three petitions only recently consolidated by Multidistrict Panel's order, this Court has taken no significant steps to begin scheduling any briefing on the merits of Petitioners' claims.

As intervention would contribute to the just and equitable adjudication of the legal questions presented, it should be permitted.

CONCLUSION

For these reasons, Movants' Motion to Intervene should be granted.

Dated: September 11, 2017

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-1926 **Caption:** Alliance of Nurses for Healthy Env., et al. v. EPA, et al.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

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(s) Peter D. Keisler

Party Name American Chemistry Council, et al.

Dated: 9/11/2017

CERTIFICATE OF SERVICE

I hereby certify that the copies of the foregoing Motion of American Chemistry Council et al. for Leave to Intervene as Respondents was served, this 11th day of September, 2017, through CM/ECF on all registered counsel.

/s/ Peter D. Keisler
Peter D. Keisler