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

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Case No. 19-1124

MOTION OF GROWTH ENERGY TO INTERVENE

Pursuant to Rule of Appellate Procedure 15(d) and D.C. Circuit Rule 15(b), Growth Energy hereby moves to intervene as a matter of right in support of the United States Environmental Protection Agency ("EPA") in this action seeking review of EPA's final rule titled *Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*, 84 Fed. Reg. 26,980 (June 10, 2019) ("RVP Rule").[1] Counsel for Petitioner and Respondent have indicated that they take no position on this motion.

[1] If any cases are consolidated with this case, Growth Energy requests that it be deemed to have intervened in all consolidated cases. *See* D.C. Cir. R. 15(b) ("A motion to intervene in a case before this court concerning direct review of an agency action will be deemed a motion to intervene in all cases before this court

BACKGROUND

A. The Clean Air Act ("CAA") generally prohibits a fuel manufacturer from introducing into commerce any new fuel that is not "substantially similar" ("sub sim") to any fuel used to certify any vehicle or engine of model year 1975 or later. 42 U.S.C. §7545(f)(1)(B). The CAA allows EPA to waive this prohibition if the manufacturer establishes that use of such fuel "will not cause or contribute to a failure of any emission control device or system … to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified" under the CAA. §7545(f)(4).

In 1978, gasoline containing up to 10 percent ethanol ("E10") received a §7545(f)(4) waiver. RVP Rule, 84 Fed. Reg. at 26,984. Since around 2013, "essentially all gasoline" in the United States has been E10. *Id*. at 26,985.

In 2010 and 2011, EPA partially granted a §7545(f)(4) waiver petition filed by movant, Growth Energy, to permit the sale of gasoline containing up to 15 percent ethanol ("E15") for use in light-duty motor vehicles of model year 2001 and later. 75 Fed. Reg. 68,094 (Nov. 4, 2010); 76 Fed. Reg. 4662 (Jan. 26, 2011). In those partial waiver decisions, however, EPA included a condition limiting E15's Reid Vapor Pressure ("RVP")—a measure of volatility—to 9.0 pounds per

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involving the same agency action or order, including later filed cases, unless the moving party specifically states otherwise, and an order granting such motion has the effect of granting intervention in all such cases.").

square inch (psi) from May 1 through September 15 each year. *See* 75 Fed. Reg. at 68,149; 76 Fed. Reg. at 4682. In contrast, the §7545(f)(4) waiver for E10 does not contain a similar RVP limitation.

As specified by statute in §7545(f)(4), the waiver and its conditions applied to "fuel manufacturers," 75 Fed. Reg. at 68,148; 76 Fed. Reg. at 4682, a term EPA defines generally to encompass refiners and importers but not ethanol blenders downstream, 40 C.F.R. §79.2(d); *see also* RVP Rule, 84 Fed. Reg. at 26,982, 26,983. Additionally, EPA promulgated regulations to prevent use of E15 in unapproved vehicles and engines. *See* 76 Fed. Reg. 44,406 (July 25, 2011).

Separately, the CAA directs EPA generally to prohibit the sale of gasoline whose RVP exceeds 9.0 psi during the "high ozone season" (or summer season), which runs from June 1 to September 15 annually. 42 U.S.C. §7545(h)(1). For fuels "containing gasoline and 10 percent … ethanol," however, the CAA raises the summer RVP limit by 1.0 psi. §7545(h)(4). EPA initially interpreted the phrase "containing … 10 percent … ethanol" to mean containing "at least 9% and no more than 10%," thereby excluding E15 from the CAA's 1.0 psi allowance. 40 C.F.R. §80.27(d)(2).

Since 2011, although E15 could be introduced into commerce under the §7545(f)(4) waivers, E15 generally could not be sold during the summer season in most areas of the country due to EPA's exclusion of E15 from the 1.0 psi

allowance from the 9.0 psi summertime RVP restriction in §7545(h)(1) (and the general unavailability of gasoline blendstock with a sufficiently low RVP to allow E15 to meet the 9.0 psi restriction). RVP Rule, 84 Fed. Reg. at 26,986. Accordingly, E15 sales have grown slowly, with less than 1 percent of retail stations offering E15 as of May 2019. *Id.* at 26,986-26,987.

B. The rule at issue here updates EPA's implementation of this regulatory framework to allow E15 to be sold more widely during the summer season by eliminating the disparity in RVP requirements for E10 and E15. EPA accomplishes this through several key steps.

First, EPA reinterprets the phrase "containing … 10 percent … ethanol" in 7545(h)(4) to mean "containing at least 10 percent ethanol." As a result, the CAA's 1.0 psi RVP allowance applies equally to E10 and E15. RVP Rule, 84 Fed. Reg. at 26,991.

Second, EPA addresses the RVP restriction in the E15 waivers. As noted, the §7545(f)(4) waivers for E15 imposed a condition that fuel manufacturers may sell E15 only if the RVP does not exceed 9.0 psi during the summer. No such waiver condition applies to E10. In the RVP Rule, EPA addresses this disparity in two separate ways. First, EPA finds that, under §7545(f)(1), E15 is substantially similar to the E10 fuel currently used to certify Tier 3 motor vehicles (provided certain conditions are met to ensure that it is used only in Model Year 2001 and

later light-duty motor vehicles). RVP Rule, 84 Fed. Reg. at 27,004, 27,006. As a result, E15 no longer needs a waiver under §7545(f)(4) and thus fuel manufacturers are no longer subject to the summertime RVP restriction in the §7545(f)(4) waivers for E15. *Id.* at 27,006. Separately and independently, EPA also reaffirms that the prohibitions in §7545(f)(1)—and thus any conditions in the §7545(f)(4) waivers for E15—apply only to "fuel manufacturers," which generally do not include "downstream parties" such as oxygenate blenders and analogous parties. *Id.* at 27,009.

In sum, EPA's revised interpretation of §7545(h)(4), together with its "sub sim" finding or its separate clarification that §7545(f) generally does not apply to blenders downstream, eliminates the disparity between RVP limits for E10 and E15, allowing E15 to be sold in the summer subject to the same 10.0 psi limit that applies to E10.[2]

ARGUMENT

Growth Energy seeks to intervene in this case to protect its substantial interests in EPA's implementation of the RVP Rule.

I. Federal Rule of Appellate Procedure 15(d) allows a party to intervene in a proceeding to review agency action if a motion for leave to intervene is "filed

[2] The RVP Rule also includes new rules governing the market for trading fuel credits call renewable identification numbers (RINs) under the CAA's Renewable Fuel Standard (RFS) program. RVP Rule, 84 Fed. Reg. at 27,014.

within 30 days after the petition for review is filed and … contain[s] a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d). These requirements are satisfied in this case.

A. Growth Energy is filing its motion for leave to intervene within 30 days of the petition for review filed in Case No. 19-1124 on June 10, 2019.

B. With respect to substantive requirements for intervention, this Court has held that "intervention in the court of appeals is governed by the same standards as in the district court." *Massachusetts Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (emphasis omitted). Under Federal Rule of Civil Procedure 24(a), a party has a right to intervene if it "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2); *see Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 192 (D.C. Cir. 2013). These requirements are also satisfied in this case.[3]

[3] In any event, Growth Energy satisfies the requirements for permissive intervention under Rule 24(b), requiring only that a proposed intervenor have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

Growth Energy seeks to intervene in this case to protect its substantial interests in EPA's implementation of the RVP Rule and associated actions. Growth Energy is a national trade association comprising producers, fuel retailers, and supporters of ethanol. It is the leading association of ethanol producers in the country, with 100 producer members as well as fuel retailers and associate members whose businesses support the ethanol industry. *See* Growth Energy, *About Us*, https://growthenergy.org/about-us/. Growth Energy's core mission is to facilitate greater market access to fuels containing higher levels of ethanol, reintroduce consumers to ethanol, and pursue pro-biofuel policies. *See id*.

Eliminating the disparity in RVP limits for E15 and E10 such that both are subject to the same 1.0 psi allowance in the summer will enable E15 to be sold year-round, thereby increasing the demand for ethanol. Increased availability of higher-ethanol fuels directly benefits Growth Energy and its members. Hence, a successful challenge to EPA's actions that results in a more stringent RVP limit for E15 will directly harm Growth Energy and its members, impairing their businesses as well as the substantial investments they have made in facilities and technologies for the production of ethanol.

Growth Energy's interests are not adequately represented by another party in this case. This Court has held that this is not an onerous standard. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("[A]

movant ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation." (quotation marks omitted)). Growth Energy seeks to intervene in support of EPA. But EPA, as a government agency, cannot adequately represent the interests of a private, commercial entity. *See id*. ("[W]e look skeptically on government entities serving as adequate advocates for private parties." (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d. 728, 736 (D.C. Cir. 2003))). Only Growth Energy can adequately represent the private, commercial interests of its members in this case.

II. Even if a proposed intervenor must establish Article III standing, *see Deutsche Bank*, 717 F.3d at 193, that requirement is met here. "'An association has standing to sue 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.'" *Military Toxics Project v. EPA*, 146 F.3d 948, 953-954 (D.C. Cir. 1998) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

Growth Energy has Article III standing in this case, because it has substantial interests that could be adversely affected by this litigation. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("[A]ny person

who satisfies Rule 24(a) will also meet Article III's standing requirement."). A successful challenge to the RVP Rule resulting in a more stringent summertime RVP limit for E15 would harm Growth Energy's members by reinstituting a barrier to the sale of E15, thereby decreasing business value. *See Crossroads*, 788 F.3d at 317 (stating that a party can establish injury-in-fact when it would benefit from an agency action, the action is challenged, and an unfavorable decision would remove the benefit). In addition, the interests that Growth Energy seeks to protect—the economic interests of its members—are clearly germane to Growth Energy's purpose and this litigation does not require the participation of Growth Energy's individual members.

CONCLUSION

For these reasons, the Court should grant Growth Energy's motion to intervene.

Respectfully submitted,

/s/ Seth P. Waxman

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Counsel for Growth Energy

June 12, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Growth Energy provides the following:

Growth Energy is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). It operates for the purpose of promoting the general commercial, professional, legislative, and other common interests of its members. Its members are ethanol producers, fuel retailers, and supporters of the ethanol industry. It does not have a parent company. No publicly held company has a 10% or greater ownership interest in Growth Energy.

Respectfully submitted,

/s/ Seth P. Waxman

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CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), Growth Energy certifies that the parties in this case are:

Petitioner: American Fuel & Petrochemical Manufacturers.

Respondent: United States Environmental Protection Agency.

Movant-Intervenor: Renewable Fuels Association.

Amici: None.

Respectfully submitted,

/s/ Seth P. Waxman

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,947 words, excluding the exempted portions, as provided in Fed. R. App. P. 32(f). As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

2. This motion complies with the typeface and type style requirements of Fed. R. App. P. 27(a)(5)-(6) because it was prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

/s/ Seth P. Waxman
SETH P. WAXMAN

CERTIFICATE OF SERVICE

I certify that on June 12, 2019, I caused the foregoing Motion of Growth Energy to Intervene to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Seth P. Waxman
SETH P. WAXMAN