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

CENTER FOR BIOLOGICAL DIVERSITY, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 22-1164 and consolidated cases

MOTION OF GROWTH ENERGY TO INTERVENE IN SUPPORT OF RESPONDENT

On July 20, 2022, the Center for Biological Diversity petitioned this Court for review of the final rule issued by the United States Environmental Protection Agency ("EPA") entitled *Renewable Fuel Standard (RFS) Program: RFS Annual Rules*, 87 Fed. Reg. 39,600 (July 1, 2022) ("2022 Rule"), which was published in the Federal Register on July 1, 2022. *See* Pet. for Review, ECF No. 1956112 (D.C. Cir. July 20, 2022). Since then, seven additional petitions for review have been filed challenging the 2022 Rule, and the Court has consolidated those petitions with the petition filed by the Center for Biological Diversity. *See* ECF No. 1959986 (D.C. Cir. Aug. 19, 2022); ECF No. 1961400 (D.C. Cir. Aug. 30, 2022: ECF No. 1961449 (D.C. Cir. Aug. 30, 2022); ECF No. 1961700 (D.C. Cir. Sept. 1, 2022); ECF No. 1961810 (D.C. Cir. Sept. 1, 2022); ECF No. 1961864 (D.C. Cir.

Sept. 1, 2022). Growth Energy anticipates that some of these petitions for review will challenge the 2022 Rule on grounds that, if successful, would adversely affect Growth Energy's interests. Accordingly, Growth Energy respectfully seeks to intervene in these consolidated cases in support of Respondent EPA in order to protect Growth Energy's interests.

Growth Energy has contacted counsel for all petitioners and the respondent in these consolidated cases and requested their positions on Growth Energy's motion to intervene. The Center for Biological Diversity takes no position, but reserves the right to respond. Sinclair Wyoming Refining Company LLC; Sinclair Casper Refining Company LLC; Iogen Corporation; Iogen D3 Biofuels Partners II LLC; American Fuel & Petrochemical Manufacturers; American Refining Group, Inc.; Calumet Montana Refining, LLC; Calumet Shreveport Refining LLC; Ergon Refining, Inc.; Ergonwest Virginia, Inc.; Hunt Refining Company; Par Hawaii Refining, LLC; Placid Refining Company LLC; San Joaquin Refining Co., Inc.; U.S. Oil & Refining Company; Wyoming Refining Company; and The San Antonio Refinery LLC take no position. The U.S. Environmental Protection Agency does not oppose. The remaining petitioners did not respond.

BACKGROUND

A. The Renewable Fuel Standard ("RFS") program "requires that increasing volumes of renewable fuel be introduced into the Nation's supply of

transportation fuel each year. Congress enacted those requirements in order to move the United States toward greater energy independence and security and increase the production of clean renewable fuels." *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 697 (D.C. Cir. 2017) ("*ACE*") (quotation marks omitted). The required volumes are set forth in a statutory table and are specified according to four "nested" categories: cellulosic biofuel, which includes cellulosic ethanol (derived from corn); biomass-based diesel ("BBD"); advanced biofuel, which contains cellulosic biofuel, BBD, and other advanced biofuels; and total renewable fuel, which contains advanced biofuel and conventional corn-starch ethanol. *See* 42 U.S.C. § 7545(*o*)(2)(A)(i), (B)(i). For each category, the obligation that obligated parties must meet is expressed as an EPA-determined percentage reflecting (roughly) the required volume divided by the projected nationwide transportation-fuel consumption for a given year. *Nat'l Petrochem. & Refiners Ass'n v. EPA*, 630 F.3d 145, 148 (D.C. Cir. 2010) ("*NPRA*"); § 7545(*o*)(3)(B)(ii)(II).

Congress provided EPA with the authority to "reduc[e]" the volume requirements set forth in the statutory table for a given calendar year, but only "in limited circumstances" specified in the statute's waiver provisions. § 7545(*o*)(7)(A), (D); *NPRA*, 630 F.3d at 158. For cellulosic biofuel, EPA has the specific power to reduce the applicable cellulosic volume requirement to the

"projected volume of cellulosic biofuel production." § 7545(*o*)(7)(D)(i). If EPA exercises that cellulosic waiver power, it may flow the waiver through the nested standards, *i.e.*, reduce the advanced and total volume requirements, "by the same or a lesser volume." *ACE*, 864 F.3d at 731 (quotation marks omitted) (quoting § 7545(*o*)(7)(D)(i)). EPA also has a separate "general" waiver authority, whereby it may reduce any volume requirement "in whole or in part" if "there is an inadequate domestic supply" of renewable fuel or if "implementation of the requirement would severely harm the economy or environment." § 7545(*o*)(7)(A). "[F]or purposes of examining whether the supply of renewable fuel is adequate, the 'inadequate domestic supply' provision authorizes EPA to consider only supply-side factors—such as production and import capacity—affecting the available supply of renewable fuel, . . . not . . . demand-side factors affecting the demand for renewable fuel." *ACE*, 864 F.3d at 710.

In addition to its authority to reduce the volume in the statutory table for a particular year through a cellulosic or general waiver, EPA also has authority to modify the statutorily set volumes for multiple years at a time under the statute's "reset" provision. Under that provision, if EPA waives a sufficient amount of the required volumes for a single year or for two years consecutively, EPA must "modif[y]" the statutory volumes "for all years following the final year to which the waiver applies," based on specified processes, criteria, and standards.

§ 7545(*o*)(7)(F); *see ACE*, 864 F.3d at 712. This reset provision does not apply to BBD because the statutory tables for BBD do not extend past 2012. *See* § 7545(*o*)(2)(B)(i)(IV). However, the statute separately authorizes EPA to set post-2012 required volumes for BBD in the first instance after considering the same factors applicable to EPA's reset authority. *See id.* § 7545(*o*)(2)(B)(ii).

B. In the 2022 Rule, EPA took several actions under the RFS program. Among other things, in the exercise of its waiver, reset, and other regulatory authorities, EPA (1) established the applicable volumes for cellulosic biofuel, advanced biofuel, and total renewable fuel for 2021 and 2022, as well as the BBD volume for 2022; (2) modified the applicable volumes it previously established for cellulosic biofuel, advanced biofuel, and total renewable fuel for 2020; (3) revised the percentage standards for cellulosic biofuel, BBD, advanced biofuel, and total renewable fuel in 2020, and established new percentage standards for 2021 and 2022; and (4) addressed the remand by this Court in *ACE* by establishing a supplemental volume of 250 million gallons for 2022. *See* 87 Fed. Reg. at 39,601.

Given the statements of issues and motion for summary vacatur that some petitioners have already filed, as well as arguments petitioners raised on the proposed 2022 Rule and in litigation challenging prior RFS rules, Growth Energy expects that petitioners will challenge the 2022 Rule on grounds that will seek to reduce the required volumes or percentage standards. For example, the Center for

Biological Diversity has already moved to summarily vacate the 2022 Rule on the ground that increased demand for biofuels resulting from higher volumes or percentage standards purportedly will harm ecosystems or species in violation of the Endangered Species Act. *See* ECF No. 1966328 (D.C. Cir. Sept. 27, 2022). Similarly, the Sinclair Wyoming Refining Company and the Sinclair Casper Refining Company may challenge the 250-million-gallon supplemental volume EPA established to address this Court's remand in *ACE*. And the American Fuel & Petrochemical Manufacturers may challenge the percentage standards established for obligated parties as too high on various grounds.

ARGUMENT

Growth Energy seeks to intervene in these consolidated cases to protect its substantial interests in the 2022 Rule.[1]

I. Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b) establish procedural requirements for intervention on appeal, but not substantive ones.[2] Rather, this Court has "held that intervention in the court of appeals is

[1] *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 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.").

[2] This motion satisfies those procedural requirements. The motion is timely, it is being served on all parties to the consolidated cases, and the discussion in the text constitutes "a concise statement of [Growth Energy's] interest . . . and the grounds for intervention." Fed. R. App. P. 15(d).

governed by the same standards as in the district court." *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (emphasis omitted). Thus, a party has a right to intervene if it "claims an interest relating to the . . . 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 also Deutsche Bank Nat'l Tr. Co. v. FDIC*, 717 F.3d 189, 192 (D.C. Cir. 2013). Growth Energy satisfies this standard.[3]

A. EPA has already acknowledged that among the "[e]ntities potentially affected by this final rule are those involved with the production, distribution, and sale of . . . renewable fuels such as ethanol." 87 Fed. Reg. at 39,600. That includes Growth Energy, both directly and through its members.

Growth Energy is a national trade association dedicated to promoting the commercial production and use of renewable fuels that are the subject of the RFS volume requirements, particularly conventional and cellulosic ethanol. Growth Energy's membership includes producers of conventional and cellulosic ethanol. *See* Growth Energy, *Our Members*, https://growthenergy.org/members (last visited

[3] *A fortiori*, Growth Energy also satisfies the standard for permissive intervention, which requires only a showing that the proposed intervenor 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)(B).

Sep. 29, 2022). Growth Energy submitted to EPA a lengthy comment letter on the proposed 2022 Rule. *See* Growth Energy Comments on EPA's Renewable Fuel Standard (RFS) Program: RFS Annual Rules, EPA-HQ-OAR-2021-0324- 0521 (Feb. 4, 2022). Indeed, the timing of EPA's promulgation of the 2022 Rule was governed by a consent decree entered in litigation brought against EPA by Growth Energy (based on EPA's failure to establish renewable fuel obligations for 2021 and 2022 by the statutory deadlines). *See* Consent Decree, *Growth Energy v. Regan*, No. 1:22-cv-00347-RCL, ECF No. 10 (Apr. 22, 2022); Notice of Termination of Consent Decree, *Growth Energy v. Regan*, No. 1:22-cv-00347-RCL, ECF No. 12 (July 26, 2022).

Because the volumes and percentage standards mandate the national level of demand for renewable fuels, *see ACE*, 864 F.3d at 705; *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 917 (D.C. Cir. 2014), any reduction in the final percentage standards resulting from this litigation would reduce demand for the products that Growth Energy's members develop and sell, harming their businesses and their substantial investments in facilities, materials, and technologies used in the production of renewable fuel. Furthermore, those harms could recur and be compounded in the future because of EPA's obligation to issue percentage standards annually and EPA's practice of determining future standards partially by

reference to prior performance. As a result, this suit may afford Growth Energy its only opportunity to avoid such harms. *See* 42 U.S.C. § 7607(b)(1).

In light of these interests, Growth Energy has actively participated as petitioner and intervenor in prior actions in this Court involving challenges to EPA's RFS regulations, including rules setting percentage standards in prior years. *See, e.g.*, Order, *RFS Power Coalition v. EPA*, No. 20-1046, ECF No. 1843937 (D.C. Cir. May 22, 2020) (granting Growth Energy's motion to intervene); *accord* Order, *Growth Energy v. EPA*, No. 19-1023, ECF No. 1784196 (D.C. Cir. Apr. 23, 2019); Order, *Am. Fuel & Petrochem. Mfrs. v. EPA*, No. 17-1258, ECF No. 1725309 (D.C. Cir. Apr. 5, 2018); Order, *Alon Refin. Krotz Springs, Inc. v. EPA*, No. 16- 1052, ECF No. 1722824 (Mar. 19, 2018); Order, *Coffeyville Res. Refin. & Mktg v. EPA*, No. 17-1044, ECF No. 1706266 (D.C. Cir. Nov. 28, 2017); Order, *Ams. for Clean Energy v. EPA*, No. 16-1005, ECF No. 1611965 (D.C. Cir. May 5, 2016); Order, *Monroe Energy, LLC v. EPA*, No. 13-1265, ECF No. 1468501 (D.C. Cir. Dec. 2, 2013).

B. Growth Energy's interests would not be adequately represented by another party in this case. The requirement that there be no other adequate representative is "low," and precludes intervention only if "it is clear that the party will provide adequate representation." *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) (quotation marks omitted). Although

Growth Energy seeks to intervene in support of EPA, EPA—as a government agency—cannot adequately represent the specific interests of private commercial enterprises. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736–37 (D.C. Cir. 2003); *Crossroads*, 788 F.3d at 321; *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912–13 (D.C. Cir. 1977). In fact, EPA's defense of the 2022 Rule here could be in tension with the defense that Growth Energy would advance in some respects. *See Crossroads*, 788 F.3d at 321 (agency did not adequately represent private party even though there was "general alignment" between their positions). Only a private entity like Growth Energy can adequately represent the ethanol industry in this case.

II. This Court has also said that a proposed intervenor supporting a respondent or defendant must establish Article III standing. *See Deutsche Bank*, 717 F.3d at 193. Any such requirement is unsound and contrary to Supreme Court precedent because standing is necessary only for a party to invoke a court's jurisdiction, and a defensive intervenor, like the defendant or respondent it supports, does not invoke the court's jurisdiction. *See Va. House of Delegates v. Bethune-Hill,* 139 S. Ct. 1945, 1951 (2019) (intervenor supporting defendants need not show standing because it is not invoking court's jurisdiction); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410–11 (2013); *see also Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137

S. Ct. 1645, 1650–51 (2017). Other circuits have correctly held that defensive intervenors need not establish standing. *See, e.g.*, *King v. Governor of New Jersey*, 767 F.3d 216, 245–46 (3d Cir. 2014), *abrogated in part on other grounds by Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018). Moreover, even if defensive standing were required, EPA would have standing here, and EPA's standing would suffice for Growth Energy, since Growth Energy does not "pursue relief that is broader than or different from" that pursued by EPA. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) (citing *Town of Chester*, 137 S. Ct. at 1650–51).[4]

In any event, if any standing requirement applies here, it is satisfied. An association has Article III 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, 953–54 (D.C. Cir. 1998). And to have standing in its own right, an association member

[4] Should the Court consider standing dispositive of Growth Energy's motion, Growth Energy respectfully requests that the Court overturn *Deutsche Bank* and similar precedent through the *Irons* procedure. *See Irons v. Diamond*, 670 F.2d 265, 267-68 & n.11 (D.C. Cir. 1981).

must show "injury-in-fact, causation, and redressability." *Deutsche Bank*, 717 F.3d at 193.[5]

For the same reasons that Growth Energy has a substantial interest that could be affected adversely by this litigation, some of its members will suffer a cognizable injury-in-fact if the 2022 Rule is set aside on any ground that would result in reduced volume requirements. *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."). For example, lowering the volume requirements would cause a reduction in domestic demand for renewable fuels, including corn ethanol. That would clearly hurt Growth Energy members' bottom lines and impair the future value of their businesses and investments. *See Crossroads*, 788 F.3d at 317 ("Our cases have generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit."); *accord Fund for Animals*, 322 F.3d at 733–34 (D.C. Cir. 2003); *Military Toxics*, 146 F.3d at 954; *cf. Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) ("[E]conomic actors suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." (quotation

[5] It suffices for a single member of Growth Energy to have standing. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002); *Military Toxics Project*, 146 F.3d at 954.

marks omitted)). This injury could be redressed simply rejecting challenges that would lower the volume requirements.

Moreover, the interests that Growth Energy seeks to protect in this litigation are germane—indeed, vital—to its purposes and membership, and "mere pertinence between litigation subject and organizational purpose is sufficient." *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 636 (D.C. Cir. 2000). And finally, the validity of the relevant determinations reflected in the 2022 Rule can be adjudicated without the participation of any of its individual members.

CONCLUSION

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

Dated: September 30, 2022

Respectfully submitted,

/s/ Ethan G. Shenkman

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Growth Energy states that it is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members.

Growth Energy does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to Circuit Rule 27(a)(4), Growth Energy certifies that the parties in these consolidated cases are:

Petitioners: Center for Biological Diversity; Sinclair Wyoming Refining Company LLC; Sinclair; Casper Refining Company LLC; Iogen Corporation; Iogen D3 Biofuels Partners II LLC; American Fuel & Petrochemical Manufacturers; American Refining Group, Inc.; Calumet Montana Refining, LLC; Calumet Shreveport Refining, LLC; Ergon Refining, Inc.; Ergonwest Virginia, Inc.; Hunt Refining Company; Par Hawaii Refining, LLC; Placid Refining Company LLC; San Joaquin Refining Co., Inc.; U.S. Oil & Refining Company; Wyoming Refining Company; The San Antonio Refinery LLC; Waste Management, Inc.; WM Renewable Energy, LLC; Wynnewood Refining Co. LLC.

Respondents: United States Environmental Protection Agency; Michael S. Regan, Administrator.

Movant-Intervenors: American Petroleum Institute and Renewable Fuels Association have moved to intervene. Their motions are pending.

Amici curiae: None.

Date: September 30, 2022

/s/ Ethan G. Shenkman
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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 2,877 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/ Ethan G. Shenkman
Ethan G. Shenkman
Counsel for Growth Energy

CERTIFICATE OF SERVICE

I certify that on September 30, 2020, I caused the foregoing to be filed using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ Ethan G. Shenkman
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