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

Natural Resources Defense Council,	)	
Petitioner,	)	
v.	)	No. 10-1056
Environmental Protection Agency,	)	
Respondent.	)	

UNOPPOSED MOTION BY AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENT

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the American Chemistry Council ("ACC"), the American Petroleum Institute ("API"), the National Association of Manufacturers ("NAM"), the National Petrochemical and Refiners Association ("NPRA"), and the Western States Petroleum Association ("WSPA") (collectively, the "National Trade Associations"), by and through the undersigned counsel, hereby respectfully move to intervene in support of the Respondent in this matter. Counsel for the National Trade Associations has conferred with counsel for the parties to this action; both

the Petitioner Natural Resources Defense Council ("NRDC") and the Respondent Environmental Protection Agency ("EPA") take no position on this Motion.

INTRODUCTION

The National Trade Associations are moving to intervene so that they may appear in support of the named Respondent. The National Trade Associations are entitled to intervene as of right, or alternatively, to intervene permissively.

BACKGROUND

On March 5, 2010, the NRDC filed a Petition for Review of EPA's January 5, 2010 "Guidance on Developing Fee Programs Required By Clean Air Act ("CAA") Section 185 for the 1-hour Ozone NAAQS" ("Guidance") (previously filed as an attachment to the NRDC Pet. for Review). The Guidance provides direction to States on how to prepare State Implementation Plans ("SIPs") to implement Section 185 of the CAA.

CAA Section 185

Section 185 requires States with areas in severe or extreme nonattainment with the ozone National Ambient Air Quality Standard ("NAAQS") to include a fee collection program in their SIPs. *See* CAA Section 185, 42 U.S.C. § 7511d. Under such a program, each major stationary source of volatile organic compound ("VOC") or nitrogen oxides ("NOx") located in a severe or extreme nonattainment area would generally be required to pay a fee to the State in accordance with

Section 185(b). *See* CAA Section 185(a) (discussing requirements with respect to VOC); CAA Section 182(f), 42 U.S.C. § 7511a(f) (extending the application of Section 185 to NOx). The fees are calculated "per ton of VOC [or NOx] emitted by the source during the calendar year in excess of 80 percent of the baseline amount." CAA Section 185(b)(1). The baseline amount is the lower of the actual or allowable VOC or NOx emissions during the attainment year, although EPA is authorized to issue guidance for calculating the baseline for sources with intermittent or variable emissions. CAA Section 185(b)(2).

In 1997, EPA established an 8-hour ozone NAAQS, *see* 62 Fed. Reg. 38856 (July 18, 1997). EPA subsequently revoked its 1-hour ozone NAAQS, which had been in place since 1982. *See* 69 Fed. Reg. 23951 (April 30, 2004). In a rule issued to address the transition from the 1-hour standard to the 8-hour standard, EPA waived the application of the Section 185 fee program. *See id.* at 23985. In *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006), this Court held that the "anti-backsliding" provisions of CAA Section 172(e) required that EPA continue to apply the Section 185 fee program to those areas in nonattainment with the revoked 1-hour standard. The CAA "provides that EPA may relax a NAAQS, but in so doing, EPA must 'provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.'" *Id.* at 888 (citing CAA § 172(e), 42 U.S.C. § 7502(e)).

EPA's Guidance

In its recent Guidance, EPA provided direction to States regarding implementation of the fee program under CAA § 185. EPA explains that States can meet their obligations under the CAA and consistent with the *South Coast* decision "through a SIP revision containing either the fee program prescribed in section 185, or an equivalent alternative program" that is "consistent with the principles of section 172(e) of the CAA." Guidance at 2-3. The Guidance provides direction on the circumstances in which EPA believes it can approve such an alternative program, but notes that "[t]hese interpretations will only be finalized through EPA actions taken under notice-and-comment rulemaking to address the fee program obligations associated with each applicable nonattainment area." *Id.* at 3.

The National Trade Associations

The moving parties are national trade associations with members that will be directly impacted by the outcome of this litigation and thus have a protectable interest in supporting Respondent's defense of its Guidance. Facilities operated by the member companies of the National Trade Associations emit VOC and NOx and are located in areas designated or potentially designated as nonattainment with the 1-hour ozone NAAQS. In contrast to other groups that are moving to intervene

in this case, the National Trade Associations represent companies located across the entire country.

ACC is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. The business of chemistry is a $689 billion enterprise and a key element of the nation's economy.

API is a national trade association that represents all aspects of America's oil and natural gas industry. API has approximately 400 members, from the largest major oil company 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 the industry.

NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

NPRA is a national trade association of more than 450 companies. Its members include virtually all U.S. refiners and petrochemical manufacturers. NPRA members supply consumers with a wide variety of products and services used daily in their homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, lubricants and the chemicals that serve as "building

blocks" in making diverse products, such as plastics, clothing, medicine and computers.

WSPA is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in the six western states of Arizona, California, Hawaii, Nevada, Oregon, and Washington.

ARGUMENT

I. THE NATIONAL TRADE ASSOCIATIONS ARE ENTITLED TO INTERVENE UNDER FRAP 15(d).

Federal Rule of Appellate Procedure 15(d) guides this Court's review of a motion to intervene in proceedings to review agency action, requiring that such a motion include "a concise statement of interest of the moving party and the grounds for intervention." *See, e.g.*, *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986).

The National Trade Associations and their members have a strong and direct interest in this litigation. The National Trade Associations all have members with stationary sources that emit VOCs and NOx and are located in severe or extreme ozone nonattainment areas throughout the country. As such, these stationary sources are subject to the CAA Section 185 requirements and the National Trade Associations' members have a direct financial interest in the challenged Guidance, which provides direction on the Section 185 requirements.

The Guidance sets forth Respondent's interpretation of the Section 185 requirements that stand to benefit certain National Trade Associations' members by providing States increased flexibility for complying with the CAA Section 185. Specifically, the Guidance considers alternative programs to satisfy the Section 185 requirements and provides guidance on the circumstances in which Respondent believes it can approve such an alternative program. These interpretations potentially benefit and plainly affect many of the National Trade Associations' members. For example, "EPA believes that for an area that we determine is attaining either the 1-hour or 1997 8-hour ozone NAAQS . . ., the area would no longer be obligated to submit a fee program SIP revision . . . ." Guidance at 3. By not requiring fees "after an area has attained the 8-hour standard due to permanent and enforceable emission reductions," EPA's interpretation avoids unfairly penalizing sources in these areas, including sources owned and operated by the National Trade Associations' members. The National Trade Association thus has an interest in supporting EPA's interpretation of these fee provisions. The Guidance's direction with respect to fee-equivalent alternative programs could also have a financial impact on the National Trade Associations' members. "Under this concept, states could develop programs that shift the fee burden from the specific set of major stationary sources that are otherwise required

to pay fees according to section 185, to other non-major sources of emissions, including owners/operators of mobile sources." *Id.* at 5.

When a third-party challenges the government's issuance of a rule or other regulatory direction, the members of the regulated industry that are directly affected by that government action have a significant, protectable interest that supports intervention. *See Conservation Law Found. v. Mosbacher*, 966 F.2d 39, 41-44 (1st Cir. 1992) (holding that commercial fishermen impacted by regulatory plan to address overfishing had a recognizable interest in the timetable for implementing that plan); *NRDC v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (holding that pesticide manufacturers subject to regulation under challenge had a legally protected interest); *see also Military Toxics Project v. EPA*, 146 F.3d 948, 953 (D.C. Cir. 1998) (holding that companies that produce military munitions and operate military firing ranges had standing to challenge EPA's Military Munitions Rule).

This Court has previously held that "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties." *City of Cleveland v. NRC*, 17 F.3d 1515, 1517 (D.C. Cir. 1994). Here, the National Trade Associations will suffer injury-in-fact if Petitioner succeeds in invalidating EPA's Guidance. EPA's interpretation of and direction to States on how to implement Section 185 will have

a direct financial impact on all of the National Trade Associations' members that are subject to any fee program or fee-equivalent alternative program that is established to comply with the CAA Section 185. Because EPA's Guidance provides States flexibility that may relieve the National Trade Associations' members of some financial burden, they have a strong interest in mounting a stalwart defense of the legal adequacy of the EPA Guidance. The NRDC Petition for Review, which challenges the EPA Guidance, thus threatens financial harm to the National Trade Associations' members.

In *Military Toxics Project v. EPA*, this Court recognized precisely this type of injury as sufficient to establish standing to intervene. 146 F.3d at 953 (holding that trade association has standing to intervene on behalf of its member companies where the companies were directly subject to the challenged EPA rule and benefit from the EPA's interpretation, and thus "would suffer concrete injury if the court grants the relief the petitioners seek"); *see also South Coast*, 472 F.3d at 895-96. The National Trade Associations similarly have standing to fully participate in this case. In turn, the National Trade Associations have demonstrated a protectable interest in challenging the Guidance. A conclusion that parties have "constitutional standing is alone sufficient to establish that [they have] 'an interest relating to the property or transaction which is the subject of the action.'" *Fund for*

Animals, Inc. v. Norton, 322 F.3d 728, 735 (D.C. Cir. 2003) (citation omitted).

II. INTERVENTION IS ALSO SUPPORTED BY FEDERAL RULE OF CIVIL PROCEDURE 24.

The policies underlying Rule 24 of the Federal Rules of Civil Procedure, which guide this Court's Rule 15(d) analysis, also support intervention. *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Federal Rule of Civil Procedure 24 recognizes two forms of intervention: (1) Intervention of Right and (2) Permissive Intervention. Fed. R. Civ. P. 24. A court may grant a would-be intervenor's motion on either basis. *See Scofield*, 382 U.S. at 217, n. 10.

A. The National Trade Associations May Intervene As A Matter of Right.

Under Rule 24(a)(2), a party seeking to intervene as of right must satisfy four requirements:

> (1) the timeliness of the motion; (2) whether the applicant "claims an interest relating to the property or transaction which is the subject of the action"; (3) whether "the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) whether "the applicant's interest is adequately represented by existing parties."

Fund for Animals, 322 F.3d at 731 (citation omitted); *see Scofield*, 382 U.S. at 217 n.10 ("The Federal Rules of Civil Procedure, of course, apply only in the federal

district courts. Still, the policies underlying intervention may be applicable in appellate courts."). The National Trade Associations satisfy these requirements.

1. This Motion Is Timely.

The Petition for Review was filed March 5, 2010. No procedural or dispositive motions have been filed and neither the record nor its certified index has been submitted. Pursuant to Federal Rule of Appellate Procedure 15(d), any motion to intervene must be filed within 30 days of the Petition for Review, which is by April 5, 2010 in this case. Similarly, under this Court's March 5, 2010 Docketing Order, any procedural motion must be filed by April 5, 2010. This Motion is being filed within those deadlines and is thus timely.

2. The National Trade Associations Have A Protectable Interest In The Challenged Guidance.

As explained above, the National Trade Associations have members with stationary sources that emit VOCs and NOx and are located in severe or extreme ozone nonattainment areas throughout the country. As such, many of the National Trade Associations' members have a direct financial interest in EPA's Guidance on how States should implement the section 185 fee program.

3. The Disposition Of This Case May Impact The National Trade Associations' Interests.

The National Trade Associations each have members that will be impacted by the outcome of this litigation and have an interest in defending Respondent's

issuance of its Guidance. The Petitioner apparently seeks to invalidate the Guidance. Any relief of that nature would impair the National Trade Associations' members' financial interests. The National Trade Associations each have members with VOC and NOx-emitting facilities that are located throughout the United States in ozone nonattainment areas classified (or potentially classified) as severe or extreme. Accordingly, these members are potentially subject to the CAA Section 185 requirements and, as such, will be directly impacted by how the Court disposes of the NRDC challenge to EPA's Guidance. The implementation of Section 185 will directly impact many of the National Trade Associations' members. Where the relief sought by the Petitioner would have direct, immediate and harmful impact on a third party's interests, that adverse impact is sufficient to satisfy this criterion of Federal Rule of Civil Procedure 24(a)(2). *Fund for Animals*, 322 F.3d at 735.

4. The National Trade Associations' Interests May Not Be Adequately Represented By Respondent.

A "proposed intervenor has the burden of showing that the existing parties cannot adequately represent its interests, but this burden is 'treated as minimal.'" *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1255 (11th Cir. 2002) (citation omitted). Accordingly, an applicant for intervention need only show that its interests are sufficiently different from the existing parties such that the present

representation "may be" inadequate. *Nuesse v. Camp*, 385 F.2d 694, 702-03 (D.C. Cir. 1967).

Here, the National Trade Associations' interests are adverse to NRDC. In addition, while the National Trade Associations generally intend to support the EPA's positions in this case, the EPA is a government agency and therefore it must have a broader focus than the specific and narrower interests of the National Trade Associations. *NRDC v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977). For instance, the National Trade Associations are interested in ensuring their members are treated fairly and lawfully, and that their financial interests are protected, as EPA and the States implement the CAA Section 185 requirements related to fee programs. *Compare, e.g., id.* at 911 ("industry-intervenors have many particular, separate interests in the regulation of their own categories in addition to their overlapping interest in the promulgation of a body of valid regulations."). In contrast, the EPA is expected to participate in this litigation to represent the broad public interest and will not be focused on the economic considerations of any particular member of the affected industry. Where applicants such as the National Trade Associations have private interests, as contrasted with the government's "public" interests, this difference is sufficient to support intervention. *Fund for Animals*, 322 F.3d at 736; *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994);

County of Fresno v. Andrus, 622 F.2d 436, 438-39 (9th Cir. 1980); *NRDC v. NRC*, 578 F.2d 1341, 1345-46 (10th Cir. 1978).

B. The National Trade Associations Also Qualify For Permissive Intervention.

The National Trade Associations are not only entitled to intervene as a matter of right, they also qualify for permissive intervention. Federal Rule of Civil Procedure 24(b)(1) provides in pertinent part: "On timely motion, the court may permit anyone to intervene who: . . . (B) has a claim or defense that shares with the main action a common question of law or fact." As demonstrated above, this Motion is timely. Because the National Trade Associations have members with stationary sources throughout the country that are subject to the Section 185 requirements, they are familiar with the legal issues relevant to the Guidance, which NRDC seeks to challenge. The National Trade Associations seek to offer defenses that have common legal issues and common facts with the NRDC Petition for Review so that the Guidance is not set aside by this Court. These issues and facts are completely overlapping as among the Petitioner, Respondent and the National Trade Associations, and therefore, the requirements for permissive intervention are fully satisfied.

Therefore, even if this Court concluded that the National Trade Associations did not have a right to intervene, they should be permitted to do so.

CONCLUSION

For the foregoing reasons, the National Trade Associations are entitled to intervene as of right. They have also demonstrated that they qualify for permissive intervention. Therefore, the National Trade Associations respectfully request leave to intervene in this matter.

Respectfully submitted,

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April 5, 2010.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the American Chemistry Council ("ACC"), the American Petroleum Institute ("API"), the National Association of Manufacturers ("NAM"), the National Petrochemical and Refiners Association ("NPRA"), and the Western States Petroleum Association ("WSPA") submit the following corporate disclosure statement:

ACC has no parent companies, and no publicly-held company has a 10% or greater ownership interest in ACC.

API has no parent companies, and no publicly-held company has a 10% or greater ownership interest in API.

NAM has no parent companies, and no publicly-held company has a 10% or greater ownership interest in NAM.

NPRA has no parent companies, and no publicly-held company has a 10% or greater ownership interest in NPRA.

WSPA has no parent companies, and no publicly-held company has a 10% or greater ownership interest in WSPA.

Respectfully submitted,

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April 5, 2010.

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2010, I will cause the foregoing Unopposed Motion to Intervene and Rule 26.1 Corporate Disclosure Statement to be served by electronic means through the Court's ECF system, or, alternatively, if no electronic service is available, by first class, regular mail, upon the following individuals:

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