ORAL ARGUMENT NOT YET SCHEDULED

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

SIERRA CLUB, CLEAN AIR COUNCIL, ENVIRONMENTAL INTEGRITY PROJECT, and CHESAPEAKE CLIMATE ACTION NETWORK,	)	
Petitioners,	)	
v.	)	**No. 16-1021**
U.S. ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, Administrator, U.S. ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondents.	)	

UNOPPOSED MOTION FOR LEAVE TO
INTERVENE AS RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the American Chemistry Council ("ACC"), American Coke and Coal Chemicals Institute ("ACCCI"), American Forest & Paper Association ("AF&PA"), American Iron and Steel Institute ("AISI"), American Wood Council ("AWC"), Biomass Power Association ("BPA"), Council of Industrial Boiler Owners ("CIBO"), Coalition for Responsible Waste Incineration ("CRWI"), National Association of Manufacturers ("NAM"), National Oilseed Processors

Association ("NOPA"), and Southeastern Lumber Manufacturers Association ("SLMA") (collectively, "the Associations") respectfully move for leave to intervene as Respondents in the above-captioned case. The petitioners in this case, Sierra Club, Clean Air Council, Environmental Integrity Project, and Chesapeake Climate Action Network (collectively, the "Environmental Petitioners"), challenge a final action of the United States Environmental Protection Agency ("EPA" or "Agency") under the Clean Air Act ("CAA" or "Act"), "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Industrial Boilers and Process Heaters," published at 80 Fed. Reg. 72900, *et seq.* (Nov. 20, 2015) ("2015 Boiler Rule"). Pursuant to Federal Rule of Appellate Procedure 15(d), this motion to intervene is being filed within 30 days after the Petitioners filed their petition for review.

Counsel for the Associations have contacted counsel for the parties in this case to ascertain their positions on this motion for leave to intervene. Respondents EPA and Gina McCarthy have stated they do not oppose this motion. The Environmental Petitioners have stated they do not oppose it.

BACKGROUND

This litigation stems from prior rulemakings by EPA. In 2011, EPA issued "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Final Rule,"

published at 76 Fed. Reg. 15608 (Mar. 21, 2011) ("Boiler Rule"). EPA issued a final reconsidered version of the Boiler Rule in 2013, "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters," published at 78 Fed. Reg. 7138 (Jan. 31, 2013) ("2013 Boiler Rule"); *id.* at 7140-41 ("On March 21, 2011, the EPA issued final standards for new and existing industrial, commercial, and institutional boilers and process heaters, pursuant to its authority under section 112 of the CAA. On the same day as the final rule was issued, the EPA stated in a separate notice that it planned to initiate a reconsideration of several provisions of the final rule. . . . In this action, the EPA is finalizing multiple changes to the March 2011 final rule after considering public comment on the items under reconsideration.").

After EPA issued the 2013 Boiler Rule, it received 13 petitions for reconsideration from multiple entities, including several of the Associations seeking intervention here (e.g., AF&PA, AWC, CIBO, ACC). 80 Fed. Reg. at 72791. EPA granted reconsideration and issued a proposed rule to amend parts of the 2013 Boiler Rule. "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Proposed Rule," published at 80 Fed. Reg. 3090 (Jan. 21, 2015) ("2015

Proposed Reconsidered Boiler Rule"). The 2015 Boiler Rule being challenged in this case is the final version of this proposed rule.

In this case, the Environmental Petitioners likely will challenge at least some aspects of the 2015 Boiler Rule that the Associations support. For example, Earthjustice's comments on the 2015 Proposed Reconsidered Boiler Rule opposed the use of alternative work practice standards for startup and shutdown[1] and the minimum CO emission limit being set at 130 ppm.[2] In the final 2015 Boiler Rule, EPA maintained both of these standards, with minimal revisions. 80 Fed. Reg. at 72792-93 (disagreeing that CAA bars EPA from setting work practice standards for periods of time and explaining the basis for EPA's determination that a numeric standard is "not feasible . . . during periods of startup and shutdown,"); 80 Fed. Reg. at 72796 ("After consideration of the comments received, the EPA is maintaining a minimum level of 130 ppm CO at 3-percent O_2.").

Members of the Associations operate numerous industrial boilers that are subject to the 2015 Boiler Rule. The Associations therefore respectfully submit

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[1] Comment of Earthjustice, No. EPA-HQ-OAR-2002-0058-3926, Submitted March 9, 2015, at 1-2.

[2] *Id.* at 11-12 ("EPA's proposed alternative work practice period is unlawful, first, because EPA may set work practice standards only for classes of sources, not for periods of operation. . . . Further, EPA may set work practice standards only insofar as it is 'not practicable' to measure emissions. EPA has not even claimed—let alone shown—that it is impracticable to measure emissions from boilers during startup and shutdown as it now proposes to define those periods.").

that they should be granted leave to intervene as Respondents so that they may defend their interests in this case.

ARGUMENT

The Court should grant the Associations' motion for leave to intervene as Respondents because the Associations meet the standard for intervention in petition for review proceedings in this Court.

I. Standard for Intervention in Petition for Review Proceedings in This Court

Federal Rule of Appellate Procedure 15(d) provides the standard for intervention in this case. Federal Rule of Appellate Procedure 15(d) states that a motion for leave to intervene "must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention." This Court has held that this rule "simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought." *Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991). Under the Federal Rules of Civil Procedure, "the 'interest' test [for intervention] is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967); *see also Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133-35 (1967), quoted in *Nuesse*, 385 F.2d at 701.

Appellate courts, including this Court, have recognized that Federal Rule of Civil Procedure 24, while not binding in cases originating in courts of appeals, may be relevant to the intervention inquiry under Federal Rule of Appellate Procedure 15(d). *See, e.g.*, *Int'l Union v. Scofield*, 382 U.S. 205, 216 n.10 (1965); *Amalgamated Transit Union v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985). The requirements for intervention of right under Federal Rule of Civil Procedure 24(a)(2) are that: (1) the application is timely; (2) the applicant claims an interest relating to the subject of the action; (3) disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) existing parties may not adequately represent the applicant's interest. *See, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). This Court has previously stated that an intervenor applicant that meets the test for intervention of right also demonstrates Article III standing. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("any person who satisfies Rule 24(a) will also meet Article III's standings requirements") (*citing Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000)).

As discussed below, the Associations meet the elements of the intervention-of-right test under Federal Rule of Civil Procedure 24(a)(2) and thus satisfy any

criteria that arguably might apply to determining whether intervention as a respondent is warranted in this Court.[3]

II. The Associations Meet the Standard for Intervention.

A. This Motion Is Timely.

The Associations meet the timeliness requirement. In compliance with Federal Rule of Appellate Procedure 15(d), this motion has been filed within 30 days after Environmental Petitioners filed their petition for review on January 19, 2016. Moreover, this motion is being filed at an early stage of the proceedings and before establishment of a schedule and format for briefing. Thus, granting this motion will not disrupt or delay any proceedings.

[3] An association has standing to litigate on its members' behalf when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

For reasons discussed herein, the interests of the members of each Association will be harmed if Petitioners prevail in this litigation. Those members therefore would have standing to intervene in their own right. Moreover, the interests that each of the Associations seeks to protect are germane to its purpose of participating in proceedings and related litigation that affect its members. Finally, participation of individual members from these Associations in this litigation is not required.

B. The Associations and Their Members Have Interests that Will Be Impaired if the Petitioners Prevail.

The individual companies that are members of the Associations operate numerous industrial boilers that are subject to the 2015 Boiler Rule. Where parties are objects of governmental regulatory action, "there is ordinarily little question that the action . . . has caused [them] injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). A ruling in favor of the Petitioners would likely threaten the interests of each Association and its members. Thus, if the interest prongs of Federal Rule of Civil Procedure 24 are relevant, each of the Associations clearly meets them here.

The additional regulatory burdens and compliance costs the Associations' members would bear if the Petitioners prevail in their challenges to the 2015 Boiler Rule would harm the interests of members of the Associations. As a result, the Associations should be granted leave to intervene as Respondents.

C. Existing Parties Cannot Adequately Represent the Associations' Interests.

Assuming *arguendo* that inadequate representation is an applicable test for intervention under Federal Rule of Appellate Procedure 15(d),[4] the Associations meet that test here. Under Federal Rule of Civil Procedure 24(a)(2), the burden of

[4] Federal Rule of Civil Procedure 24(a)(2)'s "adequate representation" prong has no parallel in Federal Rule of Appellate Procedure 15(d), but the Associations address it here to inform the Court fully.

showing inadequate representation in a motion for intervention "is not onerous," as "[t]he applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

Neither the Environmental Petitioners nor EPA can adequately represent the interests of the Associations. As discussed earlier, the likely arguments of Environmental Petitioners are inimical to the interests of the Associations and their members in these cases. Thus, the Environmental Petitioners cannot represent the Associations' interests. EPA also cannot adequately represent the Associations' interests. The Agency, as a governmental entity, necessarily represents the broader "general public interest." *Id.* at 192-93 ("A government entity . . . is charged by law with representing the public interest of its citizens. . . . The District [of Columbia] would be shirking its duty were it to advance th[e] narrower interest [of a business concern] at the expense of its representation of the general public interest."); *Fund for Animals*, 322 F.3d at 736 (this Court "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors"). Unlike EPA, the Associations have the comparatively narrow interest of avoiding the unwarranted or unsupported imposition of potentially burdensome and costly emission control obligations on its members. This Court

has recognized that, "[e]ven when the interests of EPA and [intervenors] can be expected to coincide, . . . that does not necessarily mean that adequacy of representation is ensured." *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). In sum, the existing parties do not and cannot adequately represent the interests of the Associations in this case.

CONCLUSION

For the foregoing reasons, the Associations respectfully request leave to intervene as Respondents in the above-captioned case.

Respectfully submitted,

/s/ William L. Wehrum

William L. Wehrum
Felicia H. Barnes
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500
wwehrum@hunton.com
fbarnes@hunton.com
Counsel for the American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest & Paper Association, American Iron and Steel Institute, American Wood Council, Biomass Power Association, Council of Industrial Boiler Owners, Coalition for Responsible Waste Incineration, National Association of Manufacturers, National Oilseed Processors, and Southeastern Lumber Manufacturers Association

Dated: February 18, 2016

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RULE 26.1 DISCLOSURE STATEMENTS OF MOVANT INTERVENORS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, movant intervenors the American Chemistry Council ("ACC"), American Coke and Coal Chemicals Institute ("ACCCI"), American Forest & Paper Association ("AF&PA"), American Iron and Steel Institute ("AISI"), American Wood Council ("AWC"), Biomass Power Association ("BPA"), Council of Industrial Boiler Owners ("CIBO"), Coalition for Responsible Waste Incineration ("CRWI"), National Association of Manufacturers ("NAM"), National Oilseed Processors Association ("NOPA"), and Southeastern Lumber

Manufacturers Association ("SLMA") (collectively, "the Associations") file the following statements:

ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is an $801 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for fourteen percent of all U.S. exports. ACC participates on its members' behalf in administrative proceedings and in litigation arising from those proceedings. ACC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a ten percent (10%) or greater ownership interest in ACC.

ACCCI, founded in 1944, is an international trade association that represents 100% of the U.S. producers of metallurgical coke used for iron and steelmaking, and 100% of the nation's producers of coal chemicals, who combined have operations in 12 states. It also represents chemical processors, metallurgical coal producers, coal and coke sales agents, and suppliers of equipment, goods, and

services to the industry. ACCCI has no parent corporation, and no publicly held company has ten percent (10%) or greater ownership in ACCCI.

AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative – Better Practices, Better Planet 2020. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures approximately $210 billion in products annually, and employs nearly 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 47 states. No parent corporation or publicly held company has a ten percent (10%) or greater ownership interest in AF&PA.

AISI serves as the voice of the North American steel industry and represents 19 member companies, including integrated and electric furnace steelmakers, accounting for the majority of U.S. steelmaking capacity with facilities located in 41 states, Canada, and Mexico. AISI also includes approximately 125 associate members who are suppliers to or customers of the steel industry. AISI has no

parent corporation, and no publicly held company has ten percent (10%) or greater ownership in AISI.

AWC is the voice of North American wood products manufacturing, representing over 75% of the industry that provides approximately 400,000 men and women in the United States with family-wage jobs. AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocated for balanced government policies that sustain the wood products industry.

BPA is a non-profit, national trade association headquartered in Portland, Maine, and organized under the laws of the state of Maine. BPA has no parent corporation and no publicly held company has a ten percent (10%) or greater ownership interest in BPA. BPA serves as the voice of the U.S. biomass industry in the federal public policy arena. BPA is comprised of 23 member companies who either own or operate biomass power plants and 16 associate and affiliate members who are suppliers to or customers of the industry. BPA's member companies represent approximately 80 percent of the U.S. biomass to electricity sector.

CIBO is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations. CIBO has not issued shares to the public and has no parent company.

CRWI is a non-profit trade association as described in Circuit Rule 26.1(b) that provides information about, and conducts advocacy regarding, the use of high temperature combustion which is used at facilities owned or operated by CRWI members. Some of CRWI's members are regulated by the rule at issue in this proceeding. No publicly held corporation owns ten percent (10%) or more of CRWI, and CRWI does not have a parent corporation.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living

standards. The NAM has no parent company and no publicly held company has a ten percent (10%) or greater ownership interest in the NAM.

NOPA is a non-profit, national trade association headquartered in the District of Columbia. NOPA has no parent corporation and no publicly held company has a ten percent (10%) or greater ownership interest in NOPA. NOPA represents 12 companies engaged in the production of food, feed, and renewable fuels from oilseeds, including soybeans. NOPA's member companies process more than 1.6 billion bushels of oilseeds annually at 63 plants located in 19 states throughout the country, including 57 plants that process soybeans.

SLMA is a trade association that represents independently-owned sawmills, lumber treaters, and their suppliers in 17 states throughout the Southeast. SLMA's members produce more than 2 billion board feet of solid sawn lumber annually, employ over 12,000 people, and responsibly manage over a million acres of forestland. These sawmills are often the largest job creators in their rural communities, having an economic impact that reaches well beyond people that are in their direct employment. SLMA serves as the unified voice of its members on state and federal government affairs and offers various other programs including networking events, marketing and management, and operational issues. No parent corporation or no publicly held company has a ten percent (10%) or greater ownership interest in SLMA.

Respectfully submitted,

/s/ William L. Wehrum
Felicia H. Barnes
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500
wwehrum@hunton.com
fbarnes@hunton.com
Counsel for the American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest & Paper Association, American Iron and Steel Institute, American Wood Council, Biomass Power Association, Council of Industrial Boiler Owners, Coalition for Responsible Waste Incineration, National Association of Manufacturers, National Oilseed Processors, and Southeastern Lumber Manufacturers Association

Dated: February 18, 2016

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that, on this 18th day of February, 2016, I caused the foregoing documents to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system.

/s/ William L. Wehrum
William L. Wehrum