ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *Petitioner*, v. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	Case No. 13-1289 (Consolidated with Nos. 13-1290, 13-1292, 13-1293, and 13-1294)

MOTION TO INTERVENE IN SUPPORT OF RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27, and Rule 15(b) of this Court, Natural Resources Defense Council, Environmental Defense Fund, Sierra Club, Group Against Smog and Pollution, and Clean Air Council (collectively, "Movants") hereby move for leave to intervene in support of Respondents ("EPA") in case Nos. 13-1289, 13-1290, 13-1292, 13-1293, and 13-1294, and in any other similar cases involving the same agency action. Counsel for all parties in each of these consolidated cases have been contacted for their position on this motion. Counsel for the petitioner in case No. 13-1289 stated that

they take no position on this motion and do not intend to file a response. Counsel for the petitioners in case Nos. 13-1290, 13-1292, and 13-1293 stated that they will not oppose this motion. Counsel for the petitioner in case No. 13-1294 and counsel for EPA stated that they take no position on this motion. In support of their motion, Movants state as follows, and also rely on the declarations that accompany this motion.

INTRODUCTION

These consolidated cases seek review of the final rule promulgated by EPA entitled "Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards," published at 78 Fed. Reg. 58,416 (Sept. 23, 2013) (the "Reconsideration Rule"). The Reconsideration Rule amends air pollution standards that apply to oil and gas operations in response to petitions for reconsideration received from industry stakeholders following EPA's issuance, in 2012, of amended New Source Performance Standards (NSPS) limiting emissions of volatile organic compounds (VOCs) and sulfur dioxide (SO_2) from new and modified oil and gas operations. *See* 77 Fed. Reg. 49,490 (Aug. 16, 2012) (the "2012 Rule").

Movants have a demonstrable interest in defending the Reconsideration Rule against challenges brought by industry groups seeking to weaken or delay it. As described below, the Reconsideration Rule retains crucial health and

environmental safeguards for Movants' members that were initially required under the 2012 Rule. Moreover, this court has granted Movants' request to intervene in support of EPA as to petitions for review of the 2012 Rule filed by the same industry groups that have petitioned for review of the Reconsideration Rule. *See* Order of Apr. 3, 2013, *Am. Petroleum Inst. v. EPA*, No. 12-1405 (D.C. Cir.).

BACKGROUND

I. Movant Environmental Groups

Movants are national and local non-profit environmental groups that have as part of their missions the objective of protecting human health and the environment from air pollution caused by the oil and gas industry. Declaration of Yolanda Andersen ¶¶ 3-9; Declaration of Rachel Filippini ¶¶ 2-5; Declaration of John Stith ¶¶ 3-5; Declaration of Gina Trujillo ¶¶ 3-4, 6. Movants have long-standing interests and involvement in advocating and working for the reduction of air emissions from oil and gas operations. Andersen Decl. ¶¶ 4-9; Filippini Decl. ¶¶ 2-5; Stith Decl. ¶ 5; Trujillo Decl. ¶ 6. Movants have members who live in parts of the country where oil and gas operations, including the use of storage vessels, exist and are expected to expand, including California, Colorado, Pennsylvania, West Virginia, Ohio, and Texas. Andersen Decl. ¶ 11; Filippini Decl. ¶¶ 4-6, 10; Stith Decl. ¶ 7; Trujillo Decl. ¶¶ 7-8.

II. EPA's 2012 Standards for Oil and Gas Facilities

The Clean Air Act (CAA or the Act) aims "to protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). To help meet this goal, section 111 of the Act, *id.* § 7411, requires EPA to establish standards of performance for new and modified stationary sources of air pollution. Section 111(b)(1) requires EPA to issue standards of performance for each category of sources that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7411(b)(1)(A). These "New Source Performance Standards" (NSPS) must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) [EPA] determines has been adequately demonstrated." *Id.* § 7411(a)(1). The Act requires EPA to "review and, if appropriate, revise" those standards at least every 8 years. *Id.* § 7411(b)(1)(B).

In 2012, EPA issued a rule amending the NSPS requirements applicable to the oil and gas sector. 77 Fed. Reg. 49,490 (Aug. 16, 2012) (the "2012 Rule"). Among other things, the 2012 Rule established control requirements for VOC emissions from storage vessels. *Id.* at 49,498/2-3. EPA calculated that these amendments to the NSPS for storage vessels would reduce nationwide annual

emissions of VOCs by 29,654 tons. EPA, Regulatory Impact Analysis: Final New Source Performance Standards and Amendments to the National Emissions Standards for Hazardous Air Pollutants for the Oil and Natural Gas Industry (Apr. 2012) at p. 3-20, (EPA Docket No. EPA-HQ-OAR-2010-0505-4544). In discussing the air quality benefits of the 2012 Rule, EPA explained that VOC emissions react in the atmosphere to form ozone and fine particulate matter air pollution, which are associated with significant public health and environmental effects, including premature death, respiratory problems such as asthma attacks and bronchitis, and injury to vegetation. 77 Fed. Reg. at 49,535/1-2.

On October 15, 2012, more than a dozen industry groups and allied state parties petitioned for review of the 2012 Rule.[1] Movants sought and were granted intervention in support of EPA in that case. Order of Apr. 3, 2013, *Am. Petroleum Inst. v. EPA*, No. 12-1405 (D.C. Cir.).[2]

---

[1] The industry and allied state petitioners in Nos. 12-1405, 12-1406, 12-1407, 12-1408, 12-1411, 12-1412, and 12-1417 are American Petroleum Institute, Gas Processors Association, Domestic Energy Producers Alliance, Independent Petroleum Association of America, Independent Oil and Gas Association of West Virginia, Inc., Kentucky Oil & Gas Association, Inc., Pennsylvania Independent Oil & Gas Association, Ohio Oil and Gas Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association, Texas Oil & Gas Association, Western Energy Alliance, State of Texas, Railroad Commission of Texas, and Texas Commission on Environmental Quality.

[2] The 2012 Rule had also included standards issued under other Clean Air Act authority, but the Court's April 3, 2013 Order severed the NSPS-related portion of the litigation over the 2012 Rule. The cases challenging the NSPS-related portion

III. The Reconsideration Rule

Several of the industry groups who petitioned for review of the 2012 Rule also filed petitions with EPA seeking administrative reconsideration of aspects of the 2012 Rule. Some of these petitions argued that, among other things, the storage vessel pollution control equipment required under the 2012 Rule could not be obtained and installed in time to ensure compliance on the schedule established in that rule. *See, e.g.*, Petition of American Petroleum Institute (Oct. 15, 2012) at 2-3 (EPA Docket No. EPA-HQ-OAR-2010-0505-4590); Petition of Texas Oil & Gas Association (Oct. 15, 2012) at 13-15 (EPA Docket No. EPA-HQ-OAR-2010-0505-4586).

As part of its response to these petitions, EPA completed the rulemaking at issue here. In response to the information presented in the industry groups' reconsideration petitions, EPA proposed measures that would have significantly weakened the 2012 Rule's provisions limiting emissions from storage vessels. *See* 78 Fed. Reg. 22,126, 22,128/3 (Apr. 12, 2013) (proposing to exempt "Group 1" storage vessels (units constructed, modified, or reconstructed between August 23, 2011 and April 12, 2013) from the requirement to install pollution controls, in the

---

of the 2012 Rule were assigned a new docket number, No. 13-1108. Order of Apr. 3, 2013, *Am. Petroleum Inst. v. EPA*, No. 12-1405 (D.C. Cir.). Case No. 13-1108, in which Movants are intervenors supporting EPA, is currently being held in abeyance until February 24, 2014, when motions to govern further proceedings are due. *See* Order of Oct. 1, 2013, *Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir.).

absence of a subsequent increase in the vessel's emissions). The proposal would have exempted over 20,000 storage vessels from the requirement to install pollution controls, potentially allowing an additional 3 million tons of VOC emissions over the life of those vessels. *See id.* (estimating that over 20,000 storage vessels would fall into Group 1); 78 Fed. Reg. at 58,420/2 (same); Comments of Clean Air Council *et al.* (May 28, 2013) at 3, 9-10, App. 1 (EPA Docket No. EPA-HQ-OAR-2010-0505-4622) (estimating the impact of the proposed rule on VOC emissions).

However, after receiving additional information demonstrating the existence of an adequate supply of pollution control equipment for storage vessels, EPA decided to largely retain the key elements of the standards for storage vessels adopted in the 2012 Rule. *See* 78 Fed. Reg. at 58,417/2-3 (explaining that based on "new information we received since proposal . . . we are not changing the requirement of the 2012 NSPS that Group 1 storage vessel affected facilities comply with the emission standard requirements"). EPA's decision to retain these standards ensures that VOC emission reductions from storage tanks will occur as EPA's analysis of the 2012 Rule predicted. *Id.* at 58,434/1 (explaining that the Reconsideration Rule will not increase air pollutant emissions because owners of storage vessels would need to install the same or similar pollution control equipment as would have been necessary to meet the 2012 Rule).

On November 22, 2013, twelve industry associations petitioned for review of the Reconsideration Rule.[3] These petitions have been consolidated by order of this Court. Order of Dec. 3, 2013, *Am. Petroleum Inst. v. EPA*, No. 13-1289 (D.C. Cir.).

The Industry Petitioners will likely seek to weaken the Reconsideration Rule's requirements. These parties filed comments supporting EPA's proposal to relax the 2012 Rule's control requirements for storage vessels and advocating further changes to delay and/or weaken EPA's proposed regulations. *See, e.g.*, Comments of Western Energy Alliance (May 28, 2013) at 2 (EPA Docket No. EPA-HQ-OAR-2010-0505-4617) (requesting that EPA relax the threshold for allowing the removal of emission control equipment); Comments of Texas Oil & Gas Association (May 28, 2013) at 3 (EPA Docket No. EPA-HQ-OAR-2010-0505-4623) (recommending that controls be required only at storage vessels with the potential to emit 12 tons per year or more of VOCs).

[3] The industry petitioners in these consolidated cases are American Petroleum Institute (No. 13-1289), Gas Processors Association (No. 13-1290), Texas Oil and Gas Association (No. 13-1292), Independent Petroleum Association of America, Independent Oil and Gas Association of West Virginia, Inc., Kentucky Oil & Gas Association, Inc., Pennsylvania Independent Oil & Gas Association, Ohio Oil and Gas Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association, and Virginia Oil & Gas Association (No. 13-1293), and Western Energy Alliance (No. 13-1294), (collectively, the "Industry Petitioners").

In contrast, Movants have a strong interest in preventing the weakening of the health and welfare protections provided by the Reconsideration Rule to their members, many of whom live in close proximity to oil and gas operations that include storage vessels covered by the Reconsideration Rule or in areas slated for oil and natural gas development where new storage vessels are likely to be placed into service. Accordingly, Movants meet the standards for intervention, as further detailed below.

ARGUMENT

Movants should be permitted to intervene in these proceedings in order to support their organizational interests and the specific interests of their members whose health and welfare are threatened by the air pollution that the Reconsideration Rule seeks to limit. As demonstrated below, Movants meet the requirements for intervention. Further, this motion is timely filed within 30 days of November 22, 2013, when the petitions for review in which Movants seek to intervene were filed. FED. R. APP. P. 15(d); *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1367 (D.C. Cir. 1988).

I. Standard Applicable to a Motion to Intervene

Under Federal Rule of Appellate Procedure 15(d), a motion to intervene need only make "a concise statement of the interest of the moving party and the grounds for intervention." Movants seek intervention to oppose attempts to

weaken public health and environmental safeguards that will protect their members. As discussed further below, that interest is sufficient to support intervention in this case.

This Court has previously allowed Movants to intervene in industry petitions challenging EPA actions under the Clean Air Act, including the industry challenges to the 2012 Rule and other regulations applicable to oil and gas operations. *See, e.g.*, Order of Apr. 3, 2013, *Am. Petroleum Inst. v. EPA*, No. 12-1405 (D.C. Cir.) (granting Movants' intervention motion in industry suits challenging the 2012 Rule); Order of Apr. 8, 2011, *Am. Gas Ass'n v. EPA*, No. 11-1020 (D.C. Cir.) (Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club granted intervention in industry lawsuits challenging greenhouse gas emissions reporting regulations applicable to oil and gas facilities).[4] Comparable circumstances warrant a grant of intervention to Movants here.

[4] Similarly, this Court has regularly permitted intervention by industry organizations seeking to support EPA actions challenged by environmental groups. *See, e.g.*, *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009) (National Petrochemical and Refiners Association and other industry groups allowed to intervene in support of EPA's 8-hour ozone National Ambient Air Quality Standard); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) (industry groups intervened to support EPA's 2006 revisions to its national ambient air quality standards for fine and coarse particulate matter); *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008) (chemical industry groups intervened to support EPA rule exempting major sources of air pollution from normal emission standards during periods of startups, shutdowns, and malfunctions).

II. Movants meet the standard for intervention.

The health and welfare of Movants' members are threatened by air emissions generated by oil and gas operations where they live, work, and recreate. Movants' members live, work, and engage in recreation and other activities near oil and gas operations, including storage vessels regulated by the Reconsideration Rule, and are exposed to air pollution from these sources. Declaration of William Ferullo ¶¶ 4-6, 8-10; Declaration of Denise Fort ¶¶ 3-7; Declaration of William J. Hughes ¶¶ 2, 6-10. Similarly, Movants' members also live and engage in activities in areas where additional investments in oil and gas operations are expected and where additional storage vessels regulated under the Reconsideration Rule are likely to be constructed. Ferullo Decl. ¶¶ 4-6; Fort Decl. ¶¶ 3-7; Hughes Decl. ¶ 7, 14. As a result, Movants' members experience harm, including exposure to air pollution and a greater risk of harm to their health, caused by emissions from oil and gas sector storage vessels, including cancer, respiratory, and other health impacts associated with exposure to VOCs and other air pollutants emitted by oil and gas operations, including storage vessels regulated in the Reconsideration Rule. Ferullo Decl. ¶¶ 6-11, 13; Fort Decl. ¶¶ 3-5; Hughes Decl. ¶¶ 8-10. Because of this air pollution and because of their concern about additional health impacts and risks due to this pollution, Movants' members refrain from or curtail recreational, aesthetic, and associational activities that they have enjoyed in the

past, and emissions from oil and gas industry storage vessels diminish their enjoyment of these and other recreational activities. Ferullo Decl. ¶¶ 10-11. Movants' members also are harmed as a result of their increased concern about their health and decreased enjoyment of other activities during which they are exposed to dangerous air pollution, such as when they must breathe air near oil and gas operations, including storage vessels, while working and during their daily commutes. Ferullo Decl. ¶¶ 10-11, 13; Fort Decl. ¶ 7; Hughes Decl. ¶¶ 13-14.

Although Movants' members need—and the Clean Air Act requires—greater control of air emissions from oil and gas facilities, and consequently greater protection for their health, property, and recreational interests than the Reconsideration Rule provides, the safeguards that the Reconsideration Rule confers give Movants reason to seek intervention to prevent further harm to their and their members' legally protected interests. Specifically, the Reconsideration Rule retains key emission standards for oil and gas industry storage vessels that were adopted in the 2012 Rule. *See, e.g.*, 78 Fed. Reg. at 58,417/2-3 (explaining that "we are not changing the requirement of the 2012 NSPS that Group 1 storage vessel affected facilities comply with the emission standard requirements").

Reflecting the importance of the health and welfare protection provided in the Reconsideration Rule, Movants Natural Resources Defense Council, Environmental Defense Fund, Sierra Club, and Clean Air Council were active

participants in the rulemaking that led to this rule. The groups submitted written comments urging EPA not to follow through on its proposal to weaken the requirements for storage vessels established in the 2012 Rule. Comments of Clean Air Council *et al.* (May 28, 2013) (EPA Docket No. EPA-HQ-OAR-2010-0505-4622). These comments noted, among other things, that EPA's proposed amendments to the 2012 Rule would lead to significant increases in emissions of VOCs. *See id.* at 3, 9-10, App. 1.

In sum, Movants' intervention is appropriate under Federal Rule of Appellate Procedure 15(d). Movants seek to oppose Industry Petitioners' attempts to vacate, weaken, or delay the Final Rule—attempts that threaten Movants' interests in protecting their members' health and ability to continue enjoying recreational and aesthetic activities and Movants' interests in protecting their own

and their members' interests in receiving access to information about emissions from the source category.[5]

Movants' participation as intervenors in support of EPA on certain issues will not delay the proceedings or prejudice any party. This motion to intervene is being timely filed within the 30-day period allowed under Federal Rule of Appellate Procedure 15(d). The Court has not yet scheduled oral argument or established a briefing schedule. Further, Movants share common interests in defending the NSPS requirements for oil and gas storage vessels and intend to file their brief in support of Respondents jointly, as directed by D.C. Circuit Rule 28(d)(4). Movants' participation will not undermine the efficient and timely adjudication of this case. Indeed, as nonprofit, environmental citizens' groups with members living near oil and gas storage vessels regulated under the

[5] Movants acting in defense of the respondent need not demonstrate standing under Article III. The Supreme Court recently confirmed that Article III standing requirements apply to those "who seek[] to initiate or continue proceedings in federal court," not to those who *defend* against such proceedings. *Bond v. United States*, 131 S. Ct. 2355, 2361-62 (2011). Here it is Petitioners, not Movants, who seek to invoke the Court's Article III jurisdiction. *See also McConnell v. FEC*, 540 U.S. 93, 233 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that where the position of the respondent-intervenors is identical to that of the agency, and the agency's standing is unquestionable, no separate inquiry regarding intervenor standing is necessary). However, even if standing were required of respondent-intervenors, the harms identified in the attached declarations from Movants' members would satisfy that requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Reconsideration Rule, Movants are likely to offer a distinct perspective that will be of assistance to the Court as it considers challenges to the Final Rule.

CONCLUSION

Movants meet the requirements for intervention: they have a demonstrated interest relating to the subject matter of this action that may be impaired by disposition in their absence and they have filed a timely motion. *See* FED. R. APP. P. 15(d). For all of the foregoing reasons, Movants Natural Resources Defense Council, Environmental Defense Fund, Sierra Club, Group Against Smog and Pollution, and Clean Air Council respectfully request leave to intervene in case Nos. 13-1289, 13-1290, 13-1292, 13-1293, and 13-1294, and under D.C. Circuit Rule 15(b), in all other petitions for review of the challenged EPA action.

Dated: December 23, 2013.

Respectfully submitted,

/s/ Timothy D. Ballo
Timothy D. Ballo
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington, DC 20036
(202) 667-4500
tballo@earthjustice.org

Counsel for Movants Environmental Defense Fund, Sierra Club, and Clean Air Council

/s/ Aaron Jacobs-Smith (by permission)
Aaron Jacobs-Smith
Clean Air Council
135 South 19th St., Ste. 300
Philadelphia, PA 19103
(215) 567-4004
ajs@cleanair.org

Counsel for Movant Clean Air Council

/s/ Peter Zalzal (by permission)
Peter Zalzal
Environmental Defense Fund
2060 Broadway, Ste 300
Boulder, CO 80302
(303) 447-7214
pzalzal@edf.org

/s/ Tomás Carbonell (by permission)
Tomás Carbonell
Environmental Defense Fund
1875 Connecticut Ave., NW
Washington, DC 20009
(202) 572-3610
tcarbonell@edf.org

Counsel for Movant Environmental Defense Fund

/s/ Joanne Spalding (by permission)
Joanne Marie Spalding
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105-3441
(415) 997-5725
Joanne.Spalding@sierraclub.org

/s/ Andres Restrepo (by permission)
Andres Restrepo
Sierra Club
50 F St., NW, Eighth Floor
Washington, DC 20001
(202) 548-4597
Andres.Restrepo@sierraclub.org

Counsel for Movant Sierra Club

/s/ David D. Doniger (by permission)
David D. Doniger
Benjamin Longstreth
Natural Resources Defense Council
1152 15th St., NW, Suite 300
Washington, DC 20005
(202) 289-6868
ddoniger@nrdc.org
blongstreth@nrdc.org

/s/ Meleah Geertsma (by permission)
Meleah Geertsma
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606
(312) 651-7904
mgeertsma@nrdc.org

Counsel for Movant Natural Resources Defense Council

/s/ Ann Weeks (by permission)
Ann Brewster Weeks
Darin Schroeder
Clean Air Task Force
18 Tremont Street, Suite 530
Boston MA 02108
(617) 624-0234
aweeks@catf.us
dschroeder@catf.us

/s/ David Marshall (by permission)
David Marshall
Clean Air Task Force
41 Liberty Hill Rd.
Building #2, Suite #205
Henniker, NH 03242
(603) 428-8114
dmarshall@catf.us

Counsel for Movant Group Against Smog and Pollution

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **Motion to Intervene in Support of Respondents** on all parties through the Court's electronic case filing (ECF) system.

DATED: December 23, 2013

/s/ *Timothy D. Ballo*

Timothy D. Ballo