

ORAL ARGUMENT NOT YET SCHEDULED

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

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AMERICAN PETROLEUM INSTITUTE))
and NATIONAL PETROCHEMICAL))
AND REFINERS ASSOCIATION,))
))
Petitioners,))
))
v.)	Case No. 11-1194
))
ENVIRONMENTAL PROTECTION))
AGENCY and LISA P. JACKSON,))
Administrator, U.S. Environmental))
Protection Agency,))
))
Respondents.))
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**MOTION OF SIERRA CLUB, NATURAL RESOURCES DEFENSE
COUNCIL, AND ENVIRONMENTAL INTEGRITY PROJECT TO
INTERVENE IN SUPPORT OF RESPONDENTS**

Sierra Club, Natural Resources Defense Council, and Environmental Integrity Project (collectively “Movants”) respectfully move pursuant to FED. R. APP. P. 15(d) and D.C. Cir. Rule 15(b) to intervene in support of Respondents Environmental Protection Agency (“EPA”) and Lisa P. Jackson, Administrator of EPA, in the above-captioned proceeding. The petition filed by American Petroleum Institute and National Petrochemical and Refiners Association seeks

review of EPA's efforts to collect air pollution information from petroleum refineries, as expressed in (1) a *Federal Register* notice announcing another agency's approval of EPA's information collection and (2) the letters EPA has sent to individual refineries requesting data. Counsel for Petitioners American Petroleum Institute and National Petrochemical and Refiners Association has been consulted and stated that Petitioners take no position on this motion. Counsel for Respondents has also been contacted and stated that Respondents take no position on this motion. Pursuant to D.C. Circuit Rule 15(b), this motion also constitutes a motion to intervene in all petitions for review of the challenged actions.

INTRODUCTION

At issue in this case is EPA's ability to access information needed for the development of legally-required air pollution standards. Pursuant to a settlement agreement concluded with Movants, EPA has agreed to a schedule for the completion of a rulemaking addressing several gaps in the air pollution regulations governing petroleum refineries. The air pollution standards that the agency is now developing will cover, among other things, both greenhouse gas emissions responsible for global warming and emissions of toxic air pollutants that pose serious dangers to human health even when emitted in relatively small amounts. The schedule negotiated by Movants and EPA for that rulemaking encompasses the time needed for the agency to collect sufficient information from refineries to

develop defensible rules that require emissions reductions consistent with the Clean Air Act. In accordance with that schedule, EPA undertook a public participation process to develop an information collection request for refineries that will generate comprehensive and accurate information on refinery equipment, processes, and emissions. Movants have been deeply involved in the development of this information collection request, advocating for a thorough and expeditious gathering of data from refineries.

In this case, organizations representing the refining industry seek to challenge EPA's efforts to collect this information. Presumably because their members wish to delay the development of emissions standards and undermine the factual justification for EPA's regulatory determinations, American Petroleum Institute and National Petrochemical and Refiners Association have petitioned for review. To ensure that EPA's forthcoming refinery emissions regulations are completed on time and are based on a high-quality data set, Movants seek to intervene in this proceeding in support of Respondents.

BACKGROUND

A. Movant Environmental Organizations

Movants are nonprofit citizens' groups working on many fronts to research, analyze, and control air pollutant emissions from petroleum refineries.

Sierra Club is a grassroots environmental organization with over 625,000 members nationwide. Declaration of Steve Yaver ¶¶ 2, 6. Sierra Club works to promote solutions to global warming and the other air pollution problems to which petroleum refineries significantly contribute. *Id.* ¶¶ 2-3. Sierra Club's activities include major efforts to reduce air pollution, including greenhouse gas emissions, from the petroleum refining sector. *See id.* As explained below, the information collection challenged in this proceeding would materially advance these efforts. Additionally, Sierra Club has members who are exposed to air pollution emitted by refineries and who have legitimate concerns that their health and welfare would be threatened by inadequate air pollution standards if EPA is unable to access the information the agency has requested from refineries. *See id.* ¶¶ 6-8; Declaration of Karla Land ¶¶ 4-16.

Natural Resources Defense Council ("NRDC") is a national nonprofit environmental organization with over 400,000 members nationwide. Declaration of Gina Trujillo ¶¶ 3, 8. NRDC's mission includes the prevention and mitigation of global warming in order to protect and maintain NRDC's members' use and enjoyment of natural resources threatened by global warming, as well as the abatement of other air pollutants that threaten the health and welfare of NRDC's members. *Id.* ¶ 4-5. Through its Clean Air Project and Climate Center, NRDC pursues federal and state policies to curb the pollution that is causing, among other

things, respiratory and cardiac illness, cancer, and global warming, including emissions from U.S. petroleum refineries, which are a major contributor to global warming and other harmful air pollution. *Id.* ¶¶ 5-6. As explained below, the information collection challenged in this proceeding would materially advance these efforts. Further, NRDC has members who are exposed to air pollution emitted by refineries and who have legitimate concerns that their health and welfare would be threatened by inadequate air pollution standards if EPA is unable to access the information the agency has requested from refineries. *See id.* ¶¶ 8.

Environmental Integrity Project (“EIP”) is a national nonprofit organization dedicated to advocating for more effective enforcement of environmental laws. EIP works with a coalition of national and local organizations to advocate for stronger enforcement of emissions requirements at refineries, and publishes reports and disseminates data to assist other organizations working to ensure adequate air pollution control measures are included in refinery air permits. *See, e.g.*, http://environmentalintegrity.org/news_reports/documents/RefineryDatabaseWEB-010810.pdf (database tracking refinery permit actions nationwide). EIP’s ability to carry out its mission of improving the enforcement of environmental laws would be adversely impacted if EPA does not have access to the information that the agency has requested from refineries.

B. Movants’ Challenge to EPA’s Refinery Emission Standards and the Resulting Settlement Agreement

Section 111 of the Clean Air Act requires EPA to establish and periodically update standards of performance for new and newly modified stationary sources of air pollutant emissions. 42 U.S.C. § 7411(b)(1). In 2008, EPA completed such an update of the standards of performance for petroleum refineries. 73 Fed. Reg. 35,838 (June 24, 2008). Movants challenged these revised standards on multiple grounds and also submitted a petition to EPA seeking reconsideration of several aspects of the 2008 final rule. *See* Pet. for Review, *EIP v. EPA*, No. 08-1281 (D.C. Cir. Aug. 25, 2008); Pet. For Reconsideration, EPA Docket ID No. EPA-HQ-OAR-2007-0011-0243 (Aug. 25, 2008). EPA subsequently granted Movants' reconsideration petition and entered into settlement negotiations with Movants regarding a schedule for the completion of the agency's reconsideration proceeding. *See* Settlement Agreement at 2, attached as Ex. A to Joint Mot. To Hold in Abeyance, *New York v. EPA*, No. 08-1279 (D.C. Cir. Dec. 29, 2010).

While Movants sought an expeditious resolution of the issues identified in their petition for reconsideration, they agreed to a more extended schedule for that process in exchange for EPA also agreeing to fulfill additional Clean Air Act requirements relating to refineries. *Id.* at 3. For example, while EPA's refusal to adopt standards for greenhouse gas emissions from refineries and the adequacy of the standards adopted for nitrogen oxides and particulate matter were key issues in Movants' reconsideration petition, EPA also agreed to review the standards

applicable to certain toxic air pollutants as part of its reconsideration process. *Id.* at 4-5. On December 21, 2010, Movants and EPA reached agreement on a schedule for EPA's completion of reconsideration. That schedule requires EPA to propose emissions standards by December 10, 2011, and to issue final standards by November 10, 2012. *Id.*

C. EPA's Information Collection Request and Petitioners' Challenge

To initiate the rulemaking contemplated in the settlement agreement discussed above, EPA developed an information collection request to gather needed data from refineries. While section 114 of the Clean Air Act provides EPA with broad authority to "require any person who owns or operates any emission source" to make reports and "provide such other information as [EPA] may reasonably require," 42 U.S.C. § 7414(a)(1), the Paperwork Reduction Act, 44 U.S.C. § 3504(c)(1), requires EPA to obtain approval from the White House's Office of Management and Budget ("OMB") for such information collection requests. OMB approved the information collection for refineries on March 28, 2011, *see* 76 Fed. Reg. 19,766 (Apr. 8, 2011), and EPA sent letters to each of the approximately 150 U.S. refineries on March 31, 2011.

EPA's information collection request for refineries establishes a series of rolling deadlines to allow recipients additional time to complete more intensive data gathering activities. The first component of the request, an electronic survey

seeking information on each refinery's processes, control devices, and control costs, was due May 31. The second component, due June 30, consists of an inventory estimating current air pollution emissions. Finally, on August 31, refineries must submit sampling and testing of their crude oil feedstocks and, for some refineries, test data on emissions from specific components. *See Website for the Petroleum Refineries Information Collection Request, at <https://refineryicr.rti.org/Home.aspx> (last visited June 14, 2011).*

On May 27, 2011 Petitioners American Petroleum Institute and National Petrochemical and Refiners Association sought judicial review of EPA's information collection. Petitioners will likely seek to narrow or delay EPA's collection of information. In comments filed during OMB's review of the information collection request, Petitioners urged OMB and EPA to postpone the information collection and reduce the scope of the inquiry. *See EPA Docket ID No. EPA-HQ-OAR-2010-0682-0046 at 1-2 (Mar. 4, 2011).*

ARGUMENT

Movants should be permitted to intervene in these proceedings in order to support their organizational interests and the specific interests of Sierra Club and NRDC's members in ensuring that EPA's emissions standards for refineries are based on comprehensive and accurate data. As demonstrated below, Movants meet the requirements for intervention. Further, this motion was timely filed within

thirty days of May 27, 2011, when the American Petroleum Institute and National Petrochemical and Refiners Association's petition for review was filed. FED. R. APP. P. 15(d); *Alabama Power Co. v. I.C.C.*, 852 F.2d 1361, 1367 (D.C. Cir. 1988).

A. Standard Applicable to a Motion to Intervene

Under FED. R. APP. P. 15(d), a motion to intervene need only make “a concise statement of the interest of the moving party and the grounds for intervention.” This Court has noted that “in the intervention area the ‘interest’ test 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) (reversing denial of intervention under FED. R. CIV. P. 24(a)). Movants seek intervention to oppose attempts to restrict and delay the collection of information on refinery emissions. As discussed further below, that interest is sufficient to support intervention in this case.

This court has regularly allowed Movants to intervene in industry petitions challenging EPA actions under the Clean Air Act. *See, e.g.*, Order of Feb. 3, 2011, *American Chemistry Council v. EPA*, No. 09-1325 (D.C. Cir.) (Sierra Club and NRDC granted intervention in industry lawsuits challenging greenhouse gas reporting regulations applicable to several categories of facilities, including

petroleum refineries); Order of Oct. 8, 2008, *Am. Petroleum Inst. v. EPA*, No. 08-1277 (D.C. Cir.) (Sierra Club, NRDC, and EIP granted intervention in suits by industry challenging revisions to air pollutant emissions standards for petroleum refineries).¹ Comparable circumstances warrant a grant of intervention to Movants here.

B. Movants' Motion to Intervene Should Be Granted.

The disposition of this case ““may as a practical matter impair or impede”” Movants' interests. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)). Petitioners seek to undermine EPA's forthcoming refinery emissions standards by delaying and withholding information needed to conduct a rigorous analysis of available pollution control technologies and practices. Movants and their members would be harmed if EPA's emission standards for refineries are delayed or weakened because of inadequate data, and to protect these interests Movants have invested a great deal of effort in securing a

¹ 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).

schedule for the issuance of these regulations and advocating a thorough and prompt collection of information from refineries. Thus, disposition of the petition may as a practical matter materially impair the interests of Movants and their members in both the data that is the subject of the information collection request and the effectiveness of the forthcoming standards that will be based on this data.

The health and environmental benefits that hinge on EPA's information collection and the other concerns discussed below establish Movants' "interest" both under Rule 15(d) and their standing to sue under Article III of the Constitution, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), whether or not standing is independently required of parties who, as here, seek to intervene in support of a respondent.² For the same reasons, Movants fall squarely within the "zone of interests" protected or regulated by the relevant provisions of the Clean Air Act. *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (quoting *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

² *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("Requiring standing of someone who seeks to intervene as a defendant runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction.") (discussing district court intervention under Fed. R. Civ. P. 24, citing *Virginia v. Hicks*, 539 U.S. 113, 117-22 (2003)) (internal citation omitted); *cf. Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003) (overturning district court decision denying intervention in support of defendant under Fed. R. Civ. P. 24, and rejecting court's conclusion that proposed intervenor lacked Article III standing); *Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533, 538-39 (D.C. Cir. 1999) (discussing standing to intervene question).

1. Movants' Organizational Interest in Refinery Emissions Information

Movants have a substantial interest in this proceeding to ensure EPA's collection of comprehensive and accurate emissions information from petroleum refineries. Movants' organizational interests in air pollution prevention will be prejudiced if EPA is forced to curtail its request for data to inform the agency's analysis of air pollution standards. Effective regulatory control of refinery emissions can only be accomplished if EPA has sufficient data to understand the sources of those emissions and the efficacy of the technologies and practices available to reduce them. Indeed, the need for high quality data is especially great for refineries, as EPA has previously acknowledged gaps in its understanding of refinery emissions. *See* Letter from Elizabeth Craig, Acting Assistant Administrator, to The Hon. Bill White, Mayor of Houston 1 (Apr. 7, 2009) (expressing concerns about the accuracy of refinery emissions estimation methodologies), *available at* <http://www.epa.gov/QUALITY/informationguidelines/documents/08003-response.pdf>.

Moreover, because EPA is required to make available to the public all emissions data obtained pursuant to section 114(a) of the Clean Air Act, *see* 42 U.S.C. § 7414(c), Movants have an interest in the challenged information collection as a source of data to further their own work to reduce air pollution from

refineries. Restricting or delaying the challenged information collection would impair Movants' mission of educating the public about refinery emissions and refinery compliance and noncompliance with Clean Air Act requirements. In addition, the loss of access to such information would adversely impact Movants' communications with Congress and policymakers. Movants also need accurate refinery emissions data to make basic policy decisions and strategic advocacy choices.

2. Movants' Members' Interests in Refinery Emissions Information

Movants Sierra Club and NRDC also have an interest in this action because they have members whose health and welfare is threatened by the air pollution that EPA's forthcoming emissions standards for refineries will regulate. Sierra Club and NRDC have hundreds of thousands of members nationwide. Yaver Decl. ¶ 6; Trujillo Decl. ¶ 8. These members live, work, and recreate in areas adversely impacted by refinery emissions – including areas where refineries are concentrated and where additional refining capacity is likely to be needed. *E.g.*, Land Decl. ¶¶ 4-15. For example, Sierra Club and NRDC each have hundreds of members who reside near refineries in Texas, Louisiana, and California. Yaver Decl. ¶ 7; Trujillo Decl. ¶ 8; *see also* Energy Information Administration, "Refinery Capacity Report 2010," Table 3 (June 25, 2010) (listing location and production capacity of U.S. refineries), *available at*

http://www.eia.gov/oil_gas/petroleum/data_publications/refinery_capacity_data/ref_capacity.html. The health and welfare of these Sierra Club and NRDC members is threatened by refinery emissions where they live, work, and recreate. *E.g.*, Land Decl. ¶¶ 4-15. Moreover, Sierra Club and NRDC's members also use, own, and enjoy property and natural resources which are harmed or are at risk of harm from global warming. These members will benefit if EPA can effectively address refineries' global warming pollution using data from the challenged information collection.

The health and welfare interests of Sierra Club and NRDC members is central to the underlying Clean Air Act provisions in response to which EPA is attempting to acquire emissions information from refineries. Pursuant to its settlement agreement with Movants, EPA is promulgating standards under sections 111 and 112 of the Clean Air Act. *See* Settlement Agreement at 4-5, attached as Ex. A to Joint Mot. To Hold in Abeyance, *New York v. EPA*, No. 08-1279 (D.C. Cir. Dec. 29, 2010). Section 111 requires EPA to adopt standards limiting emissions from each category of stationary sources that “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1). Meanwhile, standards adopted in EPA's section 112 rulemaking must “provide an ample margin of safety to

protect public health” unless “a more stringent standard is necessary to prevent . . . an adverse environmental effect.” 42 U.S.C. § 7412(f)(2)(A).

3. Movants’ Longstanding Commitment to Understanding and Reducing Air Pollution from Refineries

Movants have advanced their organizational interests and the interests of their members by their many years of advocacy in favor of strong emissions standards for petroleum refineries. As explained above, the instant information collection was issued to initiate a rulemaking to which EPA committed pursuant to a settlement agreement in a case brought by Movants challenging standards the agency set for refineries in 2008. However, those 2008 standards were themselves promulgated pursuant to a court order in a case brought by Movant Sierra Club. *See Consent Decree Our Children's Earth Foundation v. EPA*, No. C 05-00094 CW (N.D. Cal. Oct. 31, 2005) (setting deadline for EPA to complete review of the refinery standards of performance).

Because comprehensive and accurate emissions data are central to EPA’s issuance of strong air pollution standards, Movants have also been deeply involved in the development of EPA’s information collection request. Movants submitted extensive technical comments on EPA’s initial information collection proposal and met with staff from both the agency and OMB to advocate for a broad collection of data needed to develop effective standards. *See EPA Docket ID No. EPA-HQ-*

OAR-2010-0682-0011 (Nov. 29, 2010) (Movants' comments on proposed information collection request).

Movants' significant participation in proceedings related to EPA's emissions standards for refineries generally and the challenged information collection specifically, strongly favors their motion for leave to intervene. Both the Supreme Court and this Court have noted the anomaly that would result if participants in administrative proceedings who prevail, in whole or in part, before the agency were denied the ability to defend that success in judicial review proceedings brought as of right by parties aggrieved by the agency's decision. *See Int'l Union, Aerospace and Agric. Implement Workers of Am. v. Scofield*, 382 U.S. 205, 216 (1965) (criticizing "element of fortuity" that would arise if party's ability to participate in court of appeals depended on whether it prevailed before the agency, and embracing assumption that "Congress would not intend, without clearly expressing a view to the contrary, that a party should suffer by his own success before the agency"); *Synovus Fin. Corp. v. Bd. of Gov'rs of Fed. Reserve Sys.*, 952 F.2d 426, 432 (D.C. Cir. 1991). Further, the Clean Air Act does not limit intervention by parties that have participated extensively in the agency's decision. *See* 42 U.S.C. § 7607(b); *Alabama Mun. Distribs. Gr. v. FERC*, 300 F.3d 877, 879 (D.C. Cir. 2002).

4. Movants Bring an Important Perspective to this Action.

This Court's practice of granting intervention to private organizations – including environmental groups, trade organizations, and others – supporting agency actions in which they have an interest, *see supra* at 9-10 (citing cases), reflects its recognition that private entities have a distinctive perspective that contributes to the Court's careful consideration of challenges to important agency actions.

Movants' status as private organizations with missions focusing solely and systematically on environmental protection and conservation objectives, and their extensive experience with the development and implementation of environmental protection programs, including the emissions standards for which EPA seeks the information at issue here, provide them with a unique and distinctive perspective on the issues at stake. As independent nonprofit organizations that perform public education and advocacy to protect public health and the environment while working to represent the interests of their members, Movants also have a unique perspective to offer on the importance of the public having speedy and complete access to information on refinery emissions. Movants therefore respectfully requests that the Court not require them to rely on EPA alone to present the full range of legitimate arguments available to oppose weakening, limitation, or delay of the challenged information collection.

CONCLUSION

For all of the foregoing reasons, Movants Sierra Club, Natural Resources Defense Council, and Environmental Integrity Project respectfully request leave to intervene in case No. 11-1194, and under D.C. Circuit Rule 15(b), in all other petitions for review of the challenged EPA actions.

Dated June 23, 2011.

Respectfully submitted,

/s/ Timothy D. Ballo

Timothy D. Ballo

Earthjustice

1625 Massachusetts Ave., NW,
Suite 702

Washington, DC 20036

(202) 667-4500 Ext. 209

tballo@earthjustice.org

*Counsel for Sierra Club and
Environmental Integrity Project*

Meleah Geertsma

Natural Resources Defense Council

1200 New York Avenue, NW

Suite 400

Washington, DC 20005

(202) 289-2403

mgeertsma@nrdc.org

*Counsel for Natural Resources Defense
Council*

Sparsh Khandeshi

Environmental Integrity Project

1 Thomas Circle, NW

Suite 900

Washington, DC 20005

(202) 263-4446
skhandeshi@environmentalintegrity.org

*Counsel for Environmental Integrity
Project*

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served Movants Sierra Club, Natural Resources Defense Council, and Environmental Integrity Project's Motion to Intervene, Rule 26.1 Disclosure Statement, Certificate as to Parties, Rulings, and Related Cases, and the attached Declarations on the following counsel and parties, either through the Court's ECF system (Email) or through Certified First-Class U.S. Mail, as indicated below:

David T. Buente, Jr. (Email)
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
dbuente@sidley.com

Eileen McDonough (Email)
U.S. Department of Justice
(DOJ) Environment & Natural
Resources Division
PO Box 23986, L'Enfant Plaza Station
Washington, DC 20026-3986
Eileen.McDonough@usdoj.gov

Dated: June 23, 2011

/s/ Timothy D. Ballo
Timothy D. Ballo
Attorney