ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, *et al.*, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	Case No. 16-1033 (and consolidated cases)

UNOPPOSED MOTION TO INTERVENE IN SUPPORT OF RESPONDENT FILED BY AIR ALLIANCE HOUSTON, CALIFORNIA COMMUNITIES AGAINST TOXICS, CLEAN AIR COUNCIL, COALITION FOR A SAFE ENVIRONMENT, COMMUNITY IN-POWER & DEVELOPMENT ASSOCIATION, DEL AMO ACTION COMMITTEE, ENVIRONMENTAL INTEGRITY PROJECT, LOUISIANA BUCKET BRIGADE, SIERRA CLUB, TEXAS ENVIRONMENTAL JUSTICE ADVOCACY SERVICES, AND UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27, and Rule 15(b) of this Court, Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Sierra Club, Texas Environmental Justice Advocacy Services, and Utah Physicians for a Healthy Environment (collectively, "Movants") hereby move for leave to intervene in support of Respondent U.S.

Environmental Protection Agency ("EPA") in case No. 16-1033, and any other similar cases involving the same agency action.

Counsel for Petitioners in Case No. 16-1033, American Fuel & Petrochemical Manufacturers Association and American Petroleum Institute ("Industry Petitioners"), has stated that they do not oppose this motion. Counsel for Respondent has stated that EPA does not oppose this motion. In support of their motion, Movants state as follows.

INTRODUCTION

These consolidated cases seek review of the final rule promulgated by EPA entitled "Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards; Final Rule," and published at 80 Fed. Reg. 75,178 (Dec. 1, 2015) ("Final Rule"). The Final Rule amends the national emission standards for hazardous air pollutants emitted from major oil refineries, which convert crude oil into refined products (including diesel and aviation fuels, gasoline, and lubricating oils and feedstocks for the petrochemical industry). *Id.* at 75,181. As described below, the Final Rule establishes new protections that reduce Movants' members' and constituents' exposure to toxic air pollution, including carcinogens, and provide benefits for Movants' members and constituents and which, therefore, Movants have a demonstrable interest in defending.[1]

I. EPA'S NEW STANDARDS

EPA's Final Rule promulgates national emission standards for hazardous air pollutants emitted by petroleum or oil refineries pursuant to section 7412(d) and 7412(f) of the Clean Air Act. 42 U.S.C. § 7412(d), (f); 80 Fed. Reg. at 75,180.

Section 7412 of the Clean Air Act governs highly toxic air pollutants Congress has designated as hazardous to human health and the environment. 42 U.S.C. § 7412(b)(1). Section 7412(d) requires EPA to promulgate emission standards for major sources of these air pollutants ensuring "the maximum degree of reduction in emissions" that is achievable "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements." *Id.* § 7412(d)(2); *id.* § 7412(d)(3) (requiring emission standards to be no less stringent than the emission limitation achieved by the relevant best-performing sources). To ensure these

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[1] Movants have filed an administrative petition for reconsideration with EPA, and all Movants except for Sierra Club also filed a petition for judicial review of the Final Rule to challenge certain parts of the Rule as unlawful, arbitrary and capricious under the Clean Air Act. *See* Pet'n for Rev., No. 16-1035 (D.C. Cir. Feb. 1, 2016). Movants' petition for review is consolidated with Industry Petitioners' petition in lead Case No. 16-1033. Movant Sierra Club supports its co-Movants' petition for review and is separately filing a motion seeking leave to intervene in support of Environmental Petitioners' petition for review.

standards remain up-to-date, section 7412(d)(6) requires EPA to "review, and revise as necessary," all such emission standards "no less often than every 8 years." *Id.* § 7412(d)(6). In addition, section 7412(f) requires EPA to assess and reduce the public health risks remaining after the application of section 7412(d) emission standards to prevent unacceptable health risks and assure "an ample margin of safety to protect public health" and "prevent … an adverse environmental effect." *Id.* § 7412(f)(2)(A).

There are about 149 petroleum refineries, including 142 major sources that EPA has identified are currently regulated by the Final Rule. 80 Fed. Reg. at 75,181; EPA, Final Residual Risk Assessment for the Petroleum Refining Source Sector at 35, App.5 tbl.1 (Sept. 2015), EPA-HQ-OAR-2010-0682-0800 ("Risk Assessment"). These sources emit significant amounts of § 7412-listed toxic air pollutants, such as benzene, hydrogen cyanide, lead, arsenic, formaldehyde, dioxin, mercury, and acetaldehyde, many of which are human carcinogens and can also cause other serious health problems. *See, e.g.*, Risk Assessment at 41-52 (summarizing health risks EPA found). EPA determined that people living near and exposed to the pollution from oil refineries have an increased risk of cancer, and other serious health threats from chronic and acute exposure to these sources' hazardous air emissions. *Id.* (noting highest non-cancer chronic health risk is for neurological harm); 80 Fed. Reg. at 75,187 (summarizing health risks). Public health research has similarly found increased rates of several types of cancer, preterm deliveries, asthma related hospitalizations, and increased mortality in communities exposed to refinery pollution. *See* Comments of Air Alliance Houston *et al.* at 22-26 (Oct. 28, 2014) (citing research studies), EPA-HQ-OAR-2010-0682-0568.

In issuing the Final Rule, EPA found that stronger emission standards were needed from various types of refinery equipment. For example, EPA determined that: some uncontrolled emissions from refineries required limits; certain developments in practices, processes, and control technologies had occurred in recent years that warranted strengthening the emission standards and requiring additional monitoring; and stronger standards were needed from certain refinery equipment to protect public health. The agency thus promulgated more stringent standards and requirements expected to reduce toxic air pollution from refineries, including from storage vessels and tanks, delayed coker units, and flares, among other updates. 80 Fed. Reg. at 75,182-84, 75,225-26. In addition, EPA promulgated changes to the existing emission standards for refineries that include: (1) fenceline monitoring to identify and reduce fugitive emissions from refineries; (2) eliminating the rules' general exemption for periods of startup, shutdown, and malfunction; (3) requiring additional performance tests, monitoring, and electronic reporting of test results. *Id.* at 75,182-85.

The Final Rule is expected to reduce human exposure to toxic air pollution and resulting health threats. In particular, EPA determined that the Final Rule will require a reduction of 1,323 tons per year (tpy) of hazardous air pollutants or HAP (2,646,000 pounds per year) and 16,600 tpy of volatile organic compounds (VOC), and will also assure that flares achieve reductions of another 3,900 tpy of HAP (7,800,000 pounds per year), 33,000 tpy of VOC, and 377,000 metric tonnes per year of greenhouse gases (CO_2 equivalent) where these had not been occurring. *Id.* at 75,226 & tbl.2 (total anticipated reduction of 5,220 tons per year of hazardous air pollutants). EPA expects some reductions in cancer risk and incidence as a result of the Final Rule's requirements. *See* Risk Assessment at 52-53 (post-control risk assessment). EPA also expects reductions in toxic air emissions from other improvements, such as the fenceline monitoring requirements, but did not quantify those reductions. 80 Fed. Reg. at 75,226.

II. INDUSTRY PETITIONERS' CHALLENGE TO EPA'S STANDARDS

On January 29, 2016, Industry Petitioners petitioned for review of the Final Rule. On January 19, and February 1, 2016, Industry Petitioners also filed petitions for administrative reconsideration with EPA. Industry Petitioners in this case are trade associations for refineries and other oil companies. The American Petroleum Institute ("API") describes itself as a trade association for the oil and natural gas industry.[2] American Fuel & Petrochemical Manufacturers ("AFPM") describes itself as a trade association representing manufacturers of gasoline, diesel, jet and other fuels and oils, as well as petrochemicals.[3]

In their submissions to the agency, Industry Petitioners have opposed improvements EPA has finalized, suggesting that in this litigation they will try to weaken, delay, and vacate the Final Rule, including a request to EPA for an administrative stay. *See, e.g.*, Comments of API & AFPM (Oct. 28, 2014), EPA-HQ-OAR-2010-0682-0583; *see also* API & AFPM, Initial Request for Administrative Reconsideration and an Administrative Stay (Jan. 19, 2016); API & AFPM, Supplemental Request for Administrative Reconsideration (Feb. 1, 2016).

III. MOVANT ENVIRONMENTAL ORGANIZATIONS

Movants have interests in preventing the weakening and removal of the health and welfare protections that the Final Rule provides to their members and constituents who live, work, and engage in recreational activities near oil refineries. Movants are local and national nonprofit groups that have as part of their missions the objective of protecting human health and the environment from toxic air pollution, such as that caused by the oil refineries regulated by EPA's

[2] API, *About API*, http://www.api.org/GlobalItems/GlobalHeaderPages/About-API (last visited Feb. 26, 2016).

[3] AFPM, *About AFPM*, https://www.afpm.org/about-afpm/ (last visited Feb. 26, 2016).

Final Rule. Many Movants have been working for years to try to strengthen pollution monitoring and local health protections from oil refineries' emissions in communities around the U.S., particularly in California, Louisiana, Pennsylvania, Texas, and Utah, to protect their members' and constituents' health and welfare. For example, Air Alliance Houston and seven other Movants brought a Clean Air Act citizen suit to challenge EPA's failure to perform the current rulemaking which led to a consent decree containing a schedule for this rulemaking. *See* Consent Decree, Air Alliance Houston v. McCarthy, No. 1:12-cv-01607-RMC (D.D.C. Feb. 3, 2014); Proposed Rule, 79 Fed. Reg. 36,880, 36,886 (June 30, 2014). Additionally, as a result of Sierra Club's successful prior litigation before this Court which led to vacatur of a separate regulatory exemption during periods of startup, shutdown, and malfunction ("SSM"), EPA has removed the general SSM exemption for refineries in the Final Rule. 80 Fed. Reg. at 75,184; 79 Fed. Reg. at 36,942; *see Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir. 2008) (holding exemption violates Clean Air Act requirement that "section 112 standard apply continuously").[4] Movants also submitted comments urging EPA to set standards that would further reduce human exposure and achieve greater protection

[4] Movants note that EPA did not fully finalize the removal of all exemptions as proposed, and this is a loophole that Movants are challenging as Petitioners. *See* n. 1, *supra*.

for public health from these sources' toxic air emissions. *See, e.g.*, Comments of Air Alliance Houston *et al.* (Oct. 28, 2014), EPA-HQ-OAR-2010-0682-0568. As noted, *supra* note 1, Movants have also challenged and are working to strengthen the Final Rule through seeking reconsideration and judicial review.

ARGUMENT

Movants respectfully request respondent-intervenor status in these proceedings to protect the interests of their members and constituents who are exposed to and suffer health and welfare impacts caused by the hazardous air pollution that the Final Rule seeks to limit, and thus who receive benefits from the Final Rule.[5] As demonstrated below, Movants meet the requirements for intervention. Further, this motion is timely filed within 30 days of January 29, 2016, when the first petition for review was filed. Fed. R. App. P. 15(d); *Ala. 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." This Court has noted that "in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as

[5] Movant Sierra Club is also seeking petitioner-intervenor status, by separate motion filed in regard to petition for review No. 16-1035.

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 weaken public health and environmental requirements that will protect their members and constituents and thus satisfy this test, as explained below and shown by the attached declarations. Moreover, this Court has previously allowed Sierra Club and other organizations to intervene in industry petitions challenging EPA actions under the Clean Air Act, including other national air toxics standards.[6] Comparable circumstances warrant a grant of intervention to Movants here.

II. MOVANTS MEET THE TEST FOR INTERVENTION.

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, they have filed a timely motion, and they satisfy all

[6] *See, e.g.*, *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420 (D.C. Cir. 2011) (Sierra Club intervened in support of EPA); *Portland Cement Ass'n v. EPA*, 665 F.3d 177 (D.C. Cir. 2011) (same for Sierra Club and other environmental groups); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855 (D.C. Cir. 2001) (same for Sierra Club); Order, Am. Chem. Council v. EPA, No. 14-1083 (D.C. Cir. July 14, 2014), DN1502458 (granting Sierra Club and other groups' motion to intervene in industry group's challenge to chemical plants rule); Order, Am. Petrol. Inst. v. EPA, No. 12-1405 (D.C. Cir. Apr. 3, 2013), DN1428767 (granting intervention of environmental groups including Movants California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, and Sierra Club in industry challenge to oil and gas standards).

applicable requirements under this Court's precedent. *See* Fed. R. App. P. 15(d); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015).

Movants' members and constituents live, work, and engage in recreation and other activities near existing sources regulated by the Final Rule and are exposed to toxic air pollution from these oil refineries. *See* Declarations (attached). They also experience other harms from exposure and concerns about resulting health impacts (including cancer and neurological hazards), which impair their ability to engage in and diminish their enjoyment of various activities that are important to their quality of life. *Id.*; 80 Fed. Reg. at 75,187 (summarizing health threats). Certain requirements of the Final Rule benefit Movants' health and welfare interests and thus give them reason and the necessary grounds to seek intervention to prevent harm to their and their members' and constituents' legally protected interests. *See, e.g.*, 80 Fed. Reg. at 75,226 & tbl. 2 (describing benefits); *see also Crossroads*, 788 F.3d at 317-18 (allowing intervention to prevent injury where "unfavorable decision would remove the party's benefit" and where "a [petitioner] seeks relief, which, if granted, would injure the prospective intervenor").[7]

[7] Furthermore, to the extent this Court has required and continues to require respondent-intervenors to show Article III standing, this motion and the accompanying declarations do so. *See, e.g.*, *Sierra Club v. EPA*, 755 F.3d 968, 975-76 (D.C. Cir. 2014); *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1370-71 (D.C. Cir. 2007); *see also Crossroads*, 718 F.3d at 316 (discussing caselaw and holding intervenor-defendants must show Article III but not prudential standing);

As summarized above, the Final Rule contains improvements that will reduce the amount of hazardous air pollution going into the air in communities near the regulated sources, and that will strengthen compliance and the information available on such emissions. *See*, *e.g.*, 80 Fed. Reg. at 75,182-84. The new standards will require sources to reduce their usual hazardous air emissions and reduce the resulting exposure for Movants' members and constituents. In addition, removing the general SSM exemption will also provide them greater protection from spikes in emissions than the protection under the prior standards, and reduce their exposure and resulting harm. 79 Fed. Reg. at 36,945 ("emissions during a malfunction event can be significantly higher than emissions at any other time of source operation"). Requiring fenceline monitoring and corrective action

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but see McConnell v. FEC, 540 U.S. 93, 233 (2003) (holding that intervenor-defendants need not show independent Article III standing, because: "It is clear … that the Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's."), *overruled on other grounds by Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Clinton v. City of New York*, 524 U.S. 417, 431-32 n.19 (1998) ("Because both the City of New York and the health care appellees have standing, we need not consider whether the appellee unions also have standing to sue."); *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986) (not deciding whether intervenor must show independent Article III standing); *Teva Pharms. USA Inc. v. Sebelius*, 595 F.3d 1303, 1318 (D.C. Cir. 2010) (citing *McConnell*, 540 U.S. 93, and stating: "as a practical matter identically positioned on the issues (though from radically different perspectives), we think it prudent to follow the line of precedent in this circuit declining to assess a would-be intervenor's standing when answering the question wouldn't affect the outcome of the case").

requirements for benzene emissions and other monitoring and testing requirements will also strengthen protection from dangerous air pollution releases. 80 Fed. Reg. at 75,197 ("We expect that the fenceline monitoring standard will result in improved fugitive HAP emissions management"); *see also id.* at 75,182-83, 75,192-200. Further, delay, removal, or weakening of the improvements contained in the Final Rule would increase the potential for more harmful pollution to be released, leading to increased and prolonged exposure to toxic air pollution from regulated facilities for Movants' members and constituents.

In sum, Movants' intervention is appropriate under Federal Rule of Appellate Procedure 15(d). The grounds for Movants' intervention are to oppose Industry Petitioners' attempt to vacate, weaken, or delay the Final Rule, which could occur if Industry Petitioners were successful, and which would increase the likelihood of harm to Movants and their members and constituents (by allowing more toxic air emissions, and by removing the monitoring and reporting requirements which increase the likelihood of compliance and provide information to strengthen enforcement). Success in this case for Industry Petitioners would also undermine Movants' interests in protecting their members' and constituents' health and ability to continue enjoying recreational and aesthetic activities and Movants' interests in protecting their own and their members' and constituents' interests in receiving information about emissions from the source category.

Because a ruling in favor of Industry Petitioners would take away regulatory protections, prolong and increase Movants' members' and constituents' exposure to toxic air pollution from oil refineries, and also prolong and increase the threat to the environment in which they live and recreate, Movants have the requisite interest in intervening as respondents in the present case. Fed. R. App. P. 15(d); *see also Crossroads*, 788 F.3d at 317-18.

Further, Movants' interests may not be adequately represented in the absence of intervention and Movants should not be required to rely on EPA alone to make arguments necessary to protect Movants' members' and constituents' health and welfare. The adequacy of representation test is "not onerous." *Crossroads*, 788 F.3d at 317-18 (explaining that the existence of different governmental and private interests supports intervention) (citation omitted); *see also Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (explaining that movant need only show representation "may be" inadequate). In recognition of potentially divergent public and private concerns, this Court "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003); *see also* n.6, *supra*. That is especially true in regard to air emission standards like these, where EPA often has not taken timely or complete action needed to protect Movants' interests, as described above.

Movants' participation as intervenors in support of EPA will not delay the proceedings or prejudice any party. This motion to intervene is timely filed under Federal Rule of Appellate Procedure 15(d). This Court has not yet established a briefing schedule. Further, as Movants intend to file their brief jointly, as directed by D.C. Circuit Rule 28(d)(4), their participation will not undermine efficient adjudication of this case. Instead, as nonprofit, environmental and community groups with members and constituents living near refineries regulated by the Final Rule, Movants will offer a distinct perspective that may be of assistance to this Court. *See, e.g.*, *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977).

CONCLUSION

For all of the foregoing reasons, Movants respectfully request leave to intervene in support of EPA in consolidated case No. 16-1033, and any other related cases.

DATED: February 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **Unopposed Motion to Intervene in Support of Respondent Filed by Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Sierra Club, Texas Environmental Justice Advocacy Services, and Utah Physicians for a Healthy Environment** and the accompanying **Certificate as to Parties, Rulings, and Related Cases** and **Rule 26.1 Disclosure Statement** on all parties through the Court's electronic case filing (ECF) system.

DATED: February 29, 2016

/s/ Emma C. Cheuse
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