ORAL ARGUMENT NOT YET SCHEDULED

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

JOHNSON CONTROLS BATTERY GROUP, INC., *et al.*,	)	
Petitioners,	)	
v.	)	
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	Case No. 12-1130 (Consolidated with Nos. 12-1129, 12-1134, 12-1135)
Respondents.	)	

MOTION OF SIERRA CLUB, CALIFORNIA COMMUNITIES AGAINST TOXICS, FRISCO UNLEADED, MISSOURI COALITION FOR THE ENVIRONMENT FOUNDATION, AND NATURAL RESOURCES DEFENSE COUNCIL TO INTERVENE ON BEHALF OF RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27, and Rule 15(b) of this Court, Sierra Club, California Communities Against Toxics, Frisco Unleaded, Missouri Coalition for the Environment Foundation, and Natural Resources Defense Council (petitioners in case No. 12-1135) (collectively, "Environmental Movants") hereby respectfully move for leave to intervene in support of respondents U.S. Environmental Protection Agency and Lisa P. Jackson, Administrator (collectively, "EPA") in case Nos. 12-1129, 12-1130, and 12-1134, and any other similar cases involving the same agency action. Counsel for EPA has stated that it takes no position on this motion at this time. Counsel for

Johnson Controls Battery Group, Inc. (No. 12-1130) has stated that it presently takes no position on and reserves its right to oppose this motion. Counsel for the other petitioners (Nos. 12-1129, 12-1134) have stated that they do not object to this motion.

In support of this motion, Environmental Movants state as follows, and also rely on the declarations that accompany this motion:

1. The present cases seek review of the final rule promulgated by EPA entitled "National Emissions Standards for Hazardous Air Pollutants From Secondary Lead Smelting; Final Rule," published at 77 Fed. Reg. 556 (Jan. 5, 2012) ("Final Rule") (modifying 40 C.F.R. Part 63, Subpart X). The Final Rule limits emissions of highly toxic air pollutants—including lead and other hazardous air pollutants ("HAP")—from new and existing secondary lead smelters (including sources commonly known as battery recyclers). *Id.* at 558-59. According to EPA, "risks to public health due to emissions from this source category are unacceptable." *Id.* at 563. EPA has issued the Final Rule to reduce lead emissions and prevent this source category from causing ambient air levels of lead to exceed the level allowed by the 2008 National Ambient Air Quality Standards ("NAAQS") for lead. *Id.* EPA also expects that its Final Rule will reduce the cancer risk caused by this source category, due in part to reductions in emissions of

arsenic and cadmium. *Id.* In addition, EPA's final rule also set emission limits for the first time on dioxins and furans ("D/F"). *Id.* at 559.

2. Industry Petitioners in Nos. 12-1129, 12-1130, and 12-1134 are the Association of Battery Recyclers, Inc., Johnson Controls Battery Group, Inc., and Doe Run Resources (collectively, "Industry Petitioners"). These industry groups filed comments that sought to delay and/or weaken EPA's proposed rule.[1] The Association of Battery Recyclers ("ABR") has also filed a petition for reconsideration of EPA's Final Rule that seeks to weaken elements of the rule related to the dioxin/furans standard and the enclosure standards. *See* EPA-HQ-OAR-2011-0344-0172 (ABR petition for reconsideration, filed Mar. 5, 2012).

3. Sierra Club is a national non-profit organization with over 600,000 members working to protect and promote safe and healthy communities, to practice and promote the responsible use of the earth's ecosystems and resources, and to protect and restore the environment, and has over 9,000 members in areas located near the 16 secondary lead smelters in existence or currently under

[1] *See, e.g.*, Comments of the Association of Battery Recyclers, EPA-HQ-OAR-2011-0344-0096; Comments of Johnson Controls Battery Group, Inc., EPA-HQ-OAR-2011-0344-0090; Comments of Doe Run Resources, EPA-HQ-OAR-2011-0344-91.

construction. Andersen Declaration ¶¶ 4-5; *see, e.g.*, Mullen Decl. ¶¶ 1, 3. Sierra Club has longstanding interests and involvement in advocacy, education, and litigation to reduce emissions of toxic air pollutants, including lead, to protect its members' health, recreational, and aesthetic interests and to protect public health in affected local communities. For example, after Sierra Club brought a Clean Air Act citizen suit to challenge EPA's failure to perform the current rulemaking, EPA entered into a consent decree that recognized its legal duty to do so and contained a schedule for this rulemaking and similar rulemakings for 27 other major sources of toxic air pollution. *See* Consent Decree at 11, Sierra Club v. Jackson, No. 09-cv-00152-SBA (N.D. Cal.) (Sept. 26, 2011). In the current rulemaking, as a result of Sierra Club's successful prior litigation before this Court which led to vacatur of the general exemption during periods of startup, shutdown and malfunction ("SSM"), EPA has removed the similar, source category-specific exemption. Final Rule, 77 Fed. Reg. at 559; *see Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir. 2008) (holding that the SSM exemption violated the requirement that a "section 112 standard apply continuously"). Sierra Club runs a National Air Toxics Taskforce which has the mission to protect its members and residents of overburdened communities from toxic air pollution under section 112 of the Clean Air Act. Andersen Decl. ¶ 2; Williams Decl. ¶¶ 1, 3, 4.

4. Natural Resources Defense Council ("NRDC") is a national nonprofit environmental organization with over 350,000 members nationwide, including over 1,800 who live in areas where secondary lead smelting facilities are located. Lopez Decl. ¶ 6; *see, e.g.*, Carlson Decl. ¶¶ 1-3; McLellan Decl. ¶¶ 1-3. NRDC uses law, science and the support of its members to ensure a safe and healthy environment for its members and the public. One of NRDC's priorities is to protect its members from exposure to toxic air pollution. NRDC has worked for years to increase awareness and regulation of lead pollution in the air, including through providing information to the public and its members about lead pollution, such as an online interactive map providing information to its members and affected local community residents regarding lead emissions across the country, and through longstanding work to require EPA to list lead as a criteria pollutant and to adopt and then update the Lead NAAQS. *See Natural Resources Defense Council v. Train*, 545 F.2d 320 (2d Cir. 1976); Lopez Decl. ¶ 5.

5. California Communities Against Toxics ("CCAT") is a nonprofit environmental justice organization which aims to reduce Californians' exposure to pollution, to expand knowledge about the effects of toxic chemicals on human health and the environment, and to protect the most vulnerable people from harm. Williams Decl. ¶ 6. CCAT has members who live near, or themselves are local

organizations whose members live near, secondary lead smelters located in the City of Industry, CA and Vernon, CA. *Id.* ¶¶ 6-8; *see, e.g.*, Cano Decl. ¶¶ 1-3. After years of advocacy, CCAT succeeded in helping to achieve major reductions in the toxic air pollution, including lead, that the secondary lead smelter (Quemetco – owned by RSR Corporation) emitted into the area in and around Industry, CA. CCAT also has worked actively for years to try to strengthen the protection applicable in the South Coast Air Quality Management District, which covers both of the secondary lead smelters in Los Angeles County.

6. Frisco Unleaded is a local nonprofit organization which is working to strengthen protections from lead and other toxic air pollution for the Frisco, Texas community for its members and other affected community residents who live near the local Exide secondary lead smelter. Mathew Decl. ¶¶ 1-6; McCadden Decl. ¶¶ 1-2, 5-12. Frisco Unleaded was formed in 2011 by concerned residents of Frisco to address the high levels of lead and other pollution coming from this smelter.

7. Missouri Coalition for the Environment Foundation ("the MO Coalition" or "MCE") is a nonprofit organization based in the State of Missouri which has over 800 members. Logan Smith Decl. ¶ 6. The MO Coalition has worked for years to strengthen protections from lead pollution from lead smelters and related operations for its members and other members of affected communities

in Missouri, including by providing information to its members about lead pollution and through advocacy on the Lead NAAQS. *Id.* ¶¶ 5, 7, 10.

8. Some of the Environmental Movants participated in the rulemaking that led to the regulations challenged here to protect their members' interests in achieving greater protection from toxic air emissions. *See* Comments of Sierra Club, California Communities Against Toxics, Missouri Coalition for the Environment, Natural Resources Defense Council *et al.* (July 26, 2011), EPA-HQ-OAR-2011-0344-0098. Environmental Petitioners have also filed a petition for review (No. 12-1135) and a petition for reconsideration (Mar. 5, 2012) of EPA's Final Rule in regard to some issues, pursuant to CAA §§ 307(b)(1), (d)(7)(B), 42 U.S.C. §§ 7607(b)(1), (d)(7)(B). In addition to protecting their members' interests, Movants also have an organizational interest in having access to full and prompt information regarding the emissions and any malfunction incidents of sources in the Secondary Lead Smelting source category, to allow Movants to fulfill their missions, including by providing such information as a service to their members. Lopez Decl. ¶¶ 5-6; Carlson Decl. ¶ 8; McLellan Decl. ¶ 10; Andersen Decl. ¶ 2; Williams Decl. ¶¶ 3-4, 6-7, 10, 12; Logan Smith Decl. ¶¶ 5, 10.

9. 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." FED. R. APP. P. 15(d). 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) (internal quotation marks removed) (reversing denial of intervention under FED. R. CIV. P. 24(a)). Movants satisfy this test, as explained below and shown by the attached declarations.

10. Secondary lead smelters emit a range of highly toxic air pollutants (including lead, cadmium, arsenic, and organic hazardous air pollutants) listed in Clean Air Act § 112(b)(1), 42 U.S.C. § 7412(b)(1). *See* National Emissions Standards for Hazardous Air Pollutants: Secondary Lead Smelting, Proposed Rule, 76 Fed. Reg. 29,032, 29,036, 29,037 (May 19, 2011) ("Proposed Rule"). Lead, a persistent, bioaccumulative neurotoxin, has no safe level of exposure. Lead causes "a broad array of deleterious effects on multiple organ systems via widely diverse mechanisms of action" for adults and children, such as "effects on heme biosynthesis and related functions; neurological development and functions; reproduction and physical development; kidney function; cardiovascular function; and immune function," as well as the loss of IQ points. National Ambient Air Quality Standards for Lead, Final Rule, 73 Fed. Reg. 66,964, 66,975 (Nov. 12,

2008). As EPA has recognized, there is no level of lead exposure that is considered safe based on the science, because "some of these [health] effects, particularly changes in the levels of certain blood enzymes and in aspects of children's neurobehavioral development, may occur at blood lead levels so low as to be essentially without a threshold." Residual Risk Assessment for the Secondary Lead Smelting Source Category at 45 (Dec. 2011), EPA-HQ-OAR-2011-0344-0160. This source category's emissions of other pollutants, including cadmium and arsenic, also can cause cancer, chronic, and acute health risks due to inhalation and create additional health risks due to non-inhalation or "multipathway" exposure for people living near the facility. *Id.* at 30-31; Proposed Rule, 76 Fed. Reg. at 29,052; Final Rule, 77 Fed. Reg. at 562-63 (stating that for people living near the facility there is an individual lifetime cancer risk of 200-in-1 million based on "MACT allowable emissions"; an acute hazard quotient of 20; that people are exposed to lead concentrations in the air above the level of the NAAQS at 9 of 15 facilities analyzed).

11. Movants' members live and engage in recreation near the existing source regulated by the Final Rule and are exposed to its emissions. *See* Declarations (attached). As a result, they experience harm and are exposed to a greater risk of harm caused by these emissions, including cancer, neurological,

cardiovascular, and other health impacts associated with exposure to lead, cadmium, arsenic, and other pollutants emitted by this source category, *see* Final Rule, 77 Fed. Reg. at 563. Because of the toxic 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 the source category's emissions diminish their enjoyment of these and other recreational activities. *See, e.g.*, McLellan Decl. ¶¶ 5-8, 10; Cano Decl. ¶¶ 10, 13-15; McCadden Decl. ¶¶ 2-4, 6-7, 11; Carlson Decl. ¶¶ 6-7.

12. Although Movants' members need greater protection for their health and recreational interests than the Final Rule provides, they will benefit from the Final Rule in certain ways that have led Movants to seek intervention in the industry challenge to avoid harm to their and their members' legally protected interests. For example, the Final Rule sets stronger process vent emission standards than the prior standards, requires almost total enclosure of operations and sources of fugitive emissions, requires enhanced monitoring, sets emission standards for the first time to limit certain pollutants, and thus provides greater protection than previously existed from secondary lead smelters' toxic air pollution. *See, e.g.*, Final Rule, 77 Fed. Reg. at 558-65 (promulgating 40 C.F.R. §§

63.543, 63.544, 63.545, 63.548, 63.550); *see also* Proposed Rule, 76 Fed. Reg. at 29,062-63 (describing electronic reporting and other requirements). EPA predicts that the Final Rule "will cut lead and arsenic emissions by an estimated 68 percent from current actual emission levels," and also "will result in estimated annual lead emissions reductions of 7.2 tpy from process and process fugitive sources and annual lead emissions reductions of 6.4 tpy from fugitive dust sources from 2009 baseline emissions (for a total annual reduction of 13.6 tons per year)." 77 Fed. Reg. at 575. In addition, the Final Rule also removes the SSM exemption and requires notification and reporting of malfunctions. *Id.* at 559; *see also id.* at 587-88 (promulgating reporting requirements at 40 C.F.R. § 63.550(c)(11)-12, (e)). Removing this exemption and requiring malfunction and performance test reporting will provide greater protection to Movants' members from spikes in emissions than under the prior standards, and will also provide them with information that will allow them to take further action to protect their health and the health of their families.

13. If Industry Petitioners are successful in their challenges, the Final Rule could be vacated or EPA could be compelled to weaken the standards it contains and make them less protective for Movants' members, thus increasing the likelihood of harm to Movants and their members (such as by allowing more toxic

air emissions, and by removing the reporting requirements which give Movants and their members access to source category information they need to protect their interests). *See, e.g.*, McCadden Decl. ¶ 12; Mathew Decl. ¶ 6; Mullen Decl. ¶ 10; Cano Decl. ¶¶ 17-18; McLellan Decl. ¶¶ 10-11; Carlson Decl. ¶¶ 8-9; Logan Smith Decl. ¶ 10; Williams Decl. ¶¶ 11-12. If Industry Petitioners are successful in delaying the rule's compliance dates, as Doe Run sought to do in its comments, this would similarly cause Movants to experience greater toxic air emissions for a longer time period, even though EPA has already found the current level of emissions to be "unacceptable," 77 Fed. Reg. at 563. Because such results would prolong and increase Movants' members' exposure to toxic air pollution from secondary lead smelters and would also prolong and increase the threat to the environment in which they live and recreate, Movants have an interest in intervening as respondents in the present case. FED. R. APP. P. 15(d).

14. The "grounds" for Movants' intervention are to oppose Industry Petitioners' attempts to weaken the Final Rule. FED. R. APP. P. 15(d). Movants' interests in preventing weakening of the rules – and thus their interests in protecting their members' health and ability to continue enjoying recreational and aesthetic activities and in protecting their own and their members' interests in

receiving access to information about emissions from the source category – will be prejudiced if they are not allowed to intervene.

15. Movants' interests would not be adequately represented in the absence of intervention. *Cf. Dimond v. Dist. of Colum.*, 792 F.2d 179, 192-93 (D.C. Cir. 1986). The agency's interpretation of the factual and legal issues in this case may differ from the interpretation of Movants, who advocated for EPA to take stronger action than it did in the Final Rule, as shown by Movants' comments. Without their intervention, the Court will hear only EPA's arguments. 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 NRDC v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977). That is especially true here, where Movants have disagreed with—and challenged in rulemaking comments and court proceedings—both EPA's action and inaction under the Clean Air Act. *See, e.g.*, Williams Decl. ¶ 5; Comments of Sierra Club *et al.*, EPA-HQ-OAR-2011-0344-0098; *Sierra Club v. EPA*, 551 F.3d at 1028. Movants cannot rely on EPA to make all arguments that Movants believe should be advanced to protect their and their members' interests.

16. Movants respectfully submit that their views on the arguments advanced by Industry Petitioners will be of assistance to the Court. A party

seeking to intervene "may also be likely to serve as a vigorous and helpful supplement to EPA's defense." *NRDC*, 561 F.2d at 912-13. As nonprofit, environmental citizens' groups with members living near the regulated source category, Movants offer a perspective different from that which EPA is likely to provide. This Court has regularly allowed intervention by Movants and other environmental organizations to support EPA in litigation on rules challenged by industry groups under the Clean Air Act.[2]

17. 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 thirty day period allowed under Federal Rule of Appellate Procedure 15(d). As Movants share common interests and intend to file briefs and other submissions jointly, as directed by D.C. CIR. R.

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[2] *See, e.g.*, *Med. Waste Inst. & Recovery Council v. EPA*, 645 F.3d 420 (D.C. Cir. 2011) (Sierra Club and NRDC appeared as intervenors in support of EPA); *Portland Cement Ass'n v. EPA*, 665 F.3d 177 (D.C. Cir. 2011) (same for Sierra Club, NRDC, and other environmental groups); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855 (D.C. Cir. 2001) (same for Sierra Club); *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (same for NRDC); *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997) (same for NRDC); *cf. U.S. v. Metro. St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir. 1989) (reversing district court's denial of right to intervene to MO Coalition in Clean Water Act enforcement case brought by United States and State of Missouri).

28(d)(4), their participation will serve the interest of efficiency. The Court has not yet scheduled oral argument or established a briefing schedule. Movants' participation will not undermine the efficient and timely adjudication of this case.

18. In short, 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, that interest is not adequately represented by the existing parties, and they have filed a timely motion. *See* FED. R. APP. P. 15(d). For all of the foregoing reasons, Movants respectfully request leave to intervene in case Nos. 12-1129, 12-1130, and 12-1134.

DATED: April 4, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that today I have served the Sierra Club *et al.* Motion to Intervene, Declarations, Certificate As To Parties, Rulings, and Related Cases, and Statement of Intent to Utilize Deferred Appendix**,** on the following counsel for all parties through the Court's electronic filing system (ECF):

Angeline Purdy, U.S. Department of Justice, *Counsel for Respondents*;
Mark DeLaquil and Robert Steinwurtzel, *Counsel for Association of Battery Recyclers, Inc.*;
Dennis Lane, *Counsel for Doe Run Resources Corporation*;
Timothy Fitzgibbon and Jackson Smith, *Counsel for Johnson Controls Battery Group, Inc.*;
Timothy Backstrom and Lynn Bergeson, *Counsel for RSR Corporation*.

DATED: April 4, 2012

/s/ Emma C. Cheuse
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