

ORAL ARGUMENT NOT YET SCHEDULED**UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

CLEAN AIR COUNCIL, *et al.*,

Petitioners,

v.

SCOTT PRUITT, Administrator,
ENVIRONMENTAL PROTECTION
AGENCY, and UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY,Respondents.

Case No. 17-1145

**UNOPPOSED MOTION FOR LEAVE TO
INTERVENE ON BEHALF OF RESPONDENT**

Pursuant to Rules 15(d) and 27 of the Federal Rules of Appellate Procedure and Rules 15(d) and 27 of this Court, GPA Midstream Association (“GPA Midstream”), by and through undersigned counsel, respectfully moves to intervene in support of Respondents in Case No. 17-1145.

GPA Midstream clearly satisfies each requirement to intervene: (1) GPA Midstream’s request is timely, (2) GPA Midstream has material interests related to the Petition for Review, (3) disposition of the Petition for Review may impair GPA Midstream’s interests, and (4) Respondents, the United States Environmental Protection Agency and EPA Administrator Pruitt (collectively “EPA”), cannot adequately represent GPA Midstream. Moreover, GPA Midstream has standing, as the EPA action addressed in the Petition for Review regulates GPA Midstream’s

members who would be affected adversely if EPA's stay of that rule were lifted. Accordingly, GPA Midstream's motion should be granted.

Counsel for both Petitioners and Respondents have advised that they do not oppose GPA Midstream's Motion to Intervene.

BACKGROUND

EPA Reconsideration and Stay. On June 5, 2017, EPA granted partial reconsideration and issued a 90-day stay of parts of its 2016 final rule amending the existing New Source Performance Standard ("NSPS") and establishing new NSPS standards for certain emissions from certain sources in the oil and gas sector. *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay, 82 Fed. Reg. 25,730 (June 5, 2017) ("Administrative Stay"); *see also* Oil and Natural Gas Sector – New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, and Control Techniques Guidelines, 81 Fed. Reg. 35,824 (June 3, 2016) ("2016 Rule").¹ The grant of reconsideration and 90-day stay apply only to the fugitive emissions monitoring requirements, pneumatic pump provisions, and professional engineer certification requirements of the 2016 Rule. The Clean Air Council and several other non-governmental organizations (collectively, "Petitioners") have petitioned for judicial review of the Administrative Stay – and now ask this Court to

² GPA Midstream, along with other oil and gas trade associations and states, also filed a petition for judicial review of the 2016 Rule. *See American Petroleum Institute et al. v. EPA et al.*, D.C. Cir. Case No. 13-1108 (and consolidated cases). Those cases are currently being held in abeyance pending EPA's reconsideration of the 2016 Rule. *See id.* Doc. No. 1675813.

issue its own stay of EPA's Administrative Stay, or in the alternative, for summary disposition and vacatur.

The 2016 Rule applies to stationary sources in the oil and natural gas sector that commenced construction, modification, or reconstruction after September 18, 2015. 2016 Rule, 81 Fed. Reg. at 35844. Stationary sources subject to the 2016 Rule would be required to implement duplicative and costly measures to monitor and repair leaks, capture gas from the completion of hydraulically fractured wells, and comply with other restrictions on new and modified pneumatic pumps and various equipment used at gas transmission compressor stations, including compressors and pneumatic controllers. These provisions impact many segments of the oil and gas sector, including midstream activities.

On August 2, 2016, GPA Midstream, along with other oil and gas industry associations, petitioned EPA to reconsider and administratively stay parts of the 2016 Rule, including provisions related to fugitive emissions monitoring.² On April 18, 2017, EPA agreed to reconsider parts of the 2016 Rule, including the fugitive emission monitoring requirements. *See* Letter from E. Scott Pruitt, re: "Convening a Proceeding for Reconsideration of Final Rule, 'Oil and Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources,' published June 3, 2016, 81 Fed. Reg. 35824" (April 18, 2017). EPA also stated that it intended to issue a 90-day

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stay of the fugitive emissions monitoring requirements pursuant to its authority under Section 307(d)(7)(B) of the Clean Air Act. *Id.*

GPA Midstream. GPA Midstream has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. GPA Midstream is composed of close to 100 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane and natural gasoline. GPA Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. GPA Midstream’s members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

EPA’s Administrative Stay allows GPA Midstream’s members to defer implementation of costly and burdensome leak detection monitoring programs required by the 2016 Rule, while EPA reconsiders those portions of the Rule. Petitioners’ attempts to block EPA’s stay jeopardizes that relief. Thus, GPA Midstream’s members have a direct, protectable interest in the outcome of this litigation, and for the reasons discussed below, GPA Midstream meets the requirements for intervention.

ARGUMENT

I. GPA Midstream's Members Satisfy the Standards for Intervention in this Case.

This Court, like other courts of appeals, has recognized that the standard for intervention under Federal Rule of Civil Procedure 24, while not binding, informs “the grounds for intervention” required by Federal Rule of Appellate Procedure 15(d). *Amalgamated Transit Union Int’l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985); *see also Int’l Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004). For an applicant to intervene as of right under Federal Rule of Civil Procedure 24(a)(2), it must: (1) file a timely application; (2) claim an interest relating to the subject of the action; (3) show that disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest; and (4) demonstrate that existing parties may not adequately represent the applicant’s interest. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Each of these requirements is satisfied here.

A. The Motion to Intervene is Timely.

Petitioners in Case No. 17-1145 filed their petition for review on June 5, 2017. This motion is timely because it is being filed within 30 days after the filing of that petition. Fed. R. App. P. 15(d). Moreover, allowing Movant to intervene will not, as a practical matter, disrupt the proceedings because it is seeking to join this case at the

earliest possible stage, before this Court has established a schedule and format for briefing and before responses to Petitioners' Motion for Stay are due.

B. GPA Midstream Has Interests Relating to the Subject of This Proceeding that May Be Impaired.

GPA Midstream and its members' interests will be impaired if Petitioners prevail and the Administrative Stay is overturned. As detailed, GPA Midstream's members are engaged in midstream sector, and the 2016 Rule directly regulates the midstream sector along with other segments of the natural gas industry, including the midstream sector. EPA's Administrative Stay applies to portions of the 2016 Rule that are applicable to GPA Midstream's members, including the leak detection monitoring requirements. As an association representing companies who are directly and indirectly affected by the portions of the underlying rule covered by EPA's Administrative Stay, GPA Midstream falls within the class of parties who are routinely allowed to intervene in cases reviewing agency action. *See, e.g., Fund for Animals*, 322 F.3d at 735; *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (allowing an association whose member companies produced military munitions and operated military firing ranges to intervene in a challenge to EPA's Military Munitions Rule); *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 41-44 (1st Cir. 1992) (holding that commercial fishing groups who were subject to a regulatory plan to address overfishing had a cognizable interest in litigation over the plan's implementation); *NRDC v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (holding that

pesticide manufacturers subject to challenged regulation and industry representatives had a legally protected interest supporting intervention). Because they are the direct beneficiaries of EPA's Administrative Stay, GPA Midstream and its members have interests that will be impaired by the relief that Petitioners seek in this case.

Moreover, unquestionably, the 2016 Rule imposes new, costly regulatory burdens on GPA Midstream's members and other members of the oil and gas sector that have broader impacts on GPA Midstream's interests. Growth in domestic natural gas production fuels America's economy, and the midstream sector is a critical link that brings these domestic energy resources to market. If the cost to produce and transport of natural gas increases, however, new development and production will slow, ultimately leading to lost jobs and higher energy prices.

GPA Midstream's members could suffer financial loss if new development slows as a result of the increase in cost of complying with the 2016 Rule. As a result, GPA has significant direct and indirect interests in preserving EPA's Administrative Stay and reconsideration of the 2016 Rule.

C. Existing Parties Cannot Adequately Represent GPA Midstream's Interests.

The existing parties cannot adequately represent GPA Midstream's interests in this case. The burden of showing that an intervenor's interests will not be adequately represented by the parties is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). "The applicant need only show that representation of his interests

‘may be’ inadequate, not that representation will in fact be inadequate.” *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Further, this Court has recognized the “inadequacy of governmental representation” when the government has no financial stake in the outcome of the suit but the private intervenor does. *See, e.g., id.*; *Fund for Animals*, 322 F.3d at 736; *NRDC v. Costle*, 561 F.2d 904, 912 n.41 (D.C. Cir. 1977). Mere agreement between a private party and a government agency is not sufficient to establish adequate representation. *See Fund for Animals*, 322 F.3d at 736.

Respondents here are the EPA and the EPA Administrator. The EPA cannot adequately represent GPA Midstream’s interests. While EPA may share some interests as GPA Midstream supports EPA’s action, EPA has a more expansive obligation that is focused on a broad “representation of the general public interest,” not the “narrower interest” of certain businesses. *Dimond*, 792 F.2d at 192-93. Thus, GPA Midstream’s members have interests distinct from the EPA’s more general mandate, namely, helping to ensure that the companies they represent are able to operate the nation’s midstream energy facilities, preserve and create jobs, and move critical energy supplies. The difference between GPA Midstream’s private interests and the government’s public interests is sufficient to justify intervention. *Fund for Animals*, 322 F.3d at 736; *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994).

Finally, Petitioners cannot adequately represent the interests of GPA Midstream because Petitioners are challenging the Administrative Stay which GPA Midstream supports.

II. GPA Midstream Has Standing to Intervene in This Case.

GPA Midstream has Article III standing to intervene in support of Respondent because it represents companies that are directly regulated or indirectly affected by the 2016 Rule and directly benefit from EPA's Administrative Stay. GPA Midstream's members will be adversely affected if Petitioners were to prevail in blocking the reconsideration and stay of the 2016 Rule. An association has standing to sue on behalf of its members when:

- (a) its members would otherwise have standing to sue in their own right;
- (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

First, "at least some of [GPA Midstream's] members" "would have standing to [intervene] in their own right." *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 899 (D.C. Cir. 1996). As an initial matter, the member companies have standing for the same reasons they fulfill the grounds for intervention. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (noting that "any person who satisfies Rule 24(a) will also meet Article III's standing requirement").

In any event, a putative intervenor's standing depends on how that party would be affected by the agency's action and the relief sought by the Petitioner. *See Fund for Animals*, 322 F.3d at 733. Here, Petitioners challenge EPA's partial reconsideration and stay of the 2016 Rule. As discussed above, the relief sought by Petitioners would negate the benefits conferred by EPA's Administrative Stay and increase the regulatory compliance burden on GPA Midstream's members. Conversely, if EPA prevails and the Administrative Stay persists and EPA is allowed to reconsider aspects of the 2016 Rule, then GPA Midstream's members' interests will be protected. There is "little question" that a party who "is himself an object of [governmental] action (or foregone action) at issue" has standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992); *cf. Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012) (distinguishing parties on whom agency action imposes "regulatory restrictions, costs, or other burdens," for whom standing is easily established from others, for whom it is "more difficult"). Likewise, there is little question that a putative intervenor has standing when there is a clear causal chain between the underlying regulation at issue and that economic harm the intervenor will suffer as a result of the relief sought by Petitioners.

Second, the interests that GPA Midstream seeks to protect are germane to its organizational purposes of promoting the well-being of its member companies and of representing those interests in, *inter alia*, federal agency rulemaking. Imposing burdensome and costly new regulations on the natural gas midstream sector would

squarely conflict with those purposes. Thus, the substantive issues that are raised in this case—EPA’s partial reconsideration and stay of the 2016 Rule—are germane to GPA Midstream’s organizational purposes.

Finally, the participation of individual member companies—while permissible—is not mandatory. Petitioners are seeking to block the reconsideration and stay of new regulatory requirements applicable to multiple new, modified, and reconstructed oil and natural gas industry emission sources, and therefore this action is not directed at, and does not depend on the circumstances of, any specific facility.

Hence, GPA Midstream unquestionably has a sufficient stake in this case to support Article III standing.

CONCLUSION

For the foregoing reasons, GPA Midstream respectfully seeks leave to intervene in support of Respondent in Case No. 17-1145.

Dated: June 14, 2017

Respectfully submitted,

/s/ Samuel B. Boxerman

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PROJECT, NATURAL RESOURCES
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RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the GPA Midstream Association (“GPA Midstream”) states that GPA Midstream has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. GPA Midstream is composed of close to 100 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane and natural gasoline. GPA

Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. GPA Midstream's members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs. GPA Midstream has no parent companies, and no publicly-held company has a 10% or greater ownership interest in GPA Midstream.

Dated: June 14, 2017

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 15(c)(3) and 28(a)(1), Movant submits this certificate as to parties, rulings, and related cases.

A. Parties and Amici. Because this case involves direct review of a final agency action, the requirement to furnish a list of parties, intervenors, and *amici* that appeared below is inapplicable. This case involves the following parties:

(i) Petitioners

The Petitioners in this case are the Clean Air Council, Earthworks, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club.

(ii) **Respondents**

Respondent in this case is the United States Environmental Protection Agency (“EPA”) and Scott Pruitt, in his official capacity as Administrator of EPA.

(iii) **Intervenors and *Amici***

There are no *amici* at this time.

The Movant-Intervenors for Respondents are GPA Midstream Association, American Petroleum Institute, Interstate Natural Gas Association of America, Independent Petroleum Association of America, American Exploration & Production Council, Domestic Energy Producers Alliance, Eastern Kansas Oil & Gas Association, Illinois Oil & Gas Association, and Independent Oil & Gas Association of West Virginia, Inc.

B. Ruling Under Review. The final agency action under review is the EPA action entitled “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay.” 82 Fed. Reg. 25,730 (June 5, 2017).

C. Related Cases. This case has not previously been before this Court or any other court. To the knowledge of the undersigned counsel, GPA Midstream is aware of the following cases related to this matter, which may involve the same or similar issues:

American Petroleum Institute v. EPA, D.C. Cir. No. 13-1108; consolidated with D.C. Cir. Nos. 13-1289, 13-1290, 13-1292, 13-1293, 13-1294, 15-040, 15-1041, 15-1042, 15-

1043, 15-1044, 16-1242, 16-1257, 16-1262, 16-1263, 16-1264, 16-1266, 16-1267, 16-1269, and 16-1270.

These cases (which are presently held in abeyance) challenge a regulation, 81 Fed. Reg. 35,824 (June 3, 2016). That regulation is subject to partial reconsideration and partially stayed by the EPA's June 5, 2017 action, which is challenged in this case.

Dated: June 14, 2017

Respectfully submitted,

/s/ Samuel B. Boxerman

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to Intervene on Behalf of Respondents, along with associated Corporate Disclosure Statement and Certificate as to Parties, Rulings, and Related Cases, will be served this 14th day of June 2017, electronically through the Court's CM/ECF system on all registered counsel.

/s/ Samuel B. Boxerman

Samuel B. Boxerman