

No. 23-60427

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

WYNNEWOOD REFINING Co. LLC,

Petitioner,

v.

EPA,

Respondent.

On Petition for Review of Final Agency Action
of the Environmental Protection Agency

**MOTION OF GROWTH ENERGY TO
INTERVENE IN SUPPORT OF RESPONDENT**

On August 8, 2023, Wynnewood Refining Co. LLC petitioned for review of EPA's decision denying its petition for exemption from its RFS obligations for 2022. *See* Petition for Review, No. 23- 60427, ECF No. 1-1 (5th Cir. Aug. 8, 2023). If successful, this lawsuit will impair Growth Energy's significant interests in the RFS standards. Accordingly, Growth Energy respectfully moves to intervene in support of respondent, EPA.

Petitioner states that it opposes this motion. EPA takes no position on this motion.

BACKGROUND

A. Established by the Clean Air Act, the RFS “requires that increasing volumes of renewable fuel be introduced into the Nation’s supply of transportation fuel each year. Congress enacted those requirements in order to move the United States toward greater energy independence and security and increase the production of clean renewable fuels.” *Americans for Clean Energy v. EPA*, 864 F.3d 691, 697 (D.C. Cir. 2017) (cleaned up). RFS standards define the minimum national “demand” for each of four “nested” categories of renewable fuel and thereby exclude competition from non-renewable fuel, i.e., petroleum, to that extent. *Id.* at 705, 710. “Obligated parties”—generally petroleum refineries, including petitioner—are then “responsible for ensuring that the renewable fuel volume requirements are met” by incorporating the required amount of renewable fuel into the transportation fuel they make and sell. *Id.* at 705 (cleaned up).

To facilitate efficient compliance, Congress directed EPA to “establish a ‘credit program’ through which obligated parties can acquire and trade credits and thereby comply with” their RFS volume obligations. *Americans for Clean Energy*, 864 F.3d at 699. These credits—called Renewable Identification Numbers (“RINs”)—are generated when renewable fuel is produced, and they “remain attached to the fuel until the fuel is purchased by ... a refiner” and “blended” with petroleum to make transportation fuel, at which point the credits are “separated”

and available to show RFS compliance or to be “sold or traded on the open RIN market.” *Id.* Finally, when a RIN has been used to show compliance, it is “retired” and no longer available for use or sale. *Id.*

EPA sets deadlines to demonstrate compliance following the end of the compliance year. *See, e.g.*, 87 Fed. Reg 5,696, 5,697-5,698 (Feb. 2, 2022). After demonstrating compliance, an obligated party possessing excess RINs for a given year may carry them over so that it or another obligated party can use them to show compliance with the next year’s requirements. *Americans for Clean Energy*, 864 F.3d at 699-700. The national aggregate volume of “carryover” RINs is colloquially called the “RIN bank.” *Id.*

Congress also allowed individual “small refineries” to petition EPA for an “exemption” from their RFS obligations for a given year “for the reason of disproportionate economic hardship.” 42 U.S.C. § 7545(o)(9)(B)(i); *see* § 7545(o)(1)(K) (defining “small refinery”). The effect of granting an exemption is that the RFS obligations “shall not apply to [that] refiner[y]” for that year. §7545(o)(9)(A)(i), (B)(i). These compliance exemptions are sometimes called “SREs.”

B. For 2022, EPA established an “implied” non-advanced RFS requirement—i.e., the difference between the total and the nested “advanced” requirements—of 15 billion gallons, which could be met with non-advanced (or

“conventional”) renewable fuel and excess advanced biofuel above the advanced requirement. 87 Fed. Reg. 39,600, 39,601, 39,612:1 & :3, 39,623 (July 1, 2022). In doing so, EPA stated that it expected that about 95% of the renewable fuel used to meet the implied 15-billion-gallon requirement would be ethanol derived from corn and produced domestically. 87 Fed. Reg. at 39,612:1, 39,624:2; EPA, *Response to Comments* 129 (June 2022).¹

C. Petitioner petitioned EPA for exemption from its RFS obligations for 2022. EPA denied those petitions. 88 Fed. Reg. 46,795 (July 20, 2023). In doing so, EPA “relie[d] on the same approach and the same analyses described in the April 2022 SRE Denial Action and the June 2022 SRE Denial Action.” *Id.* at 46,795. Those 2022 actions are the subject of multiple pending lawsuits, including in this Court. *See Hunt Refining Co. v. EPA*, No. 22-11617 (11th Cir.); *Sinclair Wyoming Refining Co. v. EPA*, No. 22-1073 (D.C. Cir.); Order, *Calumet Shreveport Refining v. EPA*, No. 22-60266 (5th Cir.).

¹ <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P101562X.pdf>.

ARGUMENT

Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15.5 establish procedural requirements for intervention on appeal.² For the substantive requirements, this Court looks to the standards that govern intervention in district court. *See Automobile Workers v. Scofield*, 382 U.S. 205, 216-17 & n. 10 (1965); *Richardson v. Flores*, 979 F.3d 1102, 1105 (5th Cir. 2020). Thus, a party has a right to intervene if it “claims an interest relating to the ... transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Federal Rule of Civil Procedure 24(a)(2). Growth Energy satisfies this standard.³

² This motion satisfies those procedural requirements. The motion is timely under Circuit Rule 15.5. The motion is being served on all parties to the case. And the discussion in the text constitutes “a concise statement of [Growth Energy’s] interest ... and the grounds for intervention.” Federal Rule of Appellate Procedure 15(d).

³ *A fortiori*, Growth Energy satisfies the standard for permissive intervention, which requires only a showing that the proposed intervenor has “a claim or defense that shares with the main action a common question of law or fact.” Federal Rule of Civil Procedure 24(b)(1)(B).

A. Courts Have Routinely Allowed Growth Energy and Similar Biofuels Organizations to Participate in Challenges to RFS Exemption Decisions and RFS Standards

Growth Energy and other biofuels representatives have routinely participated in litigation involving RFS exemption decisions and, more broadly, RFS standards. This Court and the D.C. Circuit recently allowed Growth Energy (and other biofuels organizations) to intervene to defend the 2022 exemption decisions that formed the basis for the exemption decisions challenged here. Order, *Calumet Shreveport Refining v. EPA*, No. 22-60266, ECF No. 303 (5th Cir. Mar. 16, 2023); Order, *Sinclair Wyoming Refining Co. v. EPA*, No. 22-1073, ECF No. 1987065 (D.C. Cir. Feb. 22, 2023). The Tenth Circuit held that a similarly situated biofuels association had standing to challenge EPA's decision to grant certain exemptions. *Renewable Fuels Ass'n*, 948 F.3d 1206, 1230-39 (10th Cir. 2020).

Further, Growth Energy has successfully intervened in every lawsuit challenging EPA's annual RFS standards (which are, in effect, reduced by exemptions). See Order, *Sinclair Wyoming Refining Co. v. EPA*, No. 22-1210, ECF No. 1975422 (D.C. Cir. Nov. 29, 2022) (2020-22 standards); Order, *RFS Power Coalition v. EPA*, No. 20-1046, ECF No. 1843937 (D.C. Cir. May 22, 2020) (2020 standards); Order, *Growth Energy v. EPA*, No. 19-1023, ECF No. 1784196 (D.C. Cir. Apr. 23, 2019) (2019 standards); Order, *American Fuel &*

Petrochemical Manufacturers v. EPA, No. 17-1258, ECF No. 1725309 (D.C. Cir. Apr. 5, 2018) (2018 standards); Order, *Alon Refining Krotz Springs, Inc. v. EPA*, No. 16-1052, ECF No. 1722824 (Mar. 19, 2018) (2017 standards); Order, *Americans for Clean Energy v. EPA*, No. 16-1005, ECF No. 1611965 (D.C. Cir. May 5, 2016) (2014-16 standards); Order, *Monroe Energy, LLC v. EPA*, No. 13-1265, ECF No. 1468501 (D.C. Cir. Dec. 2, 2013) (2013 standards); Order, *American Petroleum Institute v. EPA*, No. 12-1139, ECF No. 1370535 (D.C. Cir. Apr. 24, 2012) (2012 standards); Order, *National Petrochemical & Refiners v. EPA*, No. 10-1070, ECF No. 1242852 (D.C. Cir. May 3, 2010) (2009-10 standards).

There is no reason for the Court to depart from this wide recognition that Growth Energy is entitled to participate in challenges to RFS exemption decisions.

B. The Disposition of This Case Could Impair Growth Energy’s Strong Interest in the 2022 RFS Standards

If the Court were to vacate EPA’s exemption decisions and petitioner’s exemption petitions were to be granted, Growth Energy’s members would be harmed. Declaration of Emily Skor (“Skor Declaration”) ¶10 (Aug. 28, 2023) [attached as Ex.].

EPA has acknowledged that “those involved with the production, distribution, and sale of ... renewable fuels such as ethanol”—which includes Growth Energy and its members—are “potentially affected by” the level of the

2022 RFS standards. 87 Fed. Reg. at 39,600. Growth Energy is a national trade association dedicated to promoting the commercial production and use of ethanol. Skor Declaration ¶2. Growth Energy’s 93 members are ethanol producers and account for almost 60% of domestic corn ethanol production. *Id.* ¶3. Growth Energy has a strong interest in RFS standards because they determine the minimum mandatory national demand for renewable fuel, most of which is domestically produced corn ethanol. *Id.* ¶¶4-5; *supra* p.2. That is why Growth Energy submitted extensive comments on the proposed standards for 2022. *See Growth Energy, Comments on EPA’s Renewable Fuel Standard (RFS) Program: RFS Annual Rules*, EPA-HQ-OAR-2021-0324-0521 (Feb. 4, 2022).⁴ And that is why Growth Energy has consistently participated in litigation concerning RFS standards and exemptions. *See supra* pp.6-7.

This interest is jeopardized by petitioner’s lawsuit. Because the “demand for renewable fuel will be a function of the renewable fuel standards,” *Americans for Clean Energy*, 864 F.3d at 710 (cleaned up), “the basic laws of economics” establish that reducing RFS standards will “cause the demand” for corn ethanol “to drop,” *Growth Energy v. EPA*, 5 F.4th 1, 3 (D.C. Cir. 2021); *see also Monroe Energy, LLC v. EPA*, 750 F.3d 909, 917 (D.C. Cir. 2014); Skor Declaration ¶¶5, 7.

⁴ <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0324-0521>.

Additionally, RFS standards function as a barrier to competition from petroleum producers for the content of the nation’s transportation fuel; lowering the standards “lift[s] that regulatory restriction[] on [ethanol producers’] competitors.”

American Fuel & Petrochemical Manufacturers v. EPA, 3 F.4th 373, 379 (D.C. Cir. 2021); *see* Skor Declaration ¶5.

As EPA has found, exemptions “effectively reduce[] the required volume of renewable fuel” and in turn reduce the marginal demand for renewable fuel, including ethanol. EPA, Regulatory Impact Analysis 5-7, 46 (June 2022)⁵; *see* Skor Declaration ¶7. Or, as the D.C. Circuit put it, exemptions create a “renewable-fuel shortfall.” *American Fuel & Petrochemical Manufacturers v. EPA*, 937 F.3d 559, 571, 588 (D.C. Cir. 2019). Exemptions also lift the regulatory barrier to competition from petroleum. Skor Declaration ¶7. Consequently, a decision by this Court in favor of petitioner and rejecting EPA’s denial decisions could lead to the exemption petitions being granted on remand, which would injure Growth Energy and its members by reducing demand for their product and lifting regulatory barriers to competition. *Id.* ¶8.

It makes no difference that 2022 is over because of the time-shifting enabled by carryover RINs. *See* Skor Declaration ¶9. Granting the exemption petitions

⁵ <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P10155TQ.pdf>.

would relieve petitioner of its obligation to use RINs to meet its 2022 RFS requirements, freeing those RINs to be used to meet a future year's requirements and thereby reducing the effective renewable-fuel demand of those future requirements and lifting a barrier to competition in that future year. *See, e.g., Growth Energy*, 5 F.4th at 12 (exemptions “granted after EPA has promulgated that year's standards ... hinder achievement of the applicable volumes by excusing some obligated parties from having to produce renewable fuel without requiring that other non-exempt parties make up the shortfall”); 87 Fed. Reg. at 39,613:1-2, 39,617:2 (“[C]ompliance with the RFS standards for one year is inherently intertwined with compliance for the prior year. ... Any market effects of the 2020 and 2021 volumes finalized in this rule will be felt after the rule is promulgated and mediated through the carryover RIN bank.”); 85 Fed. Reg. 7,016, 7,021:3 (Feb. 6, 2020) (“This increase in the carryover RIN bank is primarily the result of the millions of RINs that were unretired by small refineries that were granted hardship exemptions after the July 29 proposal.”). Indeed, if granting petitioner's requested exemptions at this point would not affect the supply of RINs, petitioner would lack Article III standing because its alleged injury would not be redressable. *See, e.g., Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (“no federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury”).

C. Growth Energy’s Interest Will Not Be Adequately Represented by Another Party

This may be Growth Energy’s only opportunity to refute petitioner’s claims and protect EPA’s denial of the exemption petitions for 2022. And no other party will adequately represent Growth Energy’s interests. “The requirement of [Rule 24] is satisfied if the [movant] shows that representation of [its] interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see also Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191, 2203 (2022) (requirement “present[s] proposed intervenors with only a minimal challenge”); *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 308 (5th Cir. 2022).

Although Growth Energy seeks to intervene in support of EPA, as a government agency, EPA will not adequately represent Growth Energy’s interests. Courts generally “look skeptically on government entities serving as adequate advocates for private parties.” *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015). Although this Court has recognized “presumptions of adequate representation” where the intervenor “has the same ultimate objective as a party” or a party is “a governmental body or officer charged by law with representing the interests of the intervenor,” those presumptions are rebutted here because the difference between Growth Energy’s and the

government's interests and duties “*may lead to divergent results.*” *La Union del Pueblo Entero*, 29 F.4th at 308.

EPA is not charged under the Clean Air Act with representing Growth Energy's, or the renewable-fuel industry's, interests. It is charged with setting standards, deciding whether to grant exemptions, and establishing a system of tradeable credits. EPA's arguments in this case necessarily will be focused on its own institutional interests and duties, whereas Growth Energy's arguments will reflect the commercial enterprises that comprise its membership and may take a different view of EPA's role. For example, Growth Energy will emphasize the harm to ethanol producers that petitioner's requested relief would cause, whereas EPA might not. And EPA might argue that it had *discretion* to take (or not take) a certain action, whereas Growth Energy may argue that EPA was *required* to take (or *prohibited* from taking) that action, thereby precluding EPA from reversing its policy in the future.

Indeed, these types of divergences occurred in the prior exemption case now pending in this Court. *See, e.g.*, Brief of Renewable Fuel Producers 17, 22-23, *Calumet Shreveport Refining LLC v. EPA*, No. 22-60266, ECF No. 314 (May 18, 2023) (arguing EPA lacks legal authority to take certain remedial action that EPA took for other exemption years); *id.* at 25 (arguing that requested relief would harm ethanol producers). These sorts of divergences have been common across the many

RFS cases in which Growth Energy intervened to defend EPA’s action. That suffices to carry Growth Energy’s “minimal” burden. *See La Union del Pueblo Entero*, 29 F.4th at 308-09 (presumptions overcome with respect to government party); *Wal-Mart Stores, Inc. v. Tex. Alcohol Beverage Comm’n*, 834 F.3d 562, 569 (5th Cir. 2016) (same); *Crossroads*, 788 F.3d at 321 (agency did not adequately represent private party despite their “general alignment”).

CONCLUSION

For the foregoing reasons, the Court should grant Growth Energy’s motion to intervene.

Respectfully submitted,

/s/ David M. Lehn

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August 28, 2023

EXHIBIT

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

WYNNEWOOD REFINING CO. LLC,)	
)	
Petitioner,)	
)	Case No. 23-60427
v.)	
)	
EPA,)	
)	
Respondent.)	
)	
)	

DECLARATION OF EMILY SKOR

1. My name is Emily Skor. I am over 18 years of age and am competent to give this Declaration. This Declaration is based on personal knowledge. I am submitting this Declaration on behalf of Growth Energy in the above-captioned matter.

2. I serve as the CEO of Growth Energy, a position I have held since May 2016. Growth Energy is a national trade association dedicated to promoting the commercial production and use of renewable fuels, particularly conventional and cellulosic ethanol derived from corn, sorghum, and kernel fiber.

3. Growth Energy has 93 members, all of which produce and sell ethanol in the United States. Its members account for almost 60% of all corn ethanol produced in the United States. In 2022, they collectively produced about 8.75

billion gallons of corn ethanol to meet the requirements of the Renewable Fuel Standard (“RFS”) under the Clean Air Act.

4. In the market for transportation fuel, renewable fuel competes with petroleum-based fuel. Any renewable fuel that is used for transportation purposes displaces the petroleum-based fuel that would otherwise be used.

5. The RFS annual volume requirements define the minimum amount of renewable fuel that must be used in the nation’s transportation fuel supply, i.e., the minimum nationwide demand for renewable fuel, including corn ethanol. Because the RFS requirements require the use of renewable fuel, they are a regulatory barrier to competition from petroleum over the content of the nation’s transportation fuel.

6. Ethanol is, by far, the most used renewable fuel in the transportation fuel market. Roughly three-quarters of the renewable fuel used to comply with the RFS annually is ethanol. And corn ethanol accounts for roughly 95% of the renewable fuel used to meet the RFS’s “implied non-advanced” requirement, i.e., the difference between the required advanced level and the required total level.

7. Small-refinery exemptions reduce the effective RFS requirements, reducing the national demand for renewable fuel and allowing more competition from petroleum.

8. Therefore, if the petitioner's exemption petition for 2022 were to be granted, Growth Energy's members would be harmed. Competition with their product would go up and demand for their product would go down.

9. This is so even though the exemption year of 2022 is fully in the past. The exemptions would relieve the petitioner from having to retire RINs, allowing those RINs to remain in the market and available for use to meet a future RFS obligation. Thus, the exemption would reduce the demand for renewable fuel created by that future obligation.

10. In sum, reversing EPA's denial of petitioner's exemption petition would hurt Growth Energy's members.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct based on my personal knowledge and information prepared by Growth Energy.

Executed this 28th day of August 2023.



Emily Skor

CORPORATE DISCLOSURE STATEMENT

Growth Energy is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates to promote the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

Respectfully submitted,

/s/ David M. Lehn

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August 28, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned hereby certifies:

1. This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,541 words, excluding the exempted portions, as provided in Federal Rule of Appellate Procedure 32(f). As permitted by Federal Rule of Appellate Procedure 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

2. This motion complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 27(a)(5)-(6) because it was prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

/s/ David M. Lehn

DAVID M. LEHN

August 28, 2023

CERTIFICATE OF SERVICE

I certify that on August 28, 2023, I filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ David M. Lehn

DAVID M. LEHN

August 28, 2023