UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

CALIFORNIA COMMUNITIES AGAINST TOXICS, et al.	)	
Petitioners	)	**Case No. 18-1163**
vs.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondents	)	
and	)	
METALS INDUSTRIES RECYCLING COALITION, AMERICAN COKE AND COAL CHEMICALS INSTITUTE, AMERICAN FOREST & PAPER ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS	)	
Applicants for Intervention.	)	

MOTION FOR LEAVE TO INTERVENE

Under Fed. R. App. P. 15(d) and Circuit Rules 15(b) and 27, and for the reasons set forth below, the Metals Industries Recycling Coalition ("MIRC"), American Coke and Coal Chemicals Institute ("ACCCI"), American Forest & Paper Association ("AF&PA"), and National Association of Manufacturers ("NAM") (collectively, "Intervenor-Applicants"), move for leave to intervene in

support of the United States Environmental Protection Agency ("EPA" or the "Agency") in the above-captioned case. Counsel for Intervenor-Applicants has conferred with counsel for Petitioners and Respondents. Respondents do not oppose this motion and Petitioners reserved their right to oppose Intervener-Applicants' intervention after review of this motion.

I. INTRODUCTION

The petition in this case challenges two EPA rules: "Revisions to the Definition of Solid Waste," published at 73 Fed. Reg. 64,668 (Oct. 30, 2008) ("2008 DSW Rule"), and "Response to Vacatur of Certain Provisions of the Definition of Solid Waste Rule," published at 83 Fed. Reg. 24,664 (May 30, 2018) ("2018 DSW Rule") (collectively, the "DSW Rules"). The DSW Rules define "solid waste" in several recycling-related provisions as it applies to the regulation of hazardous waste under Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921 through 6939(g).

As relevant to Intervenor-Applicants, the DSW Rules exclude from the definition of solid waste and, therefore, EPA's costly hazardous waste regulations, hazardous secondary material that is reclaimed and not discarded. Intervenor-Applicants' members either manufacture or reclaim hazardous secondary materials as an integral part of their manufacturing operations, and most Intervener-Applicants have sought to protect that interest in the legitimate reclamation of

hazardous secondary materials by participating in each regulatory proceeding underlying the DSW Rules and each legal challenge to EPA's previous efforts to define solid waste. This Motion continues Intervenor-Applicants' longstanding effort to protect their interest in the legitimate reclamation of hazardous secondary materials.

The 2008 DSW Rule excluded from the definition of solid waste hazardous secondary materials that are legitimately reclaimed and not discarded. To ensure the legitimacy of reclamation, the 2008 DSW Rule imposed conditions and requirements to "police[] the line between 'legitimate' (*i.e.*, true) recycling and 'sham' (*i.e.*, fake) recycling." *American Petroleum Inst. v. EPA*, 862 F. 3d 50, 57 (D.C. Cir. 2017) ("*API I*") (citations and quotations omitted), *modified on reh'g*, 883 F.3d 918 (D.C. Cir. 2018) ("*API II*"). Sierra Club challenged the 2008 DSW Rule, but settled with EPA before oral argument. *API I*, 862 F.3d at 56. Under that settlement agreement, EPA agreed to undertake a new rulemaking to define solid waste, and Sierra Club agreed to withdraw its petition and dismiss its action with prejudice. *Id.* As agreed, EPA proposed changes to the 2008 DSW Rule in 2011, (76 Fed. Reg. 44,094 (July 22, 2011)), finalized those changes in 2015, (80 Fed. Reg. 1,694 (Jan 13, 2015) ("2015 DSW Rule")), and joined Sierra Club in moving to dismiss Sierra Club's challenge to the 2008 DSW Rule with prejudice. *See Sierra Club v. EPA*, No. 09-1041, Joint Stipulation of Voluntary Dismissal

(D.C. Cir. Feb. 9, 2015); *Sierra Club v. EPA*, No. 09-1041, slip op. at 1 (D.C. Cir. Feb. 10, 2015). Sierra Club and others then petitioned for review of the 2015 DSW Rule.

This Court considered those challenges and issued a decision upholding aspects of the 2015 DSW Rule and vacating other aspects, thereby reinstating elements of the 2008 DSW Rule. *See, e.g., API I* and *API II*. The 2018 DSW Rule implemented this Court's holdings and *API I* and *API II*. As a result, materials sent to third parties for reclamation can qualify for exclusion from the definition of "solid waste" without being sent to a facility with a RCRA hazardous waste management permit or government pre-approval as a "verified reclamation facility."

Intervenor-Applicants fully participated in the rulemaking efforts underlying both DSW Rules, as well as the 2015 DSW Rule, and this Court has twice granted Intervenor-Applicants leave to intervene in both legal actions. *See Sierra Club v. EPA*, No. 09-1041, slip op. at 1 (D.C. Cir. July 16, 2009); *American Petroleum Institute v. EPA*, No. 09-1038, slip op. at 1 (D.C. Cir. Aug. 31, 2015). The DSW Rules challenged herein, like those previously challenged, significantly impact the operations and profitability of the entities represented by Intervenor-Applicants because those entities are subject to RCRA's solid waste regulations and because they operate pursuant to the DSW Rules' exclusions. Accordingly, Intervenor-

Applicants have a direct, legally protectable interest in this action. *See Old Dominion Elec. Coop. v. Fed. Energy Regulatory Comm'n*, 892 F.3d 1223 (D.C. Cir. 2018).

Intervention is necessary to avoid an outcome where Intervenor-Applicants' interests in the DSW Rules are adversely affected by a legal decision in an action in which they were not afforded due process to participate. Similarly, intervention is necessary to preserve Intervenor-Applicants' unique interests and legal arguments relative to the DSW Rules. For the reasons discussed below, Intervenor-Applicants meet the requirements for intervention as of right or, in the alternative, for permissive intervention.

II. BACKGROUND

This Court in *API I* provided a succinct primer of the statutory underpinnings for defining solid waste under RCRA:

> [RCRA] empowers EPA to manage solid and hazardous waste. The statute defines solid waste as 'garbage, refuse, sludge ... and other discarded material. Hazardous waste is a subset of solid waste that may pose a substantial threat to human health or the environment when improperly managed. If a material qualifies as hazardous waste, it is subject to regulation under RCRA Subtitle C … which imposes comprehensive reporting and operating requirements. Material that is not solid waste, and therefore not hazardous waste, is exempt from Subtitle C.

862 F.3d at 55 (internal quotations and citations omitted). Subtitle C regulations include costly transportation, management, and storage requirements.

While the precise approach differed to some degree, both the challenged DSW Rules, as well as the 2015 DSW Rule, each attempt to exclude from the definition of solid waste those hazardous secondary materials being legitimately reclaimed and, thus, not discarded and outside of RCRA's jurisdiction. EPA promulgated each DSW Rule to encourage beneficial recycling without adversely impacting public health or the environment.

A. 2008 DSW Rule

Among other changes to hazardous secondary materials regulations, the 2008 DSW Rule "excluded hazardous secondary materials from the definition of solid waste in two circumstances." *API I*, 862 F.3d at 55. As this Court explained:

> [F]irst, if the company that generated the materials controlled the recycling of those materials; and second, if the generator transferred the materials to an off-site recycler it had audited to ensure compliance with proper recycling practices. These two exemptions were known, respectively, as the "Generator-Controlled Exclusion" and the "Transfer-Based Exclusion." To qualify for either, secondary materials had to be recycled "legitimately," a term EPA defined by reference to certain "legitimacy factors." EPA adopted this legitimacy requirement to distinguish "true" recycling from "sham" recycling in which companies claim to reuse materials they in fact discard.

Id.

In 2009, Sierra Club and others petitioned for review of the 2008 DSW Rule, alleging it violated RCRA because it "was not sufficiently protective of human health and the environment." *API I*, 862 F. 3d at 56 (citations and quotations omitted). Sierra Club also petitioned EPA for reconsideration requesting that EPA

rescind or stay the 2008 DSW Rule.

This Court granted Intervenor-Applicants MIRC, ACCCI, and AF&PA intervenor status in Sierra Club's challenge on July 16, 2009. *See Sierra Club v. EPA*, No. 09-1041, slip op. at 1 (D.C. Cir. July 16, 2009). The parties provided briefing on the challenge, but "[b]efore this court heard oral argument, EPA entered a settlement agreement with the Sierra Club." *API I*, 862 F. 3d at 56. Pursuant to that settlement, EPA agreed to undertake a new rulemaking to define solid waste and Sierra Club agreed to withdraw its petition and dismiss its action with prejudice. *See Sierra Club v. EPA*, No. 09-1041, EPA and Sierra Club's Lodging of Settlement and Settlement Agreement (D.C. Cir. Sep. 10, 2010).

B. 2015 DSW Rule

Pursuant to the settlement agreement, EPA proposed changes to the 2008 DSW Rule in 2011. 76 Fed. Reg. 44,094 (July 22, 2011). Intervenor-Applicants provided extensive comments on that rule. *See* MIRC Comment (Oct. 20, 2011) (EPA Docket No. EPA-HQ-RCRA-2010-0742-0198); ACCCI Comment (Oct. 20, 2011) (EPA Docket No. EPA-HQ-RCRA-2010-0742-0148); NAM Comment (Oct. 20, 2011) (EPA Docket No. EPA-HQ-RCRA-2010-0742-0355); AF&PA Comment (Oct. 20, 2011) (EPA Docket No. EPA-HQ-RCRA-2010-0742-0168).

EPA finalized those changes in 2015. 2015 DSW Rule, 80 Fed. Reg. 1,694 (Jan 13, 2015). Sierra Club and EPA then dismissed with prejudice Sierra Club's

challenge to the 2008 DSW Rule. *See Sierra Club v. EPA*, No. 09-1041, Joint Stipulation of Voluntary Dismissal (D.C. Cir. Feb. 9, 2015); *Sierra Club v. EPA*, No. 09-1041, slip op. at 1 (D.C. Cir. Feb. 10, 2015).

The 2015 DSW Rule maintained the 2008 DSW Rule's same basic exclusions, but made four relevant changes:

> First, the *Final Rule* revise[d] the definition of "legitimate" recycling and expand[ed] the scope of the legitimacy factors to cover all recycling. Second, it establishe[d] that spent catalysts — which were ineligible for exclusions under the 2008 Rule — could qualify for the exemptions in the 2015 regulation. Third, the rule defer[red] a decision on whether to add conditions to 32 previously promulgated exclusions from the definition of solid waste, which EPA calls the "pre-2008" exclusions. Fourth and finally, the rule replace[d] the transfer-based exclusion with the "Verified Recycler Exclusion," a new standard governing when transferred materials qualify as solid waste.

API I, 862 F. 3d at 56 (internal citations omitted). Sierra Club, others, as well as several impacted industries ("Industry Petitioners"), including Intervenor-Applicant NAM, then challenged the 2015 DSW Rule.[1] *See, e.g., Nat'l Ass'n of Manufacturers v. EPA*, No. 15-1089, Petition for Review (D.C. Cir. Apr. 13, 2015). Intervener-Applicants (except AF&PA) were granted leave by this Court to intervene in support of EPA.[2] As this Court explained:

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[1] This Court consolidated Sierra Club's action (Case No. 15-1094) with Case Nos. 09-1038, 15-1083, 15-1085, 15-1088, and 15-1089.

[2] Intervener-Applicant NAM challenged certain aspects of the 2015 DSW Rule, but also intervened in support of EPA to defend other aspects of the Rule.

> Industry Petitioners argue[d] that both the legitimacy test and the Verified Recycler Exclusion exceed EPA's RCRA authority. Industry Petitioners also challenge[d] EPA's treatment of two specific materials: spent catalysts and off-specification commercial chemical products. Environmental Petitioners argue[d] that the Verified Recycler Exclusion is too permissive and that EPA should have added containment and notification conditions to the 32 pre-2008 exclusions.

862 F. 3d at 56.

After considering those arguments this Court upheld aspects of the 2015 DSW Rule and vacated other aspects of the Rule, thereby reinstating elements of the 2008 DSW Rule. *See API II*, 883 F.3d 918. More precisely, this Court:

> (1) vacated the 2015 verified recycler exclusion for hazardous waste that is recycled off-site (except for certain provisions); (2) reinstated the transfer-based exclusion from the 2008 rule to replace the now-vacated 2015 verified recycler exclusion; (3) upheld the containment and emergency preparedness provisions of the 2015 rule; (4) vacated Factor 4 of the 2015 definition of legitimate recycling in its entirety; and (5) reinstated the 2008 version of Factor 4 to replace the now-vacated 2015 version of Factor 4.

83 Fed. Reg. 24,664 (May 30, 2018). Accordingly, this Court very recently rejected all of Sierra Club's arguments against EPA's approach to defining solid waste and excluding certain hazardous secondary materials from Subtitle C regulation. While the Court supported the 2015 DSW Rule's imposition of additional containment and emergency preparedness requirements and consideration of material management conditions (Factor 3) in legitimacy determinations, the Court in most material respects agreed with Industry Petitioners and upheld (indeed, ordered) the approach to excluding hazardous

secondary materials EPA instituted in the 2008 DSW Rule.

C. 2018 DSW Rule

The 2018 DSW Rule implemented this Court's vacatur of certain aspects of the 2015 DSW Rule by amending the Agency's regulations to include those portions of the 2008 DSW Rule that this Court reinstated in place of the vacated portions of the 2015 DSW Rule. Substantively, the 2018 DSW Rule maintains the same basic exclusions to the definition of solid waste that EPA promulgated in the 2008 DSW Rule, but conditions those exclusions on certain additional requirements found in the 2015 DSW Rule. As such, in promulgating the 2018 DSW Rule, EPA did not create any new or different exclusions, requirements, or conditions regarding the Agency's approach to defining solid waste. EPA simply implemented this Court's vacatur by compiling previously-promulgated elements of the 2008 and 2015 DSW Rules.

Sierra Club's Petition for Review challenges the 2018 DSW Rule, and suggests that this Rule, along with this Court's 2017 and 2018 orders, provide after-arising grounds for also challenging the 2008 DSW Rule. It is impossible to surmise the legal theory underpinning Sierra Club's challenge to a decade-old rule or the precise aspects of the DSW Rules Sierra Club is challenging. Sierra Club's Petition suggests it will challenge the 2008 DSW Rule's Transfer-Based Exclusion, which it alleges was expanded by the 2018 DSW Rule and this Court's decisions.

No other information is provided. Judging from Sierra Club's challenges to the 2008 DSW Rule and 2015 DSW Rule, however, this Petition for Review likely reflects yet another attempt to challenge EPA's approach to defining solid waste and excluding certain hazardous secondary materials from Subtitle C regulation issues which directly impact Intervenor-Applicants and which Intervenor-Applicants already twice intervened to protect.

D. Interests of Intervenor-Applicants

MIRC was created in the early 1990s to address numerous recycling issues affecting the metals industries. MIRC is comprised of metals companies and trade associations representing the interests of iron, steel, nickel, chromium, copper, and brass industries. MIRC members include generators and reclaimers of hazardous secondary materials under the DSW Rules challenged in this action. Since 1993, MIRC focused on the definition of solid waste issue in rulemaking, litigation and Agency dialogue. MIRC members include: the American Iron and Steel Institute, the Copper and Brass Fabricator's Council, American Zinc Recycling, LLC, the Specialty Steel Industry of North America, and the Steel Manufacturers Association.

ACCCI represents 100% of the U.S. producers of metallurgical coke used for iron and steelmaking, and 100% of the nation's producers of coal chemicals, who combined have operations in 12 states. These companies manufacture,

generate, and recycle hazardous secondary materials pursuant to the DSW Rules challenged in this action. ACCCI also represents chemical processors, metallurgical coal producers, coal and coke sales agents, and suppliers of goods and services to the industry.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. These members include generators and reclaimers of hazardous secondary materials impacted by the DSW Rules at issue in this action.

AF&PA advances a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through public policy and marketplace advocacy. AF&PA members make products essential for everyday life from renewable and recyclable resources pursuant to the DSW Rules at issue in this action and related RCRA exclusions. AF&PA members are committed to continuous improvement through the industry's sustainability initiative - *Better Practices, Better Planet 2020*.

Intervenor-Applicants' direct interest in this case is reflected in their long-standing participation in major RCRA solid waste matters that implicate their members and the administrative proceedings underlying the 2008, 2015, and 2018 DSW Rules. Intervener-Applicants seek to protect the ability of their members to recycle secondary hazardous materials under the challenged DSW Rules.

Intervenor-Applicants' members participate in the legitimate recycling and reclamation of hazardous secondary materials. Over several decades, their members have developed the infrastructure, and entered into commercial arrangements, to facilitate for such recycling activities. If this Court vacated the DSW Rules or changed the scope or availability of exclusions for recycling hazardous secondary materials, Intervenor-Applicants' members could lose the benefit of infrastructure investments, experience decreased profitability, and incur increased regulatory costs.

Since EPA's first initiated rulemaking in 1993, Intervenor-Applicants have been actively – and consistently – engaged. Intervenor-Applicants provided comments in rulemaking proceedings for each iteration of the DSW Rules and intervened in support of EPA in challenges to the 2008 DSW Rule and the 2015 DSW Rule.

Intervenor-Applicants' participation is necessary because the interests of Intervenor-Applicants' members relate directly to the subject of this litigation, would be impaired if Petitioners prevail, and are not adequately represented by existing parties.

III. ARGUMENT

A. Intervenor-Applicants Qualify for Intervention as of Right.

In considering intervention under Fed. R. App. P. 15(d), courts often look to

the policies embodied in Rule 24 of the Federal Rules of Civil Procedure.[3] *See, e.g., AFL-CIO v. Scofield*, 382 U.S. 205, 216-17 (1965). Intervention under Fed. R. Civ. P. 24(a)(2) must be granted when four requirements are established: (1) the application for intervention is timely; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and, (4) the applicant's interest would be inadequately represented by the existing parties to the suit. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). *See also Old Dominion Elec. Coop. v. Fed. Energy Regulatory Comm'n*, 892 F.3d 1223 (D.C. Cir. 2018) (requiring intervenors to demonstrate (1) timeliness, (2) inadequate representation, and (3) standing, encompassing a legally cognizable interest, causation, and redressability). For the following reasons, Intervenor-Applicants satisfy the requirements for intervention as of right.

1. Intervenor-Applicants' Motion to Intervene is Timely.

Fed. R. App. P. 15(d) requires that a motion for leave to intervene be filed within 30 days after the petition for review was filed. Petitioners' Petition for Review was filed on June 12, 2018, and this Motion to Intervene is being filed

[3] Rule 15(d) itself merely requires a concise statement of interest and grounds for intervention. *See Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991).

within 30 days thereafter. This action is at the very earliest stages, no substantive motions have been filed, no schedule has been ordered, and this motion will not disrupt the proceedings or cause any prejudicial delay to the original parties. *See Natural Res. Def. Council v. Costle*, 561 F.2d 904, 907-908 (D.C. Cir. 1977) (*"NRDC"*) (district court abused its discretion by denying intervention three years after suit began where companies sought to participate in EPA's administration of settlement with environmental petitioners).

2. Intervenor-Applicants Possess a Protectable Interest in the Pending Action That Risks Impairment Absent Participation.

An intervenor must also show standing by demonstrating causation, redressability, and a cognizable, legally protectable interest relating to the outcome of the proceeding. *See Old Dominion Elec. Coop. v. Fed. Energy Regulatory Comm'n*, 892 F.3d 1223 (D.C. Cir. 2018). Causation requires "that a proper defendant be sued," *Common Cause v. Biden*, 748 F.3d 1280, 1284 (D.C. Cir. 2014), which here is EPA because it promulgated the DSW Rules. "Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1083 (D.C. Cir. 2017) (citations and quotations omitted). Again, this element is satisfied because the Court's decision on the DSW Rules will shape Intervenor-Applicants' cognizable interests in the rule.

It is well-established that even an indirect economic interest is sufficient to justify intervention of right. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133-135 (1967); s*ee also NRDC*, 561 F.2d at 908-910 (industry parties granted intervention in an action to compel EPA to issue effluent limitations guidelines on agreed schedule); *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 295 F.3d 1111, 1116 (10th Cir. 2002); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992).

Courts have routinely found a sufficient protectable interest where parties governed under a statutory scheme seek to intervene in challenges to the interpretation of that scheme. *See generally* Charles Alan Wright, Arthur R. Miller, Mary K. Kane, Federal Practice and Procedure § 1908.1 at 336 (3d ed. 1998); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 896 (N.D. Cal. 1984) (granting intervention to a mining association because its members will be directly affected by the final emission standards even though the matter before the court was the timeliness but not the content of the regulations). The *Ruckelshaus* court reasoned that allowing "the opportunity to participate in proceedings that seek to ensure sustainable regulations in the first place" is much preferred and avoids an "after-the-fact remedy [that] may, as a practical matter, afford much less protection." *Ruckelshaus*, 602 F. Supp. at 896. (citation and all internals omitted); *see also Huron Envtl. Activist League v. EPA*, 917 F. Supp. 34, 42 (D.D.C. 1996)

(granting intervention to a cement industry group where the relief sought "would have the result of rendering useless … the substantial good faith efforts of the … industry" in working with the government to seek solutions to environmental and regulatory problems).

This Court already found that Intervenor-Applicants have a legally protectable interest in precisely these circumstances when it granted Intervenor-Applicants' Motion to Intervene in challenges to the 2008 and 2015 DSW Rules. As before, Intervenor-Applicants have a substantial, direct, and protectable interest in the outcome of this litigation, both in terms of Intervenor-Applicants' members' economic and commercial interests, and the manner in which EPA regulates solid waste and HSM. The DSW Rules exclude from costly RCRA regulations the types of legitimately reclaimed hazardous secondary materials generated, used, and legitimately reclaimed by Intervenor-Applicants' members. Accordingly, the DSW Rules significantly reduce a number of regulatory compliance burdens that would otherwise be incurred by Intervenor-Applicants' members under RCRA. For instance, as a result of the DSW Rules, materials sent to third parties for reclamation can qualify for exclusion from the definition of "solid waste" without being sent to a facility with a RCRA hazardous waste management permit or government pre-approval as a "verified reclamation facility."

The DSW Rules also increase the volume of hazardous secondary materials being reclaimed, which provides economic benefits to Intervenor-Applicants' members while decreasing the volume of hazardous secondary wastes that would otherwise be discarded. As such, Intervenor-Applicants' members and the environment directly benefit in many ways from the challenged DSW Rules. Petitioners seek to limit – or remove entirely – opportunities for legitimate recycling of hazardous secondary materials by subjecting more of these materials to onerous RCRA regulations.

Indeed, Intervenor-Applicants' participation throughout EPA's decades-long effort to amend the definition of solid waste to exclude legitimately reclaimed hazardous secondary materials demonstrates the stake Intervenor-Applicants have in the DSW Rules. Should Sierra Club prevail in this litigation, not only would the DSW Rules' significant conservation and recovery benefits be compromised, Intervenor-Applicants' members' economic interests would be directly and adversely impacted.

Moreover, like in *Ruckelshaus*, Intervenor-Applicants should be permitted to intervene to protect their interest in ensuring a sustainable statutory interpretation in the first place, rather than being denied intervention and relegating Intervenor-Applicants to pursuing an after-the-fact remedy. *See id*. at 896.

3. Intervenor-Applicants' Interests Are Not Adequately Represented by Existing Parties.

The burden of demonstrating inadequate representation is "minimal." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). A prospective intervenor "need only show that the current representation *may be* inadequate." *Associated Dog Clubs of New York State v. Vilsack*, 44 F. Supp. 3d 1, 6 (D.D.C. 2014) (emphasis added). "As a result, this Circuit often conclude[s] that governmental entities do not adequately represent the interests of aspiring intervenors." *Id.* (citations and quotations omitted). Indeed, this Circuit has explained precisely how an agency and those it regulates have different interests requiring independent representation, even if the regulated community supported the challenged rule. *See NRDC*, 561 F.2d at 912; *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192-193 (D.C. Cir. 1986) (governmental entity charged by law with representing the public interests of its citizens might not fulfill its responsibility were it to advance the narrower interest of one element of the regulated community); *Natural Res. Def. Council v. EPA*, 99 F.R.D. at 610 (concluding that EPA, whose policies were being challenged, may not have the same interest as the intervening industry group in demonstrating that its decisions were lawful).

The Tenth Circuit has gone so far as to observe that an agency seeking to protect both the public interest and the interest of a private intervenor undertakes a "task which is on its face impossible." *Nat'l Farm Lines v. Interstate Commerce*

Comm'n, 564 F.2d 381, 384 (10th Cir. 1977). Further, given the minimal demonstration required, at least one court has held that "the burden of persuasion that representation is adequate appears to rest on the party *opposing* intervention." *Caterino v. Barry*, 922 F.2d 37, 41 n.4 (1st Cir. 1990) (emphasis in original).

Again, this Court's determination of the inadequacy of representation should not differ from its determination on Intervenor-Applicants' motions to intervene in the challenges to the 2008 and 2015 DSW Rules. As was the case in those actions – and is again here – neither Petitioners nor EPA can adequately represent Intervenor-Applicants' interests. Petitioners' interests will be directly adverse to Intervenor-Applicants' interests and, therefore, cannot represent their interests. EPA's representation of the public's broad interest, simultaneous with the more narrow interests of Intervenor-Applicants' members, make representation impossible, and at the very least meets the minimal burden required for showing inadequacy of representation.[4] For these reasons, Intervenor-Applicants satisfy the "inadequate representation" prong of the intervention requirements set forth in Fed. R. App. P. 15(d) and Fed. R. Civ. P. 24(a)(2), necessitating intervention.

[4] Another way in which the existing parties may not adequately represent the interests of the intervenors concerns the nature of any remedy the court might enter or the terms of settlement on any issues. Courts have recognized that an intervenor's interests may differ substantially in this area from the party the intervenor seeks to support. *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 133 (2nd Cir. 2001); *NRDC*, 561 F.2d at 912.

B. Intervenor-Applicants Also Meet the Criteria for Permissive Intervention.

Even when a court denies an applicant's motion to intervene as a matter of right, it must still make a separate determination on the applicant's motion for permissive intervention. *McKay v. Heyison*, 614 F.2d 899, 906-908 (3d Cir. 1980). A party seeking permissive intervention must show (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and, (3) a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b)(2); *EEOC v. Nat'l Children's Ctr., Inc.,* 146 F.3d 1042, 1046 (D.C. Cir. 1998). This Court has subject matter jurisdiction over Intervenor-Applicants' claims as to the validity of the DSW Rules for the same reason as it has jurisdiction over Petitioners' challenge. Further, this motion is timely for the same reasons discussed above.

Intervenor-Applicants have claims that share several common questions of law and fact with the Petitioners' challenge: primarily, whether the DSW Rules are lawful. Intervenor-Applicants maintain that the challenged DSW Rules set forth a lawful regulatory scheme that advances the goals and objectives of RCRA, reduces the volume of discarded waste, and encourages the reclamation of hazardous secondary materials, all while minimizing threats to public health and the environment. Because Intervenor-Applicants have claims that are common to

Petitioners' challenge, Intervenor-Applicants meet the standards for permissive intervention under Fed. R. Civ. P. 24(b) and Fed. R. App. P. 15(d).

C. Intervenor-Applicants Have Standing to Intervene.

Intervenor-Applicants have standing to act on behalf of their member companies in this action because many of the companies they represent are directly regulated by the rules at issue here. An association has standing to sue on behalf of its members when: (1) the association's members would otherwise have standing; (2) the interests the association seeks to protect are germane to the association's purpose; and, (3) neither the claim asserted nor relief requested requires the participation of individual members. *Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169, 174-175 (D.C. Cir. 2012) (citing and quoting *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)).

Each of the Intervenor-Applicants meet each part of this test. Here, Petitioners seek to limit the RCRA exclusion for legitimately recycled hazardous secondary materials. As discussed above, this exclusion in the DSW Rules and related EPA regulations significantly reduces the regulatory compliance burden incurred by Intervenor-Applicants' members and allows them to operate more efficiently. Thus, if granted, the relief that Petitioners seek would inevitably increase the financial burden of complying with RCRA's hazardous waste requirements. *See Affum v. United States*, 566 F.3d 1150, 1158 (D.C. Cir. 2009)

(plaintiff's standing to challenge regulations under which agency imposed penalties on her was "self-evident"); *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (municipalities had standing to challenge agency action authorizing fees that they would eventually have to pay); *Nat'l Coal Ass'n v. Lujan*, 979 F.2d 1548, 1552 (D.C. Cir. 1992) (association of coal companies had standing to challenge civil penalty provision designed to compel compliance with the Surface Mining Control and Reclamation Act). Further, the exclusion for legitimate recycling of hazardous secondary materials was enacted specifically to relieve companies from additional and unnecessary regulatory burdens. The purpose of the exclusion is to strike an appropriate balance between promoting environmental protection and encouraging USCA Case #15-1083 Document #1551958 Filed: 05/11/2015 Page 12 of 23 13 the legitimate recycling of hazardous secondary materials that would otherwise be discarded and managed as waste. Consequently, the Intervenor-Applicants' members that rely on the exclusion are "directly subject to" and "benefit from" the challenged provisions. *See Military Toxics Project*, 146 F.3d at 954 (industry association had standing where its members were directly regulated by and benefit from the challenged rule).

Second, Intervenor-Applicants are trade associations representing diverse manufacturing and recycling industries that were established, in part, to represent

their members in judicial and administrative proceedings such as this. In fact, Intervenor-Applicants have participated with EPA in developing the DSW Rules for over 20 years. Finally, the claims and relief requested in this case will be adequately represented by Intervenor-Applicants and, regardless of the outcome, will be applicable to multiple members of Intervenor-Applicants. Petitioners are seeking judicial review of regulations that provide exclusions from RCRA hazardous waste regulations across diverse industrial sectors that engage in legitimate recycling activities, and therefore this action is not directed at, and does not depend on the circumstances of, any specific facility. Therefore, individual member participation is not required. Accordingly, Intervenor-Applicants have standing to intervene in this action.

IV. CONCLUSION

For the foregoing reasons, Intervenor-Applicants respectfully request that this Court issue an Order granting their Motion for Leave to Intervene on behalf of Respondent EPA.

Dated: July 12, 2018

Respectfully submitted,

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ADDENDUM TO MOTION FOR LEAVE TO INTERVENE OF THE METALS INDUSTRIES RECYCLING COALITION, AMERICAN COKE AND COAL CHEMICALS INSTITUTE, AMERICAN FOREST & PAPER ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rules 15(c)(6), 26.1, and 27(a)(4) counsel for the Metals Industries Recycling Coalition ("MIRC"), American Coke and Coal Chemicals Institute ("ACCCI"), American Forest & Paper Association ("AF&PA"), and National Association of Manufacturers ("NAM") certifies as follows:

1. MIRC is an informal organization comprised of several metals companies and trade associations representing the interests of iron, steel, nickel, chromium, copper, and brass industries. MIRC was formed, in part, to fund and conduct activities associated with EPA's definition of solid waste rulemaking. As such, it has no parent company, subsidiaries or affiliates. It is unincorporated and therefore has no publicly traded stock, and thus no publicly held corporation owns 10% or more of stock in MIRC. While it may not be required under Circuit Rule 26.1(b), MIRC also provides the following information about its current members: American Iron and Steel Institute, American Zinc Recycling, LLC, Copper and Brass Fabricator's Council, Steel Manufacturers Association, and Specialty Steel

Industry of North America:

a. The American Iron and Steel Institute ("AISI") serves as the voice of the North American steel industry and represents 21 member companies, including integrated and electric furnace steelmakers, accounting for the majority of U.S. steelmaking capacity with facilities located in 41 states, Canada, and Mexico, and approximately 120 associate members who are suppliers to or customers of the steel industry. AISI participates in administrative proceedings before EPA under environmental statutes and in litigation arising from those proceedings that affect its members.

b. American Zinc Recycling, LLC ("AZR") is headquartered in Pittsburgh, Pennsylvania, employs approximately 450 people, and has six facilities throughout the United States. AZR has no parent corporation but it has three subsidiaries: (1) American Zinc Recycling Corp; (2) the International Metals Reclamation Company, LLC ("Inmetco"); and (3) American Zinc Products LLC (formerly Horsehead Metals Products, LLC).

i. American Zinc Recycling Corp. is a leading recycler of electric arc furnace dust. In December 2017, a subsidiary of Glencore plc, a publicly held company, obtained a 10% interest in American Zinc Recycling Corp.

ii. Inmetco is the leading recycler of metals-bearing wastes

and a leading processor of nickel-cadmium (NiCd) batteries in North America. It is a wholly-owned subsidiary of American Zinc Recycling LLC.

iii. American Zinc Products LLC is the owner and operator of the group's Mooresboro, North Carolina facility which utilizes environmentally-friendly processes to selectively remove and refine valuable metals from electric arc furnace dust. It is also a wholly-owned subsidiary of American Zinc Recycling LLC.

c. The Copper and Brass Fabricator's Council ("CBFC") is a trade association that represents the principal copper and brass mills in the United States. The 20 member companies together account for the fabrication of more than 80 percent of all copper and brass mill products produced in the U.S., including sheet, strip, plate, foil, bar, rod, and both plumbing and commercial tube. These products are used in a wide variety of applications, chiefly in the automotive, construction, and electrical/electronic industries.

d. Steel Manufacturers Association ("SMA") is the primary trade association of EAF carbon steel producers, often referred to as steel "minimills." SMA's 26 member companies recycle scrap steel in EAFs to produce various steel products, including carbon and alloy steels, and account for over 50 percent of U.S. steel production.

e. Specialty Steel Industry of North America ("SSINA") is a national trade association comprised of 17 producers of specialty steel products, including stainless, electric, tool, magnetic, and other alloy steels. SSINA members produce steel by melting scrap metal in electric arc furnaces ("EAF"), which, as the name implies, use electricity, most of which is manufactured and supplied by coal-fired utilities, as their primary energy source to melt steel. SSINA members account for over 90 percent of the specialty steel manufactured in the United States.

2. ACCCI, which was founded in 1944, is the international trade association that represents 100% of the U.S. producers of metallurgical coke used for iron and steelmaking, and 100% of the nation's producers of coal chemicals, who combined have operations in 12 states. It also represents chemical processors, metallurgical coal producers, coal and coke sales agents, and suppliers of equipment, goods, and services to the industry.

3. AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - *Better Practices, Better Planet 2020*. The forest products industry accounts for

approximately four percent of the total U.S. manufacturing GDP, manufactures over $200 billion in products annually, and employs nearly 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 45 states. No parent corporation or publicly held company has a ten percent (10%) or greater ownership interest in AF&PA.

4. The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM has no parent company, and no publicly held company has a 10% or greater ownership interest in the NAM.

5. As stated, a subsidiary of Glencore plc – a publicly held company – owns a 10% interest in American Zinc Recycling Corp, a subsidiary of MIRC member AZR. None of the other forgoing trade associations or business organizations has a parent corporation or other publicly-held company that has a

10% or greater ownership interest in it. CBFC, SMA, SSINA, AISI, ACCCI, AF&PA and NAM are "trade associations" within the meaning of Circuit Rule 26.1.

Dated: July 12, 2018

Respectfully submitted,

/s/ Wayne J. D'Angelo
Wayne J. D'Angelo

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1), Applicants for Intervention, the Metals Industries Recycling Coalition, the American Coke and Coal Chemicals Institute, the American Forest & Paper Association, and the National Association of Manufacturers, hereby submit the following certificate as to parties, rulings, and related cases.

(A) Parties and Amici

(i) Parties, intervenors, and amici who appeared below

Under D.C. Circuit Rule 28(a)(1)(A), the requirement to identify parties, intervenors, and amici who appeared below is inapplicable because the present petition seeks direct review of Agency rulemaking.

(ii) Persons who are parties, intervenors and amici in this Court

The Petitioners in the Petition are California Communities Against Toxics, Clean Air Council, Coalition for a Safe Environment, Community in-Power and Development Association, Louisiana Bucket Brigade, Louisiana Environmental Action Network, Sierra Club, and Texas Environmental Justice Advocacy Services. Intervenor-Applicants are moving for leave to intervene on behalf of Respondent U.S. Environmental Protection Agency to defend the rule from these petitioners.

(B) Ruling Under Review

Petitioners petitioned this Court for review of two final Agency actions promulgated by EPA: (1) "Revisions to the Definition of Solid Waste," published at 73 Fed. Reg. 64,668 (Oct. 30, 2008); and (2) "Response to Vacatur of Certain Provisions of the Definition of Solid Waste Rule," published at 83 Fed. Reg. 24,664 (May 30, 2018).

(C) Related Cases

Intervenor-Applicants are not aware of any other case that is related within the meaning of D.C. Circuit Rule 28(a)(1)(C).

July 12, 2018

Respectfully submitted,

/s/ Wayne J. D'Angelo
Wayne J. D'Angelo

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

This document contains 5,200 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

This document has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font.

/s/ Wayne J. D'Angelo
Attorney for Intervenor-Applicants
Dated: July 11, 2018

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was on this 12th day of July, 2018, served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Wayne J. D'Angelo
Wayne J. D'Angelo