ORAL ARGUMENT NOT SCHEDULED

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

STATE OF WEST VIRGINIA, STATE OF ALABAMA, STATE OF INDIANA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF NEBRASKA, STATE OF OHIO, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, and STATE OF WYOMING Petitioners, **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** Respondent.	Case No. 14-1146

UNOPPOSED MOTION OF THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, MAINE, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT AND WASHINGTON, THE COMMONWEALTH OF MASSACHUSETTS, THE DISTRICT OF COLUMBIA, AND THE CITY OF NEW YORK TO INTERVENE AS RESPONDENTS

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively, Proposed Intervenor States) file this unopposed motion for leave to intervene in this case in support of the respondent Environmental Protection Agency (EPA). Pursuant to Circuit Rule 15(b), this motion also constitutes a motion to intervene in all petitions for review of the challenged administrative action.

INTRODUCTION

On August 1, 2014, petitioners West Virginia, et al., filed a petition for review that purports to challenge a settlement agreement entered into in 2010 by EPA and the petitioners in *New York v. EPA* (D.C. Cir. No. 06-1322), which included the Proposed Intervenor States and several non-governmental environmental organizations.[1] A copy of the settlement agreement is attached as ***Exhibit A***. Under the settlement agreement, EPA agreed to a schedule to promulgate standards of performance for greenhouse gas emissions from new fossil fuel-fired electric generating units (power plants) and guidelines for greenhouse gas emissions from existing power plants, pursuant to section 111 of

[1] The environmental organizations who were parties to the Settlement Agreement are the Natural Resources Defense Council, Sierra Club and Environmental Defense Fund. They are not parties to this motion.

the Clean Air Act (the Act), 42 USC § 7411. After completing the required notice and comment process for the settlement pursuant to section 113(g) of the Act, *see* 75 Fed. Reg. 82,392 (Dec. 30, 2010), EPA signed the agreement on March 2, 2011. *See* Memorandum from Scott Jordan, Attorney in Air and Radiation Law Office, to Scott C. Fulton, General Counsel (signed March 2, 2011), *available at*: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OGC-2010-1057-0036.

The Proposed Intervenor States have a right to intervene in this proceeding under FRAP 15(d). As parties to the settlement agreement petitioners seek to challenge, Proposed Intervenor States have a direct and substantial interest in the outcome of this proceeding. Additionally, to the extent that petitioners seek to enjoin rulemaking actions designed to address greenhouse gas emissions from power plants, Proposed Intervenor States have an interest in seeing the rulemaking process move forward to address global warming-related harms. Accordingly, this motion to intervene should be granted.

BACKGROUND

Section 111 of the Act requires EPA to develop performance standards for categories of stationary sources whose emissions EPA has determined endanger public health or welfare. Section 111(b) requires the EPA Administrator to list categories of stationary sources that the Administrator finds "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to

endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). The Administrator then must establish "standards of performance" for emissions of air pollutants from new and modified sources within each such category, *id.* § 7411(b)(1)(B), as well as emission guidelines for states to follow in developing their own standards of performance to limit pollution from existing stationary sources within that category, *id.* § 7411(d).

Power plants are designated as stationary sources of air pollutants under 40 CFR part 60, subparts Da and KKKK. In February 2006, EPA published a final rule under section 111 revising the power plant standards, but did not include a standard for greenhouse gas emissions on the basis that it lacked the authority to do so under the Act. *See* 71 Fed. Reg. 9,866 (Feb. 27, 2006). Proposed Intervenor States, along with several environmental organizations, filed petitions for review of the rule, arguing, among other things, that the Act required EPA to set standards of performance for greenhouse gas emissions from power plants. The petitions for review in that case, *New York v. EPA* (D.C. Cir., No. 06-1322), were pending before this Court when the Supreme Court held that greenhouse gases are air pollutants under the Act. *Massachusetts v. EPA*, 549 U.S. 497, 528-529 (2007). At EPA's request, this Court remanded the rule to EPA for further proceedings on greenhouse gas emissions in light of *Massachusetts v. EPA*. Over the next few

years, EPA took no formal action in response to the remand order, despite multiple inquiries from the Proposed Intervenor States and environmental organizations.

In December 2009, EPA determined that anthropogenic greenhouse gas emissions are already endangering, and in the future may reasonably be anticipated to continue to endanger, public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009). Power plants are the largest domestic source of greenhouse gas emissions. Currently, fossil fuel combustion for electricity generation is responsible for almost one third of all greenhouse gas emissions in the United States. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009). Greenhouse gas emissions from power plants harm the Proposed Intervenor States and their citizens by significantly contributing to air pollution that causes climate change. Proposed Intervenor States and their citizens have experienced and will continue to experience injuries that are consistent with those expected from climate change, including:

- increased heat deaths and illnesses due to intensified and prolonged heat waves;
- increased ground-level smog, with concomitant increases in respiratory problems like asthma;
- beach erosion, inundation of property, damage to publicly-owned coastal facilities and infrastructure, and salinization of water supplies from accelerated sea level rise;

- more frequent and severe flooding from more downpours and the potential for higher storm surges, resulting in additional state emergency response costs;
- shrinking of water supplies due to reduced snowpack;
- declines in water quality from increased water temperatures and increased turbidity due to more frequent and intense storms; and
- widespread loss of species and biodiversity, including the projected loss and even disappearance of certain forest types from the U.S.

See 74 Fed. Reg. at 66,516-66,536.

In December 2010, the Proposed Intervenor States, environmental groups, and EPA entered into a settlement agreement to resolve these petitioners' claims in the *New York v. EPA* litigation. Under that settlement agreement, EPA agreed to a schedule for proposing and finalizing a rule to establish performance standards for greenhouse gas emissions from new power plants under section 111(b) of the Act and emissions guidelines for states to follow with respect to greenhouse gases from existing power plants under section 111(d). Exhibit A, ¶¶ 1-4. The sole remedy for Proposed Intervenor States for EPA noncompliance with the agreement was to file an appropriate motion, petition, or civil action seeking to compel EPA to take action responding to this Court's remand order. *Id.*, ¶ 7.

Although EPA did not meet the schedule contained in the settlement

agreement, it did propose a rule to establish performance standards for new power plants in April 2012. *See* 77 Fed. Reg. 22,392 (April 13, 2012). In January 2014, in response to public comments received, EPA published a new version of the proposed rule. *See* 79 Fed. Reg. 1,430 (Jan. 8, 2014). In June 2014, as required by section 111(d) of the Act, EPA proposed a rule that would establish emission guidelines for states to follow in developing plans to address greenhouse gas emissions from existing fossil fuel-fired power plants (the Proposed Guidelines). *See* 79 Fed. Reg. 34,830 (June 18, 2014).

After EPA published the Proposed Guidelines for comment – more than three years after the settlement agreement had been executed, but before any of the rules referenced in the settlement agreement had been finalized – petitioners commenced the instant action by filing a petition for review in this Court. The petition for review seeks to "hold the Settlement Agreement unlawful to the extent that" it commits EPA to proposing and finalizing regulations under Section 111(d), to enjoin EPA from complying with the settlement by continuing the comment period for or finalizing the Proposed Guidelines, and to vacate the settlement agreement in relevant part. Petition, at 4-5.

Proposed Intervenor States file this motion to intervene in this matter to join EPA is requesting that the Court deny the petition to review. Counsel for the Petitioners has stated that Petitioners do not oppose this motion. Counsel for EPA

has stated that EPA also does not oppose this motion.

ARGUMENT

I. The Interests of the Proposed Intervenor States Warrant Granting the Motion Under FRAP 15(d).

Under FRAP 15(d), a party seeking to intervene in a proceeding to review an administrative action must file a motion indicating the party's interest in the proceeding and the grounds for intervention within 30 days of the filing of a petition of review. Intervention under Rule 15(d) is granted where the moving party's interests in the outcome of the action are direct and substantial. *See, e.g., Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (intervention allowed under Rule 15[d] because petitioners were "directly affected by" agency action); *New Mexico Dep't of Human Services v. HCFA*, 4 F.3d 882, 884 n.2 (10th Cir. 1993) (permitting intervention because intervenors had "substantial and unique interest" in outcome); *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15[d] intervention to party with "substantial interest in the outcome").

This motion is being filed within 30 days after the petition for review was filed and, therefore, is timely under FRAP 15(d). Additionally, Proposed Intervenor States, as parties to the settlement agreement being challenged, have a direct and substantial interest in the outcome of this proceeding. The settlement agreement resolved a case Proposed Intervenor States spent several years litigating

and the agreement itself required several months of negotiations. Proposed Intervenor States' interest in avoiding annulment of the settlement agreement is therefore manifest. *See, e.g., In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991) (party to administrative proceeding involving regulation has sufficient interest to intervene in action to enjoin enforcement of that regulation); *County of Fresno v. Andrus*, 622 F.2d 436, 437-438 (9th Cir. 1980) (sufficient interest shown where action by proposed intervenor prompted promulgation of regulations that were being challenged).

Moreover, to the extent that petitioners seek to block the finalization of the Proposed Guidelines, Proposed Intervenor States have an interest in seeing the rulemaking process move forward. Although Proposed Intervenor States dispute petitioners' position that there would be any legal effect on the Proposed Guidelines of invalidating the settlement agreement, we have an interest in being able to present that view to the Court. Proposed Intervenor States, as states and other governmental entities, have a compelling interest in curbing the harmful effects of climate change on their citizens and natural resources from the largest source of these emissions. *See Massachusetts v. EPA*, 549 U.S. at 520-522. Left unchecked, climate change – spurred by greenhouse gas emissions from power plants and other sources – threatens to destroy or damage coastal areas, disrupt natural ecosystems, reduce the amount of water stored in winter snowpack,

increase the frequency and severity of extreme weather events, increase the spread of disease, lead to longer and more frequent droughts, and contribute to a host of other deleterious effects described above. *See generally Massachusetts v. EPA*, 549 U.S. at 521; 74 Fed. Reg. at 66,516-66,536. Any further delay by EPA in publishing final emission guidelines for existing power plants harms the Proposed Intervenor States and their citizens by delaying adoption of standards of performance, resulting in higher emissions of greenhouse gases than would be permitted if EPA were to finalize the proposed rule. Accordingly, Proposed Intervenor States have an interest in seeing that the rulemaking process for the Proposed Guidelines remains on track. *See Andrus*, 622 F.2d at 437-438.

II. The Liberal Intervention Policies Underlying Federal Rule of Civil Procedure 24 Support Intervention.

Federal appellate courts have also looked to the policies underlying Federal Rule of Civil Procedure 24, which governs intervention in the district courts, to determine whether a party should be allowed to intervene. *See International Union v Scofield*, 382 U.S. 205, 217 n. 10 (1965); *Building & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). Federal Rule of Civil Procedure 24(a)(2) provides that:

> Upon timely application, anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter

> impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FRCP 24(a)(2); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (delineating four-part test for intervention as of right under Rule 24). The decision to allow intervention should be guided by the "need for a liberal application in favor of permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). As discussed above, the Proposed Intervenor States have a direct and substantial interest in defending their settlement agreement and in ensuring that EPA regulates greenhouse gas emissions that cause climate change.

Furthermore, EPA may not adequately represent the interests of the Proposed Intervenor States in this action.[2] The "inadequate representation" requirement of Federal Rule of Civil Procedure 24(a) "is satisfied if the applicant shows that representation of his [or her] 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 Envtl. Defense Fund, Inc. v. Higgison*, 631 F.2d 738, 740 (D.C. Cir. 1979). The interests of one governmental entity may not be the same as those of another governmental entity. *See, e.g.*,

[2] FRAP 15(d), unlike Federal Rule of Civil Procedure 24(a), does not, on its face, require an intervenor to show inadequate representation by the parties in the litigation. In any case, Proposed Intervenor States would satisfy this element of Rule 24(a), as explained below.

Forest Conserv. Council v. U.S. Forest Serv., 66 F.3d 1489, 1499 (9th Cir. 1995). Here, the Proposed Intervenor States were adverse parties to EPA in the *New York v. EPA* litigation. To fully protect their interests, the Proposed Intervenor States should be permitted to intervene as party-respondents in this proceeding.

III. Permissive Intervention under Federal Rule of Civil Procedure 24(b) Also Is Appropriate.

Lastly, even if the policies behind intervention as of right were not applicable here, the Court should exercise its discretion to allow permissive intervention. Permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B) is available when the proposed intervenor can show that it "has a claim or defense that shares with the main action a common question of law or fact." In granting permissive intervention, courts should consider whether the intervention would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Given that Proposed Intervenor States timely filed this motion to intervene, there will be no delay in the proceeding or prejudice to the adjudication of the original parties' rights if the motion is granted. Indeed, as explained above, no party opposes this motion. Furthermore, as explained above, the Proposed Intervenor States have a direct and substantial interest in the outcome of this litigation, which may not be adequately protected unless they are permitted to

intervene. Accordingly, granting the motion on grounds of permissive intervention also would be appropriate.

CONCLUSION

For the reasons stated above, the Proposed Intervenor States respectfully request that this Court grant their motion to intervene in this case.

Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), the undersigned counsel for the State of New York hereby represents that the other parties listed in the signature blocks below have consented to the filing of this motion to intervene.

Dated: September 2, 2014

Respectfully submitted,

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By: /s/ Michael J. Myers

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Unopposed Motion for Leave to Intervene as Respondents was filed on September 2, 2014 using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Michael J. Myers