ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHITE STALLION ENERGY CENTER, LLC, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Case No. 12-1100

MOTION FOR LEAVE TO INTERVENE AS RESPONDENTS

The Commonwealth of Massachusetts and the States of Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Rhode Island, Vermont and the District of Columbia and the City of New York (collectively, "Proposed Intervenors") hereby move for leave to intervene as parties respondent in this action, for the reasons set forth below.

BACKGROUND

1. Under Section 307(b)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7607(b)(1), the White Stallion Energy Center, LLC, filed a Petition for Review with this Court on February 16, 2012, for review of the final action of Respondent United States Environmental Protection Agency ("EPA") published in the Federal Register at 77 Fed. Reg. 9304, *et seq*., (Feb. 16, 2012), and titled "National

Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units" ("Final Rule"). EPA also refers to the Final Rule as the Mercury and Air Toxics Standards ("MATS"). 77 Fed. Reg. 9306/3.

2. EPA issued the Final Rule after remand and in direct response to this Court's decision in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). 77 Fed. Reg. 9308/2. *New Jersey v. EPA* involved review of EPA's 2005 rules that (a) purported to reverse EPA's December 2000 listing of coal- and oil-fired electricity generating units ("EGUs") as sources of mercury under section 112 of the Clean Air Act, 70 Fed. Reg. 15994 (March 29, 2005), and (b) established performance standards for new and existing sources of mercury emissions under section 111 of the Clean Air Act (the "Clean Air Mercury Rule" or "CAMR"), 70 Fed. Reg. 28606 (May 18, 2005). This Court ruled that the attempt to delist sources under section 112 was procedurally invalid and, as a result, the sources remained listed (and hence subject to regulation) under section 112. Because section 111 prohibits performance standards for sources listed under section 112, the Court further ruled that CAMR was void and remanded the matter to EPA. 517 F.3d at 583-84.

3. The MATS is designed to reduce by 90% emissions of mercury by the electric power industry through the application of various control technologies already available in the market and used in the industry. Implementation of these technologies will also result in substantial reductions in emissions of other toxic metals and co-beneficial reductions in small particulates (2.5 microns in diameter and below) and sulfur dioxide, a precursor of small particulates. EPA estimates that the dollar value of health benefits of the Final Rule will outweigh the costs by between three-to-one and nine-to-one. 77 Fed. Reg. 9306. The Final Rule allows existing sources three years to comply, and notes that up to two additional years may be allowed in certain special cases.

4. The Proposed Intervenors request leave to intervene in this action under Rule 15(d) of the Federal Rules of Appellate Procedure because the Court's action on the petition for review will affect the public health and welfare of their residents.

ARGUMENT

A. The Proposed Intervenors Have Direct and Substantial Interests in the Outcome of this Action that Warrant Intervention under Fed. R. App. Pro. Rule 15(d).

5. Rule 15(d) of the Federal Rules of Appellate Procedure imposes no specific requirements on a party seeking to intervene other than that it must explain its interest in the proceeding. Rule 15(d) has been interpreted to permit

intervention where the intervenor has a direct and substantial interest in the outcome of the action. *See, e.g., Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (allowing Rule 15(d) intervention because petitioners were "directly affected by" application of agency policy); *New Mexico Dept. of Human Servs. 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"). In determining whether a potential intervenor has a direct and substantial interest in a particular controversy, courts should consider the design of the statute at issue. *Texas v. United States Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985) (denying intervention to 31 utilities whose only participation in the statutory scheme was to provide funding).

6. Here, the Proposed Intervenors have a direct and substantial interest in the outcome of this action that is consistent with the statutory purpose of protecting public health and welfare. Many of the Proposed Intervenors were petitioners in *New Jersey v. EPA*, 517 F.3d 574 (2008), an action they brought to ensure that EPA followed the CAA's requirement that EPA promulgate standards reflecting the "maximum achievable control technology" for hazardous air pollutants such as mercury. The MATS is a direct result of that litigation, and the same interests that

led the Proposed Intervenors to challenge the earlier rule now lead them to support MATS.

7. The Proposed Intervenors are responsible for protecting the health of their residents and the welfare of their environment. Mercury is highly toxic to humans, especially to developing fetuses and children, and wildlife. Once deposited, mercury can change into methylmercury, an even more toxic form, which is persistent and bio-accumulates in the food chain.

8. As a sector, electricity generating plants are the largest domestic source of mercury emissions in the United States. In a Technical Support Document issued with MATS, EPA reported modeling results showing that EGUs were responsible for mercury deposition throughout the eastern United States at from 0.18 to over 10 micrograms per square meter. EPA, "Revised Technical Support Document: National-Scale Assessment of Mercury Risk to Populations with High Consumption of Self-caught Freshwater Fish," at 58. *See also id*. at 65 ("U.S. EGU Hg deposition is concentrated in the eastern U.S."). EPA estimates that populations in 29% of watersheds in the United States are at risk from exposure to methylmercury from EGUs. 77 Fed. Reg. 9316/2. Moreover, in 2010, all 50 states, one U.S. territory, and three tribes had mercury advisories in effect for 16.4 million lake acres and 1.1 million river miles. EPA, *2010 Biennial National Listing of Fish Advisories*, EPA-820-F-11-014 (Nov. 2011), at 3, 5.

9. Power plants are also significant emitters of hazardous air pollutant metals such as arsenic, nickel, cadmium, chromium, lead and selenium, and the acid gases hydrogen chloride and hydrogen fluoride. Arsenic, chromium, and nickel have been classified as human carcinogens, while cadmium is classified as a probable human carcinogen. Additionally, adverse noncancer health effects associated with these pollutants include lung irritation and congestion, alimentary effects such as nausea and vomiting, and effects on the central nervous system and kidneys. 77 Fed. Reg. 9310-9311. The control technologies employed pursuant to the Final Rule to reduce mercury emissions will also substantially reduce emissions of these pollutants.

10. The Proposed Intervenors each own numerous parks with rivers, lakes, and streams that have been degraded by deposition of mercury and other hazardous air pollutants emitted by EGUs, and fish in those water bodies have been rendered unhealthful for human consumption as a result. The Proposed Intervenors' residents, many of whom rely upon freshwater fish to supplement their food supply, are put at risk by the continued deposition of hazardous air pollutants emitted by coal- and oil-fired power plants in the Proposed Intervenors' water bodies.

11. For these reasons, because this Rule resulted from the Proposed Intervenors' earlier action, and because the pollutants in issue degrade their parks

and surface waters and injure the health of their residents, the Proposed Intervenors have direct and substantial interests in the MATS Rule, sufficient to support their intervention in this action in support of the Final Rule. *See New Jersey v. EPA*, 517 F.3d 574 (2008). *See also Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (impacts of rising sea level to state-owned parks gives state standing to challenge EPA's denial of rulemaking petition).

12. Finally, the Proposed Intervenors possess an "'interest independent of and behind the titles of [their] citizens, in all the earth and air within [their] domain'" (*id.* at 518-19 *quoting Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)) that gives them each a "special position and interest" (*id*. at 518). The Supreme Court has noted: "It is of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual." *Id.* at 518. The "special solicitude" to which the petitioner-States were entitled in *Massachusetts v. EPA* (*id.* at 520) in the standing context is equally applicable to this Court's analysis here.

13. Thus, there can be no doubt that the Proposed Intervenors have an interest in the subject matter of this litigation that is both substantial and direct, supporting their right to intervene in the action. The Proposed Intervenors have sufficient interest in the rulemaking at issue to support intervention under Rule 15(d).

B. The Liberal Intervention Policies Underlying Fed. R. Civ. Pro. 24 Further Support Granting Intervention.

14. The intervention policies underlying Fed. R. Civ. Pro. 24 provide guidance in analyzing intervention under Rule 15(d), although the requirements of Fed. R. Civ. Pro. 24 do not directly apply to motions to intervene in challenges to administrative actions in the federal appellate courts. *See United States v. Bursey*, 515 F.2d 1228, 1238 n.24 (5th Cir. 1975) (policies underlying intervention in district courts may be applicable in appellate courts).

15. Addressing intervention as of right, Fed. R. Civ. Pro. 24(a) provides:

> On timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or 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.

Fed. R. Civ. Pro. 24(a)(2).

16. Rule 24(a) is construed liberally in favor of granting intervention. *See United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002); *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). The Proposed Intervenors easily meet Rule 24(a)(2)'s criteria. *See e.g., generally, Coalition for Responsible Regulation, Inc. v. EPA*, D.C. Cir., No. 09-1322, Order (May 5, 2010) (Document No. 1243328) (granting States' motion to intervene in support of EPA's Endangerment Determination made pursuant to CAA, § 202(a)).

17. The courts are especially sensitive to the needs of states to intervene in actions that implicate state laws and policy interests. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) (allowing California to intervene as of right in an antitrust enforcement action to assert "California interests in a competitive system").

18. Fed. R. Civ. Pro. 24(b), which provides for permissive intervention, gives a federal court discretion to allow intervention when a proposed intervenor makes a timely application demonstrating that it "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. Pro. 24(b)(1)(B). In exercising such discretion, courts "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. Pro. 24(b)(3). *See also Citizens for an Orderly Energy Policy, Inc. v. Suffolk County*, 101 F.R.D. 497, 502 (E.D.N.Y. 1984) (possibility of undue delay or prejudice is the "principal consideration").

19. As EPA's issuance of the Final Rule was a direct response to *New Jersey v. EPA* – a case brought by many of the Proposed Intervenors to challenge EPA's decision to delist EGUs under CAA § 112 – it is beyond doubt that the Proposed Intervenors have direct, and long-standing, interests in the subject of this action. This alone warrants that they be permitted to intervene.

C. EPA May Not Adequately Represent Proposed Intervenors' Interests.

20. Unlike Fed. R. Civ. Pro. 24(a), Rule 15(d) of the Federal Rules of Appellate Procedure does not, on its face, require a proposed intervenor to show inadequate representation by the parties in the litigation. Nevertheless, Proposed Intervenors would satisfy this element of Rule 24(a). According to the Supreme Court, "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his 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).

21. A proposed intervenor need not show that the representation of its interest *will* in fact be inadequate. *See Diamond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Moreover, "[a] governmental party that enters a lawsuit solely to represent the interests of its residents . . . *differs from other parties, public or private,* that assert their own interests, even when these interests coincide." *United States v. Hooker Chems. & Plastics Corp*., 749 F.2d 968, 992 n.21 (2d Cir. 1984) (emphasis added). Any doubts about intervention here should be resolved in favor of Proposed Intervenors. *See Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

22. EPA and Administrator Jackson may resolve or settle this action in a manner that does not square with the interests of the Proposed Intervenors. The

potential difference between the interests of the Proposed Intervenors and EPA is readily apparent in the fact that at the outset of the litigation over EPA's delisting action, the Proposed Intervenors were challenging EPA's position with respect to mercury emissions from EGUs.

D. Proposed Intervenors' Intervention Is Timely.

23. Rule 15(d) provides in relevant part that a motion for intervention is timely if filed within 30 days after the petition for review is filed. This Motion for Leave to Intervene is being filed within this time period and is therefore timely.

24. Allowing the Proposed Intervenors to intervene to protect their own rights and interests here will also not unduly delay or prejudice the rights of any other party.

25. On March 15, 2012, the Massachusetts Attorney General's Office informed counsel for Respondent and Petitioner in this case of Proposed Intervenors' intent to file this motion. Counsel for Respondent stated that Respondent is not taking a position with regard to this motion at this time, and counsel for Petitioner stated that Petitioner does not oppose the intervention sought by this motion.

26. Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), the undersigned counsel for the Commonwealth of Massachusetts hereby represents that the other parties listed in

the signature blocks below have consented to the filing of this Motion for Leave to Intervene as Respondents.

CONCLUSION

For the foregoing reasons, the Proposed Intervenor States respectfully request that this Court grant their motion to intervene as party-respondents.

Dated: March 16, 2012

Respectfully Submitted,

FOR THE COMMONWEALTH OF MASSACHUSETTS

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Intervene as Respondents filed through the Court's CM/ECF System has been served electronically on all registered participants of the CM/ECF System as identified in the Notice of Docket Activity, and that paper copies will be sent by first class mail, postage prepaid, to those indicated as non-registered participants who have not consented in writing to electronic service, on March 16, 2012.

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