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

EME HOMER CITY GENERATION, L.P.,	)	
Petitioner,	)	
v.	)	Case No. 11-1302
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LISA P. JACKSON, ADMINISTRATOR	)	
Respondents.	)	

Consolidated with 11-1315, 11-1323, 11-1329 and 11-1338

MOTION OF AMERICAN LUNG ASSOCIATION TO INTERVENE IN SUPPORT OF RESPONDENT

The American Lung Association ("Movant-Intervenor") respectfully moves pursuant to Fed. R. App. P. 15(d) and Rule 15(b) of this Court to intervene in support of respondent U.S. Environmental Protection Agency ("EPA") in the above captioned proceeding for judicial review of the EPA's "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals," 76 Fed. Reg. 48208 (August 8, 2011) (the "Cross-State Air Pollution Rule" or the "Rule"), and in any future petitions for review challenging the same agency action, including but not limited to 11-1315,

11-1323, 11-1329 and 11-1338, which have been consolidated with 11-1302 by orders of this Court dated September 14, 2011 and of even date herewith.

Petitioner EME Homer City Generation, L.P., has stated that it will not take any position on this motion at this time, and reserves the right to respond to this motion. Petitioner Luminant Generation Company, LLC *et al.* has stated that it takes no position on this motion at this time, pending review of same. Petitioner GenOn Energy, Inc. was contacted for its position on this motion, but no response was received by the time of this filing. Petitioners State of Kansas and State of Texas, *et.al*. have each stated that they will not oppose this motion. Respondent takes no position on this motion, and will not file a response. Proposed Intervenor-Respondents Exelon Corporation, Clean Air Council, Environmental Defense Fund and Sierra Club each consent to this motion.

I. INTRODUCTION

Movant-Intervenor is a national public health organization dedicated to saving lives by improving lung health and preventing lung disease, and has participated in the administrative proceedings related to the EPA action under challenge. The members of Movant-Intervenor moreover are substantially and significantly impacted by the harm now ongoing as a result of air pollution from electric generating units that will face more stringent emission limitations under

the Rule. These members will directly benefit from the reductions in air pollution the Rule will require, and correspondingly, would be injured if the Rule is weakened or delayed.

The Rule requires significant reductions of nitrogen oxide ("NOx") and sulfur dioxide ("SO_2") emissions in 27 states in the eastern United States that significantly affect the ability of downwind states to attain and maintain compliance with the 1997 and 2006 fine particulate ("$PM_{2.5}$") national ambient air quality standards ("NAAQS") and the 1997 ozone NAAQS.[1] The Rule is a replacement for EPA's 2005 Clean Air Interstate Rule ("CAIR"),[2] and responds to this Court's remand of CAIR and the 2006 CAIR Federal Implementation Plans ("FIPs") in *North Carolina v. EPA*.[3]

Petitioner seeks to review EPA's final Rule, and has also filed a Motion for a Stay or, In the Alternative, Expedited Review. For the reasons set forth below, Movant-Intervenor seeks to intervene in support of respondent EPA in this proceeding.

II. BACKGROUND

[1] NOx reacts with volatile organic compounds and other pollutants in the presence of sunlight to form ozone, while SO_2 and NOx each react with other compounds in the atmosphere to form fine particulate matter.
[2] 70 Fed. Reg. 25162 (May 12, 2005).
[3] *North Carolina v. EPA*, 531 F.3d 896, modified on reh'g, 550 F.3d 1176 (D.C. Cir. 2008).

A. Movant-Intervenor

Movant-Intervenor is a nonprofit organization founded in 1904 working to save lives by improving lung health and preventing lung disease in the United States through research, education and advocacy.

1. The American Lung Association ("ALA") is a national nonprofit organization with chartered organizations (akin to state chapters) in all fifty states and the District of Columbia. *See* Exhibit B, Declaration of Charles Connor. ALA's mission statement is "to save lives by preventing lung disease and promoting lung health." As scientific evidence has shown that air pollution is a primary contributor to the worsening of lung disease, the ALA has for many years conducted advocacy and litigation to promote full and timely implementation of the Clean Air Act. ALA, through its advocacy and education programs aimed at protecting human health, is pursuing initiatives at the state and national levels designed to support efforts to reduce emissions of pollutants such as NOx and SO_2 from all sources, including major sources such as electric generating plants.

B. The Rule

The Clean Air Act (the "Act") requires states to include in their plans to implement the NAAQS "adequate provisions…prohibiting…any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will…contribute significantly to nonattainment in, or interfere with

maintenance by, any other State with respect to any such national primary or secondary air quality standard…." Section 110(a)(2)(D)(i)(I). If a state does not meet that requirement on its own, EPA must require it to do so or impose a federal implementation plan (FIP).[4] Once EPA has determined that transported pollution significantly contributes to downwind nonattainment problems, it must require that pollution to be eliminated.[5] EPA's final Rule is intended to fulfill these obligations, and to do so in a manner that meets the Court's concerns with CAIR set forth in *North Carolina v EPA.*

EPA has thoroughly documented in the Rule proposal and elsewhere the problem of transported air pollution and its extensive and harmful effect on downwind public health and welfare and resulting NAAQS attainment problems.[6] In this case, EPA has shown that in the absence of regional reductions in NOx and SO_2 emissions, ozone and $PM_{2.5}$ nonattainment will continue to be experienced in

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[4] Section 110(c)(1) of the Act provides: "The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or
(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan."

[5] *See also, North Carolina v. EPA*, 531 F.3d at 908.

[6] *See, e.g.*, 75 Fed. Reg. 45210 at 45219-21 (proposed Transport Rule); *see also* 69 Fed. Reg. 4566 at 4575-4609 (CAIR proposal); 63 Fed. Reg. 57356 *et.seq*. (NOx SIP Call).

the East, South and Midwest. More specifically, EPA has found that NOx and SO_2 emissions from 27 states contribute significantly to nonattainment of the $PM_{2.5}$ or ozone NAAQS in other states.[7]

EPA's analysis demonstrates that the Rule will produce important public health and environmental benefits and will be dramatically cost-effective. According to EPA estimates, by 2014 the final Rule will annually prevent approximately 13,000 to 34,000 premature deaths,[8] 15,000 non-fatal heart attacks, and about 1.7 million work days lost to illness.[9] EPA also estimates that benefits from the rule will exceed costs by over 100 times (an estimate which omits many substantial benefits that were not included because EPA could not reduce them to a fixed monetary value).[10]

The Rule will also serve the primary goal of section 110(a)(2)(D) of the Act—that is, helping states attain applicable air quality standards by eliminating upwind air pollution that significantly contributes to NAAQS nonattainment and maintenance problems. EPA estimates that once the Rule is fully implemented in 2014, most current nonattainment areas in the eastern United States will be able to

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[7] *See, e.g.*, 76 Fed. Reg. 48208 at 48209-10.
[8] The lower estimate is based on the mortality coefficient from a 2002 Pope, et al study; the higher estimate is based on a 2006 Laden et al study. 76 Fed. Reg. 48208 at 48308-11.
[9] *Id.*
[10] 76 Fed. Reg. 48208 at 48311-17.

come into attainment with and maintain the 1997 ozone NAAQS and the 1997 and 2006 fine particulate matter NAAQS.[11]

The Rule replaces CAIR and its associated emission allowance trading programs. Furthermore, the Rule replaces state implementation plans ("SIPs") and FIPs that were previously promulgated to comply with the invalidated CAIR with new FIPs that implement this Rule.[12] As EPA explains, its prior approvals of CAIR-related SIP submissions from various states subject to CAIR were in error because they were based on the premise that compliance with CAIR would satisfy a state's obligations under section 110(a)(2)(D)(i)(I) of the Act,[13] a premise negated by this Court's decision in *North Carolina v. EPA*.[14] Furthermore, this Rule does provide states the flexibility to promulgate their own SIPs to replace the applicable FIP in whole or in part.[15]

III. GROUNDS FOR INTERVENTION

Movant-Intervenor should be permitted to intervene in these proceedings in order to support its organizational interests and the specific interests of its members in reduction of air pollution in the eastern United States. This motion is

[11] 78 Fed. Reg. 48208 at 48210.
[12] 78 Fed. Reg. 48208 at 48321-22.
[13] 78 Fed. Reg. 48208 at 48220-22.
[14] *North Carolina v. EPA*, 531 F.3d at 908, 916.
[15] 78 Fed. Reg. 48208 at 48321, 48326-32.

timely filed within thirty days of August 23, 2011, when the petition for review in Case No. 11-1302 was filed.[16] Fed. R. App. P. 15(d); *Alabama Power Co. v. I.C.C.*, 852 F.2d 1361, 1367 (D.C. Cir. 1988).

A. Movant-Intervenor's Organizational Interests in this Proceeding.

Movant-Intervenor has a substantial interest in this proceeding to advance its organizational mission of saving lives and improving lung health in advocating reduction of NOx and SO_2 emissions from power plants. Movant-Intervenor has worked for years to reduce U.S. power plant emissions. Its members, who have vital interests in efforts to reduce these emissions, benefit substantially from this work.

Movant-Intervenor has advanced its organizational mission and the interests of its members by advocating reduction of power plant air pollution over the last two decades. More particularly, Movant-Intervenor has filed comments on EPA's rulemakings under section 110(a)(2)(D) of the Clean Air Act, including written comments on EPA's proposal of this Rule, as well as comments on EPA's proposed CAIR, the predecessor to this Rule. *See, e.g.*, Exhibit B, Declaration of Charles Connor.

The Clean Air Act does not limit intervention by parties that have participated extensively in the agency's decision, *see* 42 U.S.C. § 7607(b), but

[16] Petitions in other cases consolidated herewith were all filed after August 23, 2011.

Movant-Intervenor's significant participation in administrative proceedings related to EPA's section 110(a)(2)(D) actions strongly favors its motion for leave to intervene.

B. Movant-Intervenors' Member's Interests Will Be Harmed if Petitioners Succeed in Undermining the Rule.

Movant-Intervenor's history of engagement with EPA efforts to reduce transported air pollution in the eastern United States reflects its members' significant interest in remedies for the current and future public health harms associated with transported power plant emissions.

Reduction of ozone and fine particle concentrations in the ambient air is a major human health imperative. EPA summarized the human health impacts of fine particulates in the preamble to the proposed Rule, as follows:

> Fine particles are associated with a number of serious health effects, including premature mortality, aggravation of respiratory and cardiovascular disease…, lung disease, decreased lung function, asthma attacks, and certain cardiovascular problems.[17]

EPA also there described the adverse human health effects of ozone, which can include premature mortality, reduced lung function, aggravation of asthma, coughing, respiratory and throat pain and chest pain.[18] *See also*, Exhibit A, Declaration of Mann-Mann (Amy) Chuang.

[17] 75 Fed. Reg. 45210 at 48219.
[18] 75 Fed. Reg. 45210 at 48220.

Movant-Intervenor's members reside and work in areas that are impacted by transported fine particulate and ozone, as well as their precursor emissions, NOx and SO_2, from electric generating plants, and thus will benefit if this pollution is reduced by the Rule. *See, e.g.*¸ *See* Exhibit B, Declaration of Charles Connor; Exhibit A, Declaration of Mann-Mann (Amy) Chuang.

These health benefits and concerns establish Movant-Intervenor's "interest" under Rule 15(d) and its standing to sue under Article III of the Constitution, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), whether or not standing is independently required of parties who, as here, seek to intervene in support of a respondent.[19] For the same reasons, Movant-Intervenor falls squarely within the "'zone of interests'" protected or regulated by the relevant provisions of the Clean Air Act. *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (quoting *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

[19] *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("Requiring standing of someone who seeks to intervene as a defendant runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction.") (discussing district court intervention under Fed. R. Civ. P. 24, citing *Virginia v. Hicks*, 539 U.S. 113, 117-22 (2003)); *cf. Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003) (overturning district court decision denying intervention in support of defendant under Fed. R. Civ. P. 24, and rejecting court's conclusion that proposed intervenor lacked Article III standing); *Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533, 538-39 (D.C. Cir. 1999) (discussing standing to intervene question).

The disposition of this case "'may as a practical matter impair or impede'" Movant-Intervenor's interests. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)). Since Petitioner challenges the overall implementation scheme for the entire Rule, Movant-Intervenor's members will be harmed if Petitioner succeeds in its efforts here to delay, weaken or overturn the emission reductions required by the Rule throughout the eastern United States.

C. Movant-Intervenor Brings an Important Perspective to this Action.

This Court's practice of granting intervention to private organizations – including public health groups, environmental groups, trade organizations, and others – supporting agency actions in which they have an interest, reflects this recognition that private entities have a distinctive perspective that contributes to this Court's careful consideration of challenges to important agency actions.

Movant-Intervenor's status as a private non-profit organization focused solely and systematically on public health objectives, whose members live in the states affected by the Rule, as well as Movant-Intervenor's extensive experience with the development and implementation of public health protection programs, including the regulations at issue here, provide it with a unique and distinctive perspective on the issues at stake.

This Court has regularly granted intervention in circumstances similar to, or indistinguishable from, the circumstances here. This Court, moreover, has previously granted intervention to Movant-Intervenor to oppose industry challenges to other EPA actions under the Clean Air Act. *See, e.g*., *American Trucking Associations, Inc. v. EPA*, 175 F. 3d 1027 (D.C. Cir. 1999; *Whitman v. American Trucking Ass'n,* 531 U.S 457 (2001) (ALA granted leave to intervene in both this Court and the US Supreme Court in support of EPA).

IV. CONCLUSION

The American Lung Association should be granted leave to intervene in support of respondent.

Respectfully submitted,

/s/ *David Marshall*

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Dated: September 22, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the foregoing MOTION OF AMERICAN LUNG ASSOCIATION TO INTERVENE IN SUPPORT OF RESPONDENT, was electronically filed with the Clerk using the CM/ECF system, which will send notification of said filing to the attorneys of record, who are required to have registered with the said system.

/s/ David Marshall

Dated: September 22, 2011 David Marshall