ORAL ARGUMENT NOT SCHEDULED

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

STATE OF TEXAS, and TEXAS COMMISION ON ENVIRONMENTAL QUALITY, Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY, and REGINA A. MCCARTHY, Administrator, Respondents.	Case No. 16-1428 (and Consolidated Cases)

UNOPPOSED MOTION OF THE STATES OF NEW YORK, MARYLAND, NEW HAMPSHIRE, RHODE ISLAND, AND VERMONT, AND THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO INTERVENE AS RESPONDENTS IN ALL CONSOLIDATED CASES EXCEPT NOS. 16-1443 AND 16-1448

ERIC T. SCHNEIDERMAN
Attorney General of New York
MICHAEL J. MYERS
ANDREW G. FRANK
MORGAN A. COSTELLO
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2382

Attorneys for Proposed Intervenor State of New York

Counsel for Additional Proposed Intervenors Listed Below on Signature Page

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), New York, Maryland, Massachusetts, New Hampshire, Rhode Island, and Vermont (Moving States) move for leave to intervene as respondents in support of the final agency action taken by respondents U.S. Environmental Protection Agency and Administrator Regina McCarthy (collectively, EPA), in all except two of the consolidated petitions for review of a regulation limiting interstate air pollution.[1] Respondents consent to this motion. Counsel for petitioners in *Wisconsin, et al. v. EPA* (Case No. 16-1406) stated that the five petitioner states consent to this motion. Counsel for petitioners in the other cases indicated they take no position on this motion. Counsel for environmental and public health movant-intervenors stated their consent to this motion.

INTRODUCTION

On October 26, 2016, EPA published a final rule entitled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS" (Cross-State Update Rule or Rule), 81 Fed. Reg. 74,504 (Oct. 26, 2016). EPA promulgated the Cross-State Update Rule to reduce the interstate transport of air pollutants that significantly contribute to harmful levels of ozone in downwind areas, such as the New York City metropolitan area. EPA expects that the Rule will reduce ozone season

[1] The Moving States do not seek to intervene as respondents in *Sierra Club v. EPA*, No. 16-1443 (filed Dec. 23, 2016), or *State of Delaware Dep't of Natural Resources & Envtl. Control v. EPA*, No. 16-1448 (filed Dec. 27, 2016).

emissions of oxides of nitrogen (NO_X) in 22 eastern states that can be transported downwind as NOx or, after transformation in the atmosphere, as ozone, and negatively affect air quality and public health in downwind states. The Rule partially addresses EPA's statutory obligation under the Clean Air Act (Act) to promulgate federal implementation plans to address the interstate transport of pollutants under the "good neighbor" provision of the Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I), where states have not included adequate provisions in their state implementation plans. *See id.*, § 7410(c)(1).

Since publication, 16 petitions for review of the Rule have been filed.[2] The Court has consolidated all of the petitions and designated *State of Wisconsin v. EPA*, No. 16-1406, as the lead case. In light of the significant air quality and public health benefits the Rule would provide New York and other downwind states, the

[2] *State of Wisconsin, v. EPA*, No. 16-1406 (filed Nov. 23, 2016); *State of Texas.v. EPA*, No. 16-1428 (filed Dec. 20, 2016); *Murray Energy Corp v. EPA*, No. 16-1429 (filed Dec. 22, 2016); *Western Farmers Elec. Coop. v. EPA*, No. 16-1432 (filed Dec. 22, 2016); *Utility Air Regulatory Group v. EPA*, No. 16-1435 (filed Dec. 23, 2016); *Midwest Ozone Group v. EPA*, No. 16-1436 (filed Dec. 22, 2016); *Indiana Energy Ass'n v. EPA*, No. 16-1437 (filed Dec. 22, 2016); *City of Ames, Iowa v. EPA*, No. 16-1438 (filed Dec. 23, 2016); *Luminant Generation Co. v. EPA*, No. 16-1439 (filed Dec. 23, 2016); *Mississippi Power Co. v. EPA*, No. 16-1440 (filed Dec. 23, 2016); *The Ohio Utility Group v. EPA*, No. 16-1441 (filed Dec. 23, 2016); *Wisconsin Paper Council v. EPA*, No. 16-1442 (filed Dec. 23, 2016); *Sierra Club v. EPA*, No. 16-1443; *Oklahoma Gas & Elec. Co. v. EPA*, No. 16-1444 (filed Dec. 23, 2016); *Prairie State Generating Co. v. EPA*, No. 16-1445 (filed Dec. 23, 2016); *State of Delaware Dep't of Natural Resources & Envtl. Control v. EPA*, No. 16-1448.

Moving States seek the Rule's prompt implementation. For these reasons, the Moving States seek to intervene as respondents in defense of the Rule.

BACKGROUND

I. National Ambient Air Quality Standards and State Implementation Plans

In 1970, Congress significantly restructured federal air pollution law, creating the modern Clean Air Act because of "dissatisfaction with the progress of existing air pollution programs." *Alaska Dept. of Envtl. Conserv. v. EPA*, 540 U.S. 461, 469 (2004) (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976)). In particular, Congress authorized EPA to set nationwide air quality standards for a number of air pollutants, including ozone. *See, e.g.*, 42 U.S.C. § 7409(a); *Save Our Health Org. v. Recomp of Minn., Inc.*, 37 F.3d 1334, 1336 n.2 (8th Cir. 1994). These standards, known as National Ambient Air Quality Standards, or NAAQS, "define [the] levels of air quality that must be achieved to protect public health and welfare." *Alaska*, 540 U.S. at 469 (quoting R. Belden, *Clean Air Act* 6 (2001)). For each pollutant covered by a NAAQS, EPA classifies each county across the nation as one of the following: (1) an attainment area, if the level of the pollutant in the air is at or below the standard; (2) as a nonattainment area, if the level of the pollutant exceeds the standard; or (3) unclassifiable, if insufficient data is available to determine if the pollutant meets or exceeds the standard. 42 U.S.C. § 7407(d)(1)(A) & (B).

States are primarily responsible for ensuring that their air quality meets the NAAQS. *Id.* § 7407(a). Within three years of promulgation or revision of a NAAQS, the Act requires each state to submit a state plan consisting of air pollution regulations or other requirements to achieve and maintain compliance with the NAAQS. *See* 42 U.S.C. § 7410(a)(1) ("a plan which provides for implementation, maintenance, and enforcement of [NAAQS]"); *Alaska*, 540 U.S. at 469-70.

EPA promulgated a revised NAAQS for ozone on March 12, 2008, 73 Fed. Reg. 16,436 (Mar. 27, 2008) (2008 ozone NAAQS). Ozone is a gas that forms when other atmospheric pollutants, known as ozone "precursors," such as NO_X and volatile organic compounds, react in the presence of sunlight. 80 Fed. Reg. 65,292, 65,299 (Oct. 26, 2015). EPA has found significant negative health effects in individuals exposed to elevated levels of ozone, including coughing, throat irritation, lung tissue damage, and aggravation of existing conditions, such as asthma, bronchitis, heart disease, and emphysema. *Id.* at 65,302-11. Exposure to ozone has been linked to premature mortality. *Id.* Some subpopulations are particularly at risk from exposure to ozone pollution, including children, the elderly, and those with existing lung diseases, such as asthma. *Id.*

The Moving States have each established stringent state implementation plans with some of the strictest air quality control regulations in the country.

Nonetheless, due in large part to emissions of pollutants in upwind states that the wind carries into the Moving States, the Moving States have had difficulty achieving and/or maintaining attainment with the ozone NAAQS.

II. Interstate Transport and the "Good Neighbor" Provision

Congress recognized that states might have difficulty in achieving attainment of the NAAQS due to emissions from upwind states. To address that problem, Congress enacted the "good neighbor" provision, Clean Air Act section 110(a)(2)(D)(i), which bars a state from making a "significant contribution" to downwind nonattainment or interfere with maintenance of healthy air in other states. Under that provision, each state implementation plan must include 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 interference with maintenance by, *any other State*" with respect to the NAAQS. 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added). If a state fails to submit a plan that satisfies its obligation under the "good neighbor" provision, the Act requires EPA to fill a backstop role by issuing a federal plan for that state that prohibits interstate transport of air pollution that will significantly contribute to nonattainment in, or interfere with maintenance by, any other state with respect to any NAAQS. *Id.* § 7410(c)(1).

Under section 110(a)(2)(D)(i), EPA has made several efforts to reduce upwind states' significant contributions to downwind attainment and maintenance problems. For example, in 2003, EPA began work on a rule to require reductions in pollutants that significantly contributed to transport of ozone and particulate matter ($PM_{2.5}$) across state lines in the eastern United States, resulting in the agency's 2005 promulgation of the Clean Air Interstate Rule (CAIR), 70 Fed. Reg. 25,162 (May 12, 2005). In 2008, this Court found CAIR unlawful on several grounds, including its failure to timely control each individual state's contribution to downwind nonattainment, and remanded the rule to EPA. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). This Court originally vacated the rule, but later lifted the vacatur, leaving CAIR in place until EPA revised it. *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008).

In 2011, EPA promulgated the Cross-State Air Pollution Rule (CSAPR), 76 Fed. Reg. 48,208 (Aug. 8, 2011), to replace CAIR. CSAPR established state-specific emissions allowance trading budgets for twenty-eight states to substantially reduce emissions of pollutants from fossil fuel-fired electric generating units that significantly contribute to ozone and $PM_{2.5}$ attainment or maintenance problems in downwind states. CSAPR was subject to four years of litigation in both this Court and the Supreme Court. This Court initially stayed and eventually vacated implementation of CSAPR. *EME Homer City Generation, L.P.*

v. EPA, 696 F.3d 7 (D.C. Cir. 2012). The Supreme Court reversed the decision and remanded the case. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). On July 28, 2015, this Court ruled on the remaining legal issues, largely upholding EPA's approach to addressing interstate transport in CSAPR. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015).

III. The CSAPR Update Rule and Its Air Quality Benefits for Moving States

The CSAPR Update Rule challenged in these consolidated actions promulgates federal implementation plans for 22 states to address their "good neighbor" obligations with respect to the 2008 ozone NAAQS. The federal plans require power plants in these states to participate in a regional allowance trading program beginning in May 2017 that will reduce emissions of NO_X to assist downwind states in meeting a July 2018 attainment date for the 2008 ozone NAAQS.

In the CSAPR Update Rule, EPA found that, for most states, the emission reductions required by the rule would not represent the full amount of reductions necessary for upwind states to satisfy the requirements of the "good neighbor" provision, but rather would constitute a portion of each upwind state's significant contribution to nonattainment or interference with maintenance of the 2008 ozone

NAAQS at downwind areas.[3] Nonetheless, the CSAPR Update Rule is an important step in quantifying the emission reduction obligations of upwind states and addressing EPA's federal plan obligations pursuant to the "good neighbor" provision. While not fully addressing the interstate transport of pollution, the emission reductions required by the rule will assist Moving States in efforts to attain or maintain compliance with the 2008 ozone NAAQS and will substantially reduce harmful air quality impacts in Moving States from upwind states.

ARGUMENT

Federal Rule of Appellate Procedure 15(d) requires that a party moving to intervene set forth its interest and the grounds for intervention. 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); *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with "substantial interest in the outcome"). The decision to allow intervention is guided by practical considerations and the "need for a liberal application in favor of

[3] For this reason, some parties, including downwind states, are challenging the Rule as being legally inadequate. *See, e.g.*, *State of Delaware Dep't of Natural Resources & Envtl. Control v. EPA*, No. 16-1448.

permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 700, 702 (D.C. Cir. 1967).

I. The Moving States Meet the Rule 15(d) Standard

The Moving States have a direct and substantial interest in the outcome of this litigation, namely, upholding the general validity of the CSAPR Update Rule. For decades, the Moving States have struggled to meet or maintain the NAAQS for ozone in certain areas. To remedy this, Moving States have, on their own initiative, imposed stringent standards on electric generators and other emissions sources, including motor vehicles, in their states – more stringent than those required by the federal government and many other states. But those measures have been insufficient due in large part to pollution from upwind sources. The Moving States expect the CSAPR Update Rule to result in significant reductions in pollutants from upwind states – beyond those that CSAPR has provided – that will significantly improve air quality in the Moving States and materially assist their efforts to attain the current NAAQS in areas that do not meet those standards. The Moving States have been waiting for such reductions since at least 2003, when EPA started to work on CAIR, the predecessor to CSAPR and the CSAPR Update Rule. Thus, the Moving States have a direct and substantial interest in intervening as respondents to support the Rule in general. This Court has previously granted motions to intervene filed by downwind states in similar challenges to EPA "good

neighbor" rules, including most recently in *EME Homer City v. EPA*. *See, e.g.*, *EME Homer City v. EPA*, No. 11-1302 and consolidated cases, Order, Doc. No. 1351287 (Jan. 5, 2012) (granting motions to intervene filed by New York, North Carolina and Illinois).

In addition, the Moving States expect some petitioners to contend that EPA should postpone implementation of the Rule. The Moving States have a strong interest in intervening as respondents to fight any such delay and ensure that the pollution reductions from the Rule occur soon, at the times EPA has reasonably scheduled.

II. The Moving States Also Meet the Standard for Intervention under Federal Rule of Civil Procedure 24

In determining whether to allow intervention under Rule 15(d), this Court has sometimes looked to whether the movant would satisfy Federal Rule of Civil Procedure 24(a)(2) regarding intervention as of right in the district courts. *See Building & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). Thus, this Court has described the considerations relevant to intervention under this provision as follows:

> [Q]ualification for intervention as of right depends on the following four factors: (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether 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; and (4) whether the

> applicant's interest is adequately represented by existing parties.

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (citations and internal quotations omitted). Here, all four factors support granting this motion.

Regarding the first factor, the Moving States' motion for intervention is timely, in that it has been filed and served within thirty days of the filing of fifteen of the petitions for review of the Rule. *See* Fed. R. App. P. 15(d); Circuit Rule 15(b).

As for the second factor, the Moving States' strong interests in the subject matter of these consolidated petitions for review are set out in Argument section I above. The Moving States need the Rule's pollution reductions in upwind states to assist in attaining and maintaining the ozone NAAQS, and this need justifies their intervention as respondents to defend the Rule.

Similarly, the third factor – *i.e.*, the potential for the ultimate disposition of the litigation to impair or impede the Moving States' ability to protect those interests – also supports their intervention. A decision invalidating the Rule would deny the Moving States the upwind pollution reductions they need to assist in meeting their legal obligations under the Clean Air Act.

The final criterion under Rule 24(a)(2) is whether the Moving States' interests are adequately protected by existing parties. A party "seeking intervention ordinarily is required to make only a minimal showing that representation of his

interest *may* be inadequate." *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) (emphasis added); *see also Fund for Animals*, 322 F.3d at 735. Courts have previously recognized that the interests of one governmental entity may not be the same as those of another governmental entity. *See Forest Conserv. Council v. United States Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995). Here, as shown above, the Moving States have unique interests in ensuring that the Rule is upheld, so that upwind states reduce the pollution that prevents the Moving States from complying with the health-protecting NAAQS. Thus, the Moving States would also satisfy the standard for intervention as of right under Federal Rule of Civil Procedure 24(a)(2).

CONCLUSION

For the reasons stated above, the Moving States respectfully request that their motion to intervene as respondents in all of the consolidated petitions for review, except Nos. 16-1443 and 16-1448, be granted.

Dated: January 19, 2017

Respectfully submitted,

FOR THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

By: /s/ Michael J. Myers

Michael J. Myers
Morgan A. Costello
Assistant Attorney General
NYS Office of the Attorney General
The Capitol
Albany, NY 12224
Telephone: (518) 776-2382
Facsimile: (518) 650-9363
E-mail: michael.myers@ag.ny.gov
morgan.costello@ag.ny.gov

Andrew G. Frank
Assistant Attorney General
NYS Office of the Attorney General
120 Broadway
New York, NY 10271
Telephone: (212) 416-8271
Facsimile: (212) 416-6007
E-mail: andrew.frank@ag.ny.gov

Attorneys for the State of New York

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
ATTORNEY GENERAL OF MARYLAND

By: /s/ Michael F. Strande
Assistant Attorney General
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, MD 21230
Telephone: (410) 537-3421
Email: Michael.strande@maryland.gov

FOR THE STATE OF NEW HAMPSHIRE

JOSEPH A. FOSTER
ATTORNEY GENERAL

By: /s/ K. Allen Brooks
K. Allen Brooks
Senior Assistant Attorney General
Chief, Environmental Bureau
33 Capitol Street
Concord, NH 03301
(603) 271-3679
Email: k.allen.brooks@doj.nh.gov

FOR THE STATE OF RHODE ISLAND

PETER F. KILMARTIN
ATTORNEY GENERAL

By: /s/ Gregory S. Schultz
Gregory S. Schultz
Special Assistant Attorney General
Rhode Island Department of Attorney General
150 South Main Street
Providence, RI 02903
Telephone: (401) 274-4400
Email: gSchultz@riag.ri.gov

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: /s/ Nicholas F. Persampieri
Nicholas F. Persampieri
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
Telephone: (802) 828-6902
Email: nick.persampieri@vermont.gov

FOR THE COMMONWEALTH
OF MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL

By: /s/ Jillian Meade Riley
Jillian Meade Riley
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
Telephone: (617) 963-2424
Email: jillian.riley@state.ma.us

CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), proposed intervenors-respondents New York, Maryland, Massachusetts, Rhode Island, and Vermont submit the following certificate as to parties, intervenors and *amici curiae* in the consolidated petitions for review in Case Nos. 16-1406, 16-1428, 16-1429, 16-1432, 16-1435, 16-1436, 16-1437, 16-1438, 16-1439, 16-1440, 16-1441, 16-1442, 16-1443, 16-1444, 16-1445, and 16-1448.

District Court

This case involves consolidated direct petitions for review of a rulemaking by EPA entitled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS" (Cross-State Update Rule or Rule), 81 Fed. Reg. 74,504 (Oct. 26, 2016). There were accordingly no district court proceedings.

The Proceedings Before This Court

Petitioners

The petitioners in these consolidated actions are:

Case No. 16-1406: State of Wisconsin
State of Alabama
State of Arkansas
State of Ohio
State of Wyoming

Case No. 16-1428: State of Texas
Texas Commission on Environmental Quality

Case No. 16-1429: Murray Energy Corp.

Case No. 16-1432: Western Farmers Electric Cooperative

Case No. 16-1435: Utility Air Regulatory Group

Case No. 16-1436: Midwest Ozone Group

Case No. 16-1437: Indiana Energy Association
Indiana Utility Group

Case No. 16-1438: City of Ames, Iowa

Case No. 16-1359: Luminant Generation Company LLC
Big Brown Power Company LLC
Luminant Mining Company LLC
La Frontera Holdings, LLC
Oak Grove Management Company, LLC
Sandow Power Company, LLC

Case No. 16-1440: Mississippi Power Company

Case No. 16-1441: The Ohio Utility Group
AEP Generation Resources Inc.
Buckeye Power, Inc.
The Dayton Power and Light Company
Duke Energy Ohio, Incorporated
Dynegy Commercial Asset Management, LLC
First Energy Solutions
Ohio Valley Electric Corporation

Case No. 16-1442: Wisconsin Paper Council
Wisconsin Manufacturers and Commerce
Wisconsin Industrial Energy Group
Wisconsin Cast Metals Association

Case No. 16-1443: Sierra Club
Appalachian Mountain Club

Case No. 16-1444: Oklahoma Gas and Electric Company

Case No. 16-1445: Prairie State Generating Company, LLC

Case No. 16-1448: State of Delaware Department of Natural Resources and Environmental Control

Respondents

The respondents in these consolidated petitions for review are:

U.S. Environmental Protection Agency; and
Gina McCarthy, in her official capacity as Administrator of EPA.

Intervenors

The following entities have moved to intervene:

American Lung Association;
Appalachian Mountain Club
Environmental Defense Fund;
Sierra Club.

Amici Curiae

The Moving States are unaware of any entities that have asked for leave to appear or have been granted leave to appear as *amicus curiae*.

Dated: January 19, 2017

/s/ Michael J. Myers

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion of the States of New York, Maryland, Rhode Island, and Vermont and the Commonwealth of Massachusetts, for Leave to Intervene as Respondents in All Consolidated Cases Except Nos. 16-1443 and 16-1448* was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit on January 19, 2017 using the Court's CM/ECF system, and that service will therefore be accomplished through notice sent by the CM/ECF system to all counsel of record for petitioners, respondents and other litigants registered in the CM/ECF system for Case Nos. **.** 16-1406, 16-1428, 16-1429, 16-1432, 16-1435, 16-1436, 16-1437, 16-1438, 16-1439, 16-1440, 16-1441, 16-1442, 16-1443, 16-1444, 16-1445, AND 16-1448.

Dated: January 19, 2017

/s/ Michael J. Myers