

CASE NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 19-1140 and 19-1165

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

AMERICAN LUNG ASSOCIATION, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
et al.,
Respondents.

STATE OF NEW YORK, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

**MOTION OF WEST VIRGINIA AND 20 OTHER
STATES, STATE OFFICERS, AND STATE AGENCIES TO
INTERVENE AS RESPONDENTS**

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Pursuant to Federal Rule of Appellate Procedure 15(d) and D.C. Circuit Rule 15(b), the States of West Virginia, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Kentucky by and through Governor Matthew G. Bevin, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming, Governor Phil Bryant of the State of Mississippi, and the Mississippi Public Service Commission (collectively, “Intervening States”) move for leave to intervene as respondents in the above-captioned case.

BACKGROUND

On July 8, 2019, the Environmental Protection Agency (“EPA”) issued a final rule titled *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (July 8, 2019) (“the Rule”). The Rule, promulgated pursuant to the Clean Air Act, finalizes three separate and distinct rulemakings. *First*, it repeals a prior rule—*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the “Clean Power Plan” or “CPP”). *Second*, the Rule sets guidelines for greenhouse gas

emissions from existing coal-fired electric utility generating units (“EGUs”) under Section 111(d) of the Clean Air Act (the “Affordable Clean Energy Rule” or “ACE Rule”). As relevant to this motion, the ACE Rule details how States should establish performance standards for certain EGUs’ greenhouse gas emissions. *Finally*, the Rule includes guidance for implementing the ACE Rule.

On August 13, 2019, 22 States and 7 municipalities (“Challenging States”) filed a petition with this Court challenging the Rule. According to the Challenging States, EPA improperly repealed the CPP and improperly promulgated the ACE Rule and implementation guidance. The Intervening States, on the other hand, strongly support EPA’s return to the principles of cooperative federalism and the rule of law in this critically important area of regulation.

INTEREST AND GROUNDS FOR INTERVENTION

A party may intervene in a petition for review filed with this Court when it seeks leave “within 30 days after the petition for review is filed” and sets forth a “concise statement” of its “interest” and “the grounds for intervention.” Fed. R. App. P. 15(d); *see Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991).

Although not binding in the courts of appeals, the standards set forth in Federal Rule of Civil Procedure 24 are used to analyze a motion to intervene under Federal Rule of Appellate Procedure 15. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965).

Under Rule 24, the Intervening States may intervene as of right if (1) they file a timely motion to intervene; (2) they “have an interest in the subject of the” petition for review; (3) “their interest” would be “impaired or impeded” without intervention; and (4) no other party will adequately represent their interest. *See In re Brewer*, 863 F.3d 861, 872 (D.C. Cir. 2017). The Intervening States easily satisfy all four requirements for intervention as of right.

I. This Motion Is Timely.

A motion to intervene in a petition for review of final agency action must “be filed within 30 days after the petition for review is filed.” Fed. R. App. P. 15(d). The Challenging States filed their petition for review in Case No. 19-1165 on August 13, 2019. This motion to intervene is filed within 30 days of that date.

Intervention also would not delay resolution of this matter. The Intervening States support EPA's request to expedite consideration of this case and are prepared to comply with the proposed briefing schedule outlined in the agency's motion. *See* EPA's Motion to Expedite, *Am. Lung Ass'n v. EPA*, No. 19-1140 (D.C. Cir. Aug. 28, 2019).

II. This Action Implicates Intervening States' Legal Interests.

The Rule is critical to maintaining the cooperative federalism that underlies the Clean Air Act. The States' authority over the intrastate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Federal legislation has long recognized the primacy of State authority in this area. The Federal Power Act recognizes and preserves the States' "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). The Clean Air Act preserves this balance as well, by leaving to States the authority to

“establish[] standards of performance” for stationary sources, including EGUs. 42 U.S.C. § 7411(d)(1).

The CPP impermissibly invaded this traditional state responsibility. Its binding emission limits required States to adopt emissions standards that shifted electricity generation from coal-fired plants to natural gas-fired plants and renewable sources. The CPP also unconstitutionally commandeered the States and their officials. The Federal Government may not “use the States as implements of regulation”—in other words, commandeer them to carry out federal law. *New York v. United States*, 505 U.S. 144, 161 (1992). The CPP violated this anti-commandeering principle by forcing States to use their sovereign powers to upend their utility sectors and remake them in the image of federal policy.

The ACE Rule, by contrast, corrects many of these unlawful and unwarranted intrusions into the regulatory sphere of the States. The ACE Rule fully embraces the cooperative federalism regime embodied in the Clean Air Act’s text and structure: It recognizes the EPA’s proper role as setting national guidelines while ensuring that the States retain primacy in ground-level regulation and management of electric power

generation. The Intervening States have a significant interest in restoring cooperative federalism in this realm. *Cf. New York*, 505 U.S. at 168 (explaining the States' interests in cooperative federalism).

III. Intervening States' Interests Will Be Impaired Without Intervention.

The Intervening States' interests will be impaired if they are not permitted to intervene in this action. As previously explained, the Intervening States will be commandeered if the CPP-repeal portion of the Rule is invalidated. And the Intervening States will lose their inherent right to regulate energy-producing activity within their borders if the ACE Rule and CPP repeal were invalidated, and the CPP were reinstated. If this were to occur, the Intervening States "might protect their rights 'by bringing a separate lawsuit,'" but such "separate litigation would 'be difficult and burdensome.'" *In re Brewer*, 863 F.3d at 873 (quoting *Fund for Animals v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003)). Moreover, any damage to the Intervening States' utility markets during an intervening resurgence of the CPP would be "substantial and likely irreparable." *Fund for Animals*, 322 F.3d at 735. Denying leave to intervene would impair the Intervening States' important interests discussed above.

IV. No Party Will Adequately Represent Intervening States' Interests.

EPA will not adequately represent the Intervening States' interests. As set forth above, the CPP infringed on the Intervening States' rights. The ACE Rule restores to the States their traditional authority to manage energy resources within their territorial borders.

The Intervening States' interests could differ from EPA's interests with respect to anti-commandeering principles; the Intervening States would bear burdens while EPA would receive benefits for this commandeering. Although EPA will also urge this Court to deny the petition, EPA's rationale may substantially and substantively differ from the Intervening States' rationale for denying the petition for review.

The Challenging States can also argue from the perspective of sovereigns in our federal form of government. EPA necessarily cannot respond to the Challenging States' arguments in the same manner that the Intervening States can: as same-level sovereigns in our federal form of government. Moreover, if this Court holds that the ACE Rule is unlawful, the Challenging States are likely to seek a remedy that would increase EPA's power and impose irreparable economic harms on the

Intervening States. Given this dynamic, the Intervening States' interests are not fully represented by EPA.

Finally, the industry parties that have intervened in this case will not adequately represent the Intervening States' interests. These industry parties' primary interests relate to the regulatory burdens they will face under the CPP and the ACE Rule. They may not be as concerned about the balance of power between EPA and the States. The Intervening States' interests would therefore not be adequately advanced by EPA or any other proposed intervenor.

CONCLUSION

This Court should grant the Intervening States leave to intervene in this action.

DATED: September 12, 2019

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CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,411 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

This motion also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2019 in 14-point, Century Schoolbook font.

/s/ Lindsay S. See
Lindsay S. See

CERTIFICATE OF PARTIES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), Intervening States submit the following Certificate of Parties:

Petitioners: The petitioners in Case 19-1165 are the City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, Commonwealth of Virginia, District of Columbia, People of the State of Michigan, State of California, State of Colorado, State of Connecticut, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Maryland, State of Minnesota, State of New Jersey, State of New Mexico, State of New York, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, and State of Wisconsin.

The petitioners in Case 19-1140 are the American Lung Association and American Public Health Association.

The petitioners in consolidated cases are Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, Chesapeake Bay Foundation, Inc., Robinson Enterprises, Inc. Nuckles Oil Company, Inc., Construction Industry Air Quality Coalition, Liberty Packing Company, LLC., Dalton Trucking, Inc. Norman R. Brown, Joanne Brown, Competitive Enterprise Institute, Texas Public Policy Foundation, Westmoreland Mining Holdings LLC, City and County of Denver Colorado, The North American Coal Corporation, Biogenic CO2 Coalition, Advanced Energy Economy, American Wind Energy Association, Solar Energy Industries Association, Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, Sacramento Municipal Utility District, and State of Nevada.

Respondent: The Environmental Protection Agency is a respondent in both Case 19-1140 and 19-1165. In Case 19-1140, Environmental Protection Agency Administrator Andrew R. Wheeler is also a respondent.

Intervenors: This Court has granted motions to intervene filed by The National Rural Electric Cooperative Association, Chamber of Commerce of the United States of America, National Mining Association, America's Power, Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, AEP Generating Company, AEP Generation Resources Inc., Wheeling Power Company, Westmoreland Mining Holdings LLC, and Murray Energy Corporation.

This Court has not ruled on motions to intervene filed by Indiana Energy Association, Indiana Utility Group, and State of North Dakota.

Amici Curiae: Intervening States are not aware of any *amici curiae* at this time.

/s/ Lindsay S. See
Lindsay S. See

Rule 26.1 Disclosure Statement

None of the Intervening States are required to file a disclosure statement under Federal Rule of Appellate Procedure 26.1 or D.C. Circuit Rule 26.1.

/s/ Lindsay S. See
Lindsay S. See

CERTIFICATE OF SERVICE

I hereby certify that, on September 12, 2019, a copy of the foregoing Motion to Intervene was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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