

ORAL ARGUMENT NOT YET SCHEDULED

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

<hr/>)	
AMERICAN LUNG ASSOCIATION, <i>et al.</i> ,))	
))	
<i>Petitioners,</i>))	
))	
v.))	No. 19-1140 (and consolidated
))	cases)
UNITED STATES ENVIRONMENTAL))	
PROTECTION AGENCY, <i>et al.</i> ,))	
))	
<i>Respondents.</i>))	
<hr/>)	

NORTH DAKOTA’S MOTION TO INTERVENE

Pursuant to Federal Rule of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the State of North Dakota hereby respectfully moves for leave to intervene in support of Respondents United States Environmental Protection Agency and Administrator Andrew R. Wheeler (collectively, “EPA”), in opposition to the petitions for review (“Petitions”) in *American Lung Association v. United States Environmental Protection Agency*, Case No. 19-1140 (lead case, consolidated with cases 19-1165, 19-1163, 19-1173). These consolidated actions are challenges to EPA’s final rule entitled *Repeal of the Clean Power Plan; Emissions 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 “ACE Rule”).

EPA promulgated the ACE Rule under Section 111 of the Clean Air Act, 42 U.S.C. § 7411. Among other things, the ACE Rule repeals the Clean Power Plan, a regulation that EPA promulgated under Section 111 of the Clean Air Act in 2015. *See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015). In addition to repealing the Clean Power Plan, the ACE Rule implements guidelines for greenhouse gas emissions from existing coal-fired electric utility generating units (“EGUs”) under Section 111(d) of the Clean Air Act. The ACE Rule also instructs the States on how to develop, submit, and implement plans to establish performance standards for greenhouse gas emissions from certain EGUs. Finally, the ACE Rule adopts regulations for EPA and States implementing the ACE Rule. Several Petitions have been filed challenging the ACE Rule that have been consolidated into this case number 19-1140 (including case nos. 19-1165, 19-1166, and 19-1173).

Petitioners American Lung Association and American Public Health Association (case no. 19-1140); States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon,

Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, District of Columbia, and Cities of Boulder, Chicago, Los Angeles, New York, Philadelphia, and South Miami (FL) (case no. 19-1165); and Petitioner Chesapeake Bay Foundation, Inc. (case no 19-1173) all take no position on this motion.

Petitioners 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, and Sierra Club (case no. 19-1166) did not respond to North Dakota's conferral inquiries.

Respondents United States Environmental Protection Agency and Administrator Andrew R. Wheeler take no position on this motion.

ARGUMENT

In support of its motion, the State of North Dakota states as follows:

I. The State of North Dakota Satisfies the Standards for Intervention

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 permitting intervention.” *Nuesse v. Camp*, 385 F.2d 694, 700, 702 (D.C. Cir. 1967). Although Rule 15(d) does not provide clear criteria for intervention, Federal Rule of Civil Procedure 24(a) and the “policies underlying intervention” in federal district courts provide guidance. *See Int’l Union U.A.W. v. Scofield*, 382 U.S. 205, 216 n.10 (1965); *Amalgamated Transit Union Int’l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) (per curiam).

North Dakota may intervene as of right pursuant to Federal Rule of Civil Procedure 24(a) because: (1) the intervention motion is timely, (2) North Dakota has a cognizable interest in the case, (3) North Dakota’s absence from the case will impair its ability to protect its interests, and (4) North Dakota’s interests are inadequately represented by the existing parties. *See Williams & Humbert, Ltd. v. W&H Trade Marks (Jersey)*, 840 F.2d 72, 74 (D.C. Cir. 1988).

A. North Dakota’s Application is Timely

North Dakota’s has filed this Motion to Intervene within the sixty-day statutory timeframe to file a petition for review of the ACE Rule, which ends on September 6th, 2019 pursuant to Clean Air Act section 307(b), 42 U.S.C. §

7607(b). Further, this Motion to Intervene was filed within thirty days after the filing of the Petitions for Review in case nos. 19-1165 (August 13, 2019), 19-1166 (August 14th, 2019), 19-1173 (August 29, 2019), and constitutes a motion to intervene in all of these Petitions for Review. *See* Fed. R. App. P. 15(d).

Finally, this Motion to Intervene is also timely as Petitioners' initial filings are not yet due, and therefore North Dakota's intervention will not unduly delay or prejudice any party and will not interfere with any schedule set by the Court. Further, North Dakota supports EPA's request to expedite consideration of this case, and is prepared to comply with EPA's proposed timeframe and briefing schedule should the Court grant EPA's motion. *See* EPA's Motion to Expedite, *American Lung Ass'n v. EPA*, No. 19-1140 (D.C. Cir. Aug. 28, 2019).

B. North Dakota Has a Cognizable Interest in this Case and Its Absence from These Consolidated Case Will Impair Its Ability to Protect That Interest

North Dakota has participated extensively in the regulatory and judicial proceedings leading up to EPA's adoption of the Clean Power Plan, the litigation challenging the Clean Power Plan, EPA's proposed repeal of the Clean Power Plan, and eventual finalization of the ACE Rule that is the subject of these consolidated cases. For example, North Dakota participated in the notice and comment process during EPA's promulgation of the Clean Power Plan, and later

submitted its own administrative petition for reconsideration of various aspects of the Clean Power Plan. *See* Docket No. EPA–HQ–OAR–2013–0602.

North Dakota separately participated and played a leading role in litigation challenging the validity of the Clean Power Plan. *See State of West Virginia, et al., v. EPA, et al.*, No. 15-1363 (and consolidated); *State of North Dakota, et al., v. EPA, et al.*, No. 17-1014 (and consolidated).

North Dakota is one of four parties that independently sought and obtained a stay of the Clean Power Plan from the Supreme Court of the United States. Order in Pending Case, *North Dakota v. EPA*, No. 15A793 (U.S. Feb. 9, 2016).

Throughout the proceedings in the Supreme Court of the United States and in the Court of Appeals for the District of Columbia, North Dakota was one of the principal proponents of the argument that the Clean Power Plan violated Clean Air Act Section 111(d)'s express delegation to states of authority to establish emission rate performance standards for existing EGUs, a provision of cooperative federalism under which states retain their sovereignty to make individual decisions regarding performance standards for existing EGUs.

North Dakota also commented extensively on EPA's proposals to repeal the Clean Power Plan and promulgate the final ACE Rule, both of which are at issue in this litigation. *See* North Dakota Comments in Docket No. EPA-HQ-OAR-2017-0355.

The Petitions in these consolidated cases implicate the same issues, as many Petitioners would have this Court invalidate the ACE Rule and reinstate the Clean Power Plan, thus reinstating all of North Dakota's key concerns with the Clean Power Plan and EPA's statutory overreach under Clean Air Act Section 111(d).

C. North Dakota's Interests are Not Adequately Represented by Existing Parties

North Dakota's interests are not adequately represented by other parties to these consolidated cases. For example, North Dakota is a major generator of lignite coal-fueled electricity, which was disproportionately targeted under the Clean Power Plan, and which is still regulated under the ACE Rule. North Dakota has long promoted its active and robust lignite coal and lignite-fueled energy generating industry through a statutory state-industry partnership aimed at protecting and enhancing future use of North Dakota's abundant lignite resources. *See* N.D. Cent. Code § 54-17.5-01. In fact, the North Dakota legislature has declared it to be an essential government function and public purpose to foster and encourage the wise use and development of North Dakota's vast lignite coal resources to maintain and enhance the economic and general welfare of North Dakota. *Id.* There are unique issues pertaining to the use of lignite coal as a fuel to generate electricity that are distinct from those involving other types of coal.

North Dakota was the sole petitioner in the litigation challenging the Clean Power Plan that raised arguments specific to EPA's statutory overreach under Clean Air Act Section 111(d) as related to the regulation of lignite coal-fueled electricity. EPA's usurpation of North Dakota's sovereign authority under the Clean Power Plan and Clean Air Act Section 111(d) has the potential to have a disproportionate impact on North Dakota as a major lignite coal-producing state with many existing lignite coal-fired EGUs that would be forced to close if the Clean Power Plan was reinstated, as Petitioners to these consolidated cases desire.

North Dakota therefore faces significant economic and political implications that are simply not represented by existing parties to these consolidated cases. These interests do not always align with EPA, nor do they align with the many potential intervenors on behalf of Respondents, who simply do not have the same interests in lignite coal-fueled electricity.

Further, even to the extent that North Dakota's challenges to the Clean Power Plan may overlap with some of the pending Intervenor-Respondents seeking leave to intervene in these cases, none of those pending Intervenor-Respondents can adequately represent North Dakota's interests. To date, no other pending Intervenor-Respondents are a State, but instead are organizations or cooperatives from across the country that represent their individual constituents. North Dakota

has a unique interest in protecting its own state sovereignty that those pending Intervenor-Respondents simply cannot represent.

For the foregoing reasons, North Dakota respectfully requests that this Court grant its motion to intervene.

Dated: September 6, 2019

Respectfully submitted,

STATE OF NORTH DAKOTA
WAYNE STENEHJEM
ATTORNEY GENERAL

s/ Paul M. Seby

Paul M. Seby
Special Assistant Attorney General
Jerry Stouck
Special Assistant Attorney General
Greenberg Traurig, LLP
1144 15th Street, Suite 3300
Denver, CO 80202
Telephone: (303) 572-6584
Fax: (303) 572-6540
sebyp@gtlaw.com
stouckj@gtlaw.com

Margaret Olson
Assistant Attorney General
North Dakota Attorney General's Office
600 E. Boulevard Avenue #125
Bismarck, ND 58505
Telephone: (701) 328-3640
Email: ndag@nd.gov
maiolson@nd.gov

***Counsel for Petitioner State of North
Dakota***

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type volume limitation of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because it contains 1,687 words, excluding parts exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, according to the count of Microsoft Word. The foregoing motion also complies with Rules 27(d)(1)(E), 32(a)(5), and 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in 14-point Times New Roman type.

Dated: September 6, 2019

Respectfully submitted,

s/ Paul M. Seby _____

Paul M. Seby

Special Assistant Attorney General

State of North Dakota

***Counsel for Petitioner State of North
Dakota***

CERTIFICATE OF PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), North Dakota furnishes this list of parties, intervenors, and amici curiae that have appeared before this Court in Case No. 19-1140 (and consolidated cases) as an addendum to its motion to intervene.

Petitioners: The Petitioners are the American Lung Association and American Public Health Association (case no. 19-1140); States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, District of Columbia, and Cities of Boulder, Chicago, Los Angeles, New York, Philadelphia, and South Miami (FL) (case no. 19-1165); 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, and Sierra Club (case no. 19-1166); and Petitioner Chesapeake Bay Foundation, Inc. (case no 19-1173).

Respondents: The Respondents in this Case are the United States Environmental Protection Agency and Andrew R. Wheeler, in his capacity as Administrator of the EPA.

Intervenors: Motions to Intervene for Respondents were filed by the National Rural Electric Cooperative Association [ECF No. 1800270]; the Chamber of Commerce of the United States of America [ECF No. 1800958]; the National Mining Association [ECF No. 1801004]; America's Power [ECF No. 1801050]; 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., and Wheeling Power Company [ECF No. 1801137]; Westmoreland Mining Holding LLC [ECF No. 1801180]; and Murray Energy Corporation [ECF No. 1801182]. To the knowledge of North Dakota, this Court has not yet granted any of these motions to intervene as of the time of this filing.

Amici Curiae: To the knowledge of North Dakota, there are no amici curiae as of the time of this filing.

Dated: September 6, 2019

Respectfully submitted,

s/ Paul M. Seby

Paul M. Seby

Special Assistant Attorney General

State of North Dakota

***Counsel for Petitioner State of North
Dakota***

CERTIFICATE OF SERVICE

I hereby certify that on this day, September 6, 2019, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

Dated: September 6, 2019

Respectfully submitted,

s/ Paul M. Seby _____

Paul M. Seby

Special Assistant Attorney General
State of North Dakota

***Counsel for Petitioner State of North
Dakota***