

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**AMERICAN LUNG ASSOCIATION and
AMERICAN PUBLIC HEALTH
ASSOCIATION,**

Petitioners,

v.

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

Respondents.

No. 19-1140

**MOTION OF AMERICA'S POWER FOR
LEAVE TO INTERVENE AS RESPONDENT**

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, America's Power¹ respectfully moves for leave to intervene as a respondent in the above-captioned case. On July 8, 2019, the American Lung Association and American Public Health Association ("Petitioners") filed a petition for review challenging a final rule promulgated by the U.S. Environmental Protection Agency ("EPA" or "Agency") 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."

¹ Formerly known as the American Coalition for Clean Coal Electricity.

84 Fed. Reg. 32,520 (July 8, 2019) (“Rule”). Consistent with Federal Rule of Appellate Procedure 15(d), America’s Power is filing this motion within 30 days after Petitioners filed their petition for review.

BACKGROUND

America’s Power is a trade association comprised of companies involved in the production, transportation, and use of coal to produce electricity. America’s Power recognizes the inextricable linkage between energy, the economy, and our environment. To that end, America’s Power, as the only national trade association whose sole mission is to advocate at the federal and state levels on behalf of coal-fueled electricity, supports policies that promote the wise use of coal, one of America’s largest domestically produced energy resources, to ensure a reliable, resilient, and affordable supply of electricity to meet our nation’s demand for energy.

The members of America’s Power represent a cross section of the major industrial companies involved in the three major phases of the coal-fueled electric generating industry: (1) producers that mine and produce coal; (2) companies that transport coal such as railroads; and (3) investor-owned and cooperative electricity generators. These electricity producers own and operate coal-fired electric generating units (“EGUs”) subject to extensive regulation under the Clean Air Act

(“CAA” or “Act”). Other members are involved in producing, processing, and transporting the coal used at these regulated facilities.

On October 23, 2015, EPA promulgated a rule under section 111(d) of the CAA known as the Clean Power Plan. 80 Fed. Reg. 64,662 (Oct. 23, 2015). The Clean Power Plan included “emission guidelines” requiring states to establish standards of performance limiting the carbon dioxide (“CO₂”) emissions of existing coal-fired EGUs and other fossil fuel-fired sources of electric generation within their borders. EPA required these state standards to be at least as stringent as the emission performance rates provided in the Clean Power Plan, which for coal-fired EGUs was 1,305 pounds of CO₂ per net megawatt-hour (“lb CO₂/MWh-net”). *See* 80 Fed. Reg. at 64,667. The Clean Power Plan also restricted states’ discretion under section 111(d) to account for an existing source’s “remaining useful life” and “other factors” when establishing a standard of performance applicable to that source. 42 U.S.C. § 7411(d)(1); *see* 80 Fed. Reg. at 64,870-71 (describing Clean Power Plan treatment of “remaining useful life”).

Standards of performance under CAA section 111 must reflect

the degree of emission limitation achievable through the application of the best system of emission reduction [(“BSER”)] which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. § 7411(a)(1). The Clean Power Plan’s emission performance rates were based on EPA’s determination that the BSER for these sources was a combination of (1) efficiency improvements, or “heat rate improvements” (“HRI”), at coal-fired EGUs, and (2) shifting generation away from coal-fired EGUs to natural gas-fired combined cycle units and away from all fossil fuel-fired sources to renewable energy sources. *See* 80 Fed. Reg. at 64,667. EPA in the Clean Power Plan acknowledged that the BSER for a source category must be “limited to measures that can be implemented—‘appl[ied]’—by the sources themselves.” *Id.* at 64,720. But it justified its decision to include shifting generation to *other* facilities as part of the BSER by arguing that a “source” includes its “owner or operator,” and the owner or operator can implement this aspect of the BSER by “invest[ing] in actions at facilities owned by others.” *Id.* at 64,733. Because the resulting standard could not be achieved by a source simply through measures taken to improve its emission performance, in order to comply with its standard of performance, a coal-fired EGU would need to obtain “emission rate credits” through a state-established trading program representing investment in increased generation from gas-fired or renewable energy sources.

America’s Power (then known as the American Coalition for Clean Coal Electricity) filed a petition for review of the Clean Power Plan in this Court, along with other state and industry petitioners. *Am. Coal. for Clean Coal Elec. v. EPA*,

No. 15-1368 (D.C. Cir. filed Oct. 23, 2015) (consolidated with *West Virginia v. EPA*, No. 15-1363). On February 9, 2016, the Supreme Court stayed the effectiveness of the Clean Power Plan pending disposition of the petitions for review in this Court and any petitions for a writ of certiorari. Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016). Briefing concluded on April 22, 2016, and the Court sitting *en banc* heard oral argument on September 27, 2016.

On March 28, 2017, EPA moved to hold the challenges to the Clean Power Plan in abeyance pending its review and possible reconsideration of that rule. ECF No. 1668274, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Mar. 28, 2017). On April 28, 2017, the Court placed the Clean Power Plan litigation in abeyance for 60 days and has granted further 60-day abeyances on a rolling basis since that time.²

On July 8, 2019, EPA published the Rule at issue here, which repeals the Clean Power Plan, adopts new emission guidelines for existing coal-fired EGUs under CAA section 111(d), and makes several amendments to EPA's implementing regulations for section 111(d). In the Rule, EPA revises its interpretation of the scope of measures that may constitute the BSER for a source category under CAA section 111, stating such measures are unambiguously limited

² In light of EPA's repeal of the Clean Power Plan in this Rule, motions to dismiss those challenges as moot have been filed in *West Virginia v. EPA*. See, e.g., ECF No. 1797267 (July 15, 2019).

to those “that can be put into operation *at* a building, structure, facility, or installation” that is subject to regulation under that section. 84 Fed. Reg. at 32,524. Because the Clean Power Plan relied on shifting overall generation from one group of facilities to another as the BSER, and that measure cannot be put into effect at a regulated source itself, EPA determined that it “is obliged to repeal the CPP to avoid acting unlawfully.” *Id.* at 32,532.

The Rule establishes new emission guidelines for regulating CO₂ emissions from existing coal-fired EGUs that are aligned with the Agency’s revised interpretation of the scope of a permissible BSER. *Id.* EPA concludes that the BSER for coal-fired EGUs is HRI measures undertaken at the source. *Id.* at 32,535. Rather than establish a uniform emission performance rate setting the minimum stringency for state standards of performance, the Rule directs states to establish standards for each existing coal-fired EGU reflecting application of the BSER by evaluating the applicability of specific HRI measures to the source. *Id.* at 32,581, 40 C.F.R. § 60.5755a(a). Unlike the Clean Power Plan, the Rule’s emission guidelines leave states the discretion to adopt standards for individual sources that are less stringent than strict application of the BSER would otherwise require based on consideration of the source’s remaining useful life and other factors. *Id.* at 32,553.

On July 8, 2019, Petitioners filed a petition for review challenging the Rule. America's Power requests leave to intervene as a respondent to protect its interests in ensuring that EPA's action in the Rule is upheld.

ARGUMENT

The Court should grant this motion because, for the reasons discussed below, America's Power meets the standard for intervention in petition for review proceedings in this Court.

I. Standard for Intervention

Intervention in petition for review proceedings in this Court is governed by Federal Rule of Appellate Procedure 15(d), which provides that a motion for leave to intervene “must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.” Fed. R. App. P. 15(d). This rule “simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought.” *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991).

The policies supporting district court intervention under Federal Rule of Civil Procedure 24, while not binding in cases originating in courts of appeals, may inform the intervention inquiry under Federal Rule of Appellate Procedure 15(d). *See, e.g., Int'l Union, United Auto. Workers 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). The requirements for intervention of right under Federal Rule of Civil Procedure 24(a)(2) are that: (1) the application is timely; (2) the applicant claims an interest relating to the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) existing parties may not adequately represent the applicant's interest. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). This Court has stated that an applicant for intervention that meets the test for intervention of right also thereby demonstrates Article III standing. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003).

As discussed below, America's Power meets the elements of this intervention-of-right test and thereby satisfies any applicable standing requirements.³

³ A group such as America's Power has standing to participate in litigation on its members' behalf when:

- (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977); *see also, e.g., Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). The interests

II. America’s Power Meets the Standard for Intervention.

A. This Motion Is Timely.

America’s Power meets the timeliness requirement because this motion is being filed, in compliance with Federal Rule of Appellate Procedure 15(d), within 30 days after Petitioners filed their petition for review on July 8, 2019. Moreover, because this motion is being filed at an early stage of the proceedings before establishment of a schedule and format for briefing—indeed, even before expiration of the deadline for petitions for review of the Rule—granting this motion will not disrupt or delay any proceedings. If granted intervention, America’s Power will comply with any briefing schedule established by the Court.

B. America’s Power and Its Members Have Significantly Protectable Interests That Will Be Impaired If Petitioners Prevail.

Members of America’s Power own and operate existing coal-fired EGUs that would have been subject to the Clean Power Plan and are now subject to the replacement emission guidelines in the Rule at issue here. Under the Clean Power

members of America’s Power have in affirmation of the Rule will be harmed if Petitioners prevail in their challenge. Members of America’s Power, therefore, would have standing to intervene in their own right. Further, the interests America’s Power seeks to protect are germane to its purpose of supporting policies that promote the wise use of coal. Finally, participation of individual members of America’s Power is not required.

In addition, America’s Power meets any prudential standing requirements because its members, as regulated parties, have interests “within the zone of interests to be protected or regulated by the [CAA].” *Nat’l Petrochemical & Refiners Ass’n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam) (internal quotation marks and citation omitted).

Plan, these sources would have been required to comply with standards of performance with a minimum stringency of 1,305 lb CO₂/MWh-net, and would have needed to purchase emission rate credits reflecting increased generation from gas-fired and renewable sources of electricity. Further, shifting generation to these sources would have reduced overall demand for generation from coal-fired EGUs. The combination of increased operating costs and reduced demand would have forced many coal-fired EGUs to retire. The Rule repeals the Clean Power Plan and directs states to adopt standards of performance for coal-fired EGUs that reflect those HRI measures determined to be appropriate for application at each individual source and that are achievable based on actions that can be taken at the source itself. The Rule also allows states to alter their standards for individual units based on remaining useful life and other factors. If Petitioners prevail in this case, members of America's Power may lose the benefits of the Rule's reduced regulatory burdens, face expedited retirement of the coal-fired EGU fleet, and lose revenue due to a corresponding reduced demand for production and shipment of coal.

Although Rule 24(a)(2) does not specify the nature of the interest required for intervention of right, this Court has stated that a “‘significantly protectable’” interest is required. *S. Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (per curiam) (quoting *Donaldson v. United States*, 400 U.S.

517, 531 (1971)). The interest test for intervention, under this Court’s standard, is flexible and “is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

Where parties are the subject of governmental regulation, as members of America’s Power are with respect to the Rule and the Clean Power Plan it repeals, “there is ordinarily little question that the action or inaction has caused [them] injury.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Further, a legally protectable interest may exist where an intervenor-applicant demonstrates that it stands to “gain or lose by the direct legal operation and effect of the judgment.” *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (internal quotation marks and citation omitted). This Court has held that “[t]he ‘threatened loss’ of [a] favorable action [by an agency] constitutes a ‘concrete and imminent injury’” justifying intervention of right. Order, *New York v. EPA*, No. 17-1273 (D.C. Cir. Mar. 14, 2018) (ECF No. 1722115) (quoting *Fund for Animals*, 322 F.3d at 733) (granting group’s motion to intervene in challenge to EPA denial of rulemaking petition that would have subjected group’s members to more stringent regulation).

Here, the Clean Power Plan imposed substantial and costly regulatory burdens on members of America’s Power. While the challenged Rule also imposes

regulatory requirements on members of America's Power, the new emission guidelines will result in more reasonable burdens on these sources. Vacatur or remand of the new Rule could deprive America's Power of the benefits of that more reasonable program, and thus constitutes a concrete and imminent injury. Accordingly, America's Power has a significant, legally protectable interest in defending the Rule, and disposition of this case may impair the ability of America's Power to protect that interest.

C. Existing Parties Cannot Adequately Represent the Interests of America's Power.

Under Federal Rule of Civil Procedure 24(a)(2), the burden of showing inadequate representation in a motion for intervention “is not onerous” and “[t]he applicant need only show that representation of his interest ‘may be’ inadequate, not that representation will in fact be inadequate.” *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Assuming, for the sake of argument, that inadequate representation is an applicable test for intervention under Federal Rule of Appellate Procedure 15(d),⁴ America's Power easily passes that test here.

⁴ Federal Rule of Civil Procedure 24(a)(2)'s “adequate representation” prong has no parallel in Federal Rule of Appellate Procedure 15(d), but America's Power addresses it here to inform the Court fully of the Federal Rule of Civil Procedure 24(a)(2) analysis.

As the discussion above demonstrates, the interests of Petitioners are adverse to the interests of America's Power in this case. Petitioners are challenging EPA's final action repealing and replacing the Clean Power Plan and amending the Agency's section 111(d) implementing regulations, whereas America's Power supports those actions. Petitioners manifestly cannot adequately represent the interests of America's Power.

EPA also cannot adequately represent the interests of America's Power here. As a governmental entity, EPA necessarily represents the broader "general public interest." *Dimond*, 792 F.2d at 192-93 ("A government entity . . . is charged by law with representing the public interest of its citizens. . . . The [government entity] would be shirking its duty were it to advance th[e] narrower interest [of a business concern] at the expense of its representation of the general public interest."); *Fund for Animals*, 322 F.3d at 736 (stating this court "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors").

This court has recognized that, "[e]ven when the interests of EPA and [intervenors] can be expected to coincide, . . . that does not necessarily mean that adequacy of representation is ensured" *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). In *NRDC*, after rubber and chemical manufacturers had sought unsuccessfully to intervene in the district court in support of EPA, this Court on

appeal reversed the denial of intervention. In light of the fact that the companies' interests were narrower than those of EPA and were "concerned primarily with the regulation that affects their industries," the companies' "participation in defense of EPA decisions that accord with their interest may also be likely to serve as a vigorous and helpful supplement to EPA's defense." *Id.* at 912-13 (emphasis in original omitted). Similarly, the unique perspective that America's Power brings to this case will supplement EPA's position.

Furthermore, that EPA does not and cannot adequately represent America's Power is reinforced by the often adversarial nature of the relationship between EPA, as the federal agency with regulatory responsibility under the CAA, and members of America's Power, as the frequent subjects of EPA regulation under the Act.

In sum, the existing parties do not and cannot adequately represent the interests of America's Power in this case.

CONCLUSION

For the foregoing reasons, America's Power respectfully requests leave to intervene as a respondent in Case No. 19-1140.

Respectfully submitted,

/s/ Allison D. Wood

F. William Brownell

Elbert Lin

Allison D. Wood

Andrew D. Knudsen

HUNTON ANDREWS KURTH LLP

2200 Pennsylvania Avenue NW

Washington, DC 20037

(202) 955-1500

bbrownell@HuntonAK.com

elin@HuntonAK.com

awood@HuntonAK.com

aknudsen@HuntonAK.com

Dated: August 7, 2019

*Counsel for Movant-Intervenor-
Respondent America's Power*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(f) and (g), I hereby certify that the foregoing motion complies with the type volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 3,097 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Times New Roman type.

Respectfully submitted,

/s/ Allison D. Wood

Allison D. Wood

Dated: August 7, 2019

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**RULE 26.1 DISCLOSURE STATEMENT OF MOVANT-
INTERVENOR-RESPONDENT AMERICA'S POWER**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C.

Circuit Rule 26.1, America's Power submits the following statement:

1. America's Power is a nonprofit membership corporation organized under the laws of the District of Columbia and is recognized as a tax-exempt trade association by the Internal Revenue Service under Section 501(c)(6) of the Internal Revenue Code. Its members are companies involved in the production of electricity from coal. As the only national trade association whose sole mission is to advocate at the federal and state levels on behalf of coal-fueled electricity and the coal fleet, America's Power recognizes the inextricable linkage between

energy, the economy, and our environment. Toward that end, America's Power supports policies that promote the wise use of coal, one of America's largest domestically produced energy resources, to ensure a reliable, resilient, and affordable supply of electricity to meet our nation's demand for energy.

2. America's Power is a "trade association" within the meaning of Circuit Rule 26.1(b). It has no parent corporation, and no publicly held company owns a 10 percent or greater interest in America's Power.

/s/ Allison D. Wood
F. William Brownell
Elbert Lin
Allison D. Wood
Andrew D. Knudsen
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037
(202) 955-1500
bbrownell@HuntonAK.com
elin@HuntonAK.com
awood@HuntonAK.com
aknudsen@HuntonAK.com

Dated: August 7, 2019

*Counsel for Movant-Intervenor-
Respondent America's Power*

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**CERTIFICATE OF MOVANT-INTERVENOR-RESPONDENT
AMERICA'S POWER AS TO PARTIES AND *AMICI CURIAE***

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), Movant-Intervenor-Respondent America's Power certifies that the parties, including intervenors, and *amici curiae* in this case are as set forth below. Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), a disclosure statement for America's Power as required by Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 is being filed herewith. Because this case involves direct review in this Court of agency action, the requirement to furnish a list of parties, including intervenors, and *amici curiae* that appeared below is inapplicable.

Petitioners: Petitioners are the American Lung Association and the American Public Health Association.

Respondents: Respondents are the United States Environmental Protection Agency and Andrew R. Wheeler as Administrator of the United States Environmental Protection Agency.

Intervenors: As of the time of this filing, the National Rural Electric Cooperative Association, the Chamber of Commerce of the United States of America, and the National Mining Association have filed motions to intervene as respondents in the case. *See* ECF Nos. 1800270, 1800958, 1801004.

Amici Curiae: There are no *amici curiae* at the time of this filing.

/s/ Allison D. Wood _____
F. William Brownell
Elbert Lin
Allison D. Wood
Andrew D. Knudsen
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037
(202) 955-1500
bbrownell@HuntonAK.com
elin@HuntonAK.com
awood@HuntonAK.com
aknudsen@HuntonAK.com

*Counsel for Movant-Intervenor-
Respondent America's Power*

Dated: August 7, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2019, the foregoing motion was electronically filed with the Clerk of the court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

/s/ Allison D. Wood

Allison D. Wood