

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

STATE OF CALIFORNIA, et al.,)	
)	
<i>Petitioners,</i>)	
)	
v.)	
)	
UNITED STATES)	Case No. 21-1018
ENVIRONMENTAL PROTECTION)	(and consolidated case)
AGENCY,)	
)	
<i>Respondent.</i>)	
)	

**CORRECTED MOTION OF THE BOEING COMPANY FOR LEAVE
TO INTERVENE IN SUPPORT OF RESPONDENT**

On January 11, 2021, the United States Environmental Protection Agency (“EPA”) published this nation’s first-ever standards limiting greenhouse gas (“GHG”) emissions from airplanes’ engines. *See* “Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures,” 86 Fed. Reg. 2,136 (January 11, 2021) (the “Airplane GHG Limits” or “Rule”). These limits are, in effect, fuel-efficiency standards for airplanes. The Airplane GHG Limits mark the culmination of lengthy international and domestic processes that have been ongoing since the start of—and with extensive input from—the Obama-Biden Administration. The Administration’s goals for those processes were the establishment of uniform international GHG emission standards to

govern global air transport and the adoption of equivalent emissions standards for GHG emissions from aircraft engines into domestic law, thereby satisfying the United States' international commitments and EPA's obligations under section 231 of the Clean Air Act ("CAA"), 42 U.S.C. § 7571. It is no surprise, therefore, that the GHG limits in the final Rule mirror the international standards adopted in 2017 by the 193 member states (including the United States) of the 1944 Convention on International Civil Aviation¹ (commonly known as the "Chicago Convention"), acting through a United Nations body formed under the Chicago Convention known as the International Civil Aviation Organization ("ICAO").

The Boeing Company ("Boeing") is the United States' largest manufacturer and exporter of commercial airplanes. It is directly regulated by the Rule and must comply with both the Rule's GHG limits imposed under the authority of CAA section 231 and, as a practical matter, the ICAO standard.² Boeing thus has a substantial, direct interest in the outcome of these petitions for review, in which petitioners seek to require EPA to

¹ *Convention on International Civil Aviation, Ninth Edition*, Doc. 7300/9, available at https://www.icao.int/publications/Documents/7300_9ed.pdf (last accessed Feb. 8, 2021).

² While the ICAO standard is not directly enforceable, it is only through certification under a member country's ICAO-equivalent standards that an airplane is assured the right to operate in all ICAO member countries. See 86 Fed. Reg. at 2,140.

impose domestic GHG requirements *that are different than the international standards that govern or are expected to govern non-U.S. manufacturers of aircraft covered by the ICAO standard*. EPA recognized that such a non-uniform GHG regime would put U.S. aircraft manufacturers—like Boeing—at a substantial disadvantage compared with their foreign competitors. *See* 86 Fed. Reg. at 2,138. Boeing’s interest in defending the Rule is thus obvious, and its timely motion to intervene pursuant to Federal Rule of Appellate Procedure (“FRAP”) 15(d) and D.C. Circuit Rule 15(b) should be granted.

Counsel for Boeing is authorized to represent that EPA does not oppose this motion and that Petitioners take no position on it at this time.

BACKGROUND

I. CAA Section 231, the ICAO Standards, and the Airplane GHG Limits.

Section 231(a)(2)(A) of the CAA directs EPA to set emission standards applicable to any air pollutant emitted from any class or classes of aircraft engines that EPA has found causes or contributes to air pollution reasonably anticipated to endanger public health or welfare. 42 U.S.C. § 7571(a)(2)(A). But section 231 also has a distinct focus on safety, allowing the President to disapprove any standard that the Secretary of Transportation finds would create a hazard to aircraft safety and

prohibiting EPA from changing any standard if that change would significantly increase noise or adversely affect safety. 42 U.S.C. §§ 7571(c) & (a)(2)(B). Given this focus on safety, this Court has recognized that EPA has broad discretion to adopt aircraft engine emission standards that the Agency determines are reasonable. *See Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1229-30 (D.C. Cir. 2007).

The Rule challenged here requires certain newly-manufactured larger airplanes to meet carbon dioxide (“CO₂”) emissions limits in the form of fuel efficiency standards. Those limits were the result of a lengthy and complex regulatory process EPA undertook in consultation with the Federal Aviation Administration (“FAA”) and in coordination with the ICAO process to set global CO₂ emissions limits. Indeed, once ICAO member countries agree upon a new standard, it is “adopt[ed] into domestic law and regulation” by the individual member countries, helping to realize safe, secure, and sustainable air operations globally. 86 Fed. Reg. at 2,144.

The ICAO GHG standards were developed over a period of years, with substantial input from the Obama/Biden Administration and other governments. *See* 86 Fed. Reg. at 2,142, 2,144. The ICAO Committee on Aviation Environmental Protection (“CAEP”) “agreed to the first airplane CO₂ emissions standards” during a 2016 meeting, and ICAO adopted those

standards in 2017. *Id.* at 2,138, 2,142. Those standards became applicable to *new-type* covered airplanes on January 1, 2020, and will become applicable to newly-manufactured *in-production* covered airplanes on January 1, 2028. *Id.* at 2,142.³

Well before the ICAO standards were finally adopted, EPA began a parallel but independent U.S. regulatory process to set domestic airplane GHG limits under the CAA. In 2016, EPA Administrator Gina McCarthy determined that (1) atmospheric GHG concentrations endanger the health and welfare of future generations, and (2) GHG emissions from aircraft engines on certain larger aircraft—those aircraft that were being considered for coverage in the ICAO proceeding—cause or contribute to that endangerment. *See* 81 Fed. Reg. 54,422 (Aug. 15, 2016). Those findings obligated EPA to issue standards for the emission of GHGs from the classes of engines used on the aircraft covered by the 2016 endangerment finding (“covered aircraft”). *See* 86 Fed. Reg. at 2,139. EPA proposed such standards in August of 2020. *See* 85 Fed. Reg. 51,556 (Aug 20, 2020).

After a lengthy period of public comment and deliberation, EPA issued a final Rule in January 2021, setting for the first time limits for CO₂

³ The ICAO standards do not apply to “in-service” airplanes (*i.e.*, individual in-production airplanes that are granted airworthiness certificates prior to January 1, 2028). 86 Fed. Reg. at 2,147.

emissions from engines on most aircraft in the United States. 86 Fed. Reg. at 2,146-53. Under the Rule, any engine installed on a covered aircraft must enable that aircraft to meet the applicable aircraft fuel-efficiency standard. *See* 40 CFR § 1030.1(a), 1030.20. And it is the airplane manufacturer that must demonstrate compliance of an airframe/engine combination with the standards when it seeks civil certification from FAA. *Id.* at 1030.1(a).

The emission limits set in the Rule are “equivalent to the airplane carbon dioxide (CO₂) standards adopted by the [ICAO] in 2017,” matching the ICAO standard on three fundamental measures: scope, stringency, and timing. 86 Fed. Reg. at 2,136 & 2,144. Thus, by meeting EPA’s GHG emission standards, U.S. airplane manufacturers will also comply with the ICAO standards, and will be able to sell their aircraft globally without having to seek CO₂ certification from any foreign government.

II. Boeing’s Interest in the Airplane GHG Limits.

Boeing, which in 2016 celebrated its 100th year of building airplanes, is the only U.S. manufacturer of large civil aircraft. Boeing employs over 100,000 workers throughout the United States and purchases parts and materials from thousands of U.S. suppliers, which in turn represent approximately 1 million more jobs.

As the largest aircraft manufacturer regulated by the Airplane GHG Limits, Boeing has an obvious interest in all aspects of the Rule—and in ensuring that the Rule is well and fully defended during judicial review. It is essential to Boeing that any rule regulating aircraft GHG emissions (1) be reasonably achievable, given the billions of dollars it costs to design, build, and certify new airplanes, and (2) be aligned with the ICAO standards to facilitate the sale and operation of Boeing’s airplanes internationally and provide a level playing field for competition among airplane manufacturers across the globe. Both of these factors help ensure that Boeing continues to be able to employ tens of thousands of U.S. engineers and mechanics to design and build the best airplanes in the world. In short, Boeing has significant, direct interests in the Rule,⁴ which can only be protected by Boeing’s participation in this case.

⁴ Given its major stake in the outcome of EPA’s regulatory process, Boeing commented extensively on the proposed Rule. Boeing explained that the Rule reflects the industry’s steady progress in reducing CO₂ emissions, while simultaneously “achiev[ing] the highest practicable degree of uniformity with the ICAO CO₂ standard.” Boeing Public Comments, EPA-HQ-OAR-2018-0276-0181, at 2. Boeing noted that, if EPA were to finalize GHG standards stricter than the ICAO standards, “competitive disadvantages [] would be unnecessarily imposed on the U.S. commercial aerospace manufacturing and aviation industries,” particularly given that “such a standard could not be applied to aircraft manufactured and/or certified in other countries.” *Id.* at 3. And Boeing explained that imposing stricter GHG limitations could also pose serious flight safety concerns, as “such requirements would require the deployment of technologies that are, (Continued...)

III. Petitioners' Challenges to the Rule.

On January 15, 2021, twelve States and the District of Columbia filed a petition for review challenging the Rule under section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1). Case No. 21-1018, Doc. #1881404. Three environmental groups filed a separate petition for review the same day. Case No. 21-2101, Doc. #1880397 (Jan. 15, 2021). These two petitions have been consolidated under Case No. 21-1018.

The time for challenging the Rule runs for 60 days from the publication of the Rule in the Federal Register on January 11, 2021, 42 U.S.C. § 7607(b), and thus has not yet expired. Additional petitions for review may yet be filed.

ARGUMENT

As the largest manufacturer and exporter of aircraft directly subject to the Airplane GHG Rule, Boeing has a significant, direct interest in defending the Rule as well as standing to intervene in this litigation. Boeing depends on the continued application of the Rule to enable the tens of thousands of U.S. employees supporting its commercial airplane programs to manufacture and export aircraft that are certified by FAA to safely comply with both U.S. *and* international GHG emissions standards.

at present, speculative and unproven.” *Id.* at 2425.

Thus, Boeing would be directly harmed by a decision vacating the Rule or remanding it for EPA to consider replacing it with emissions requirements different from the ICAO standards. And Boeing's interests in the Rule and this case cannot be adequately represented by any other party to the litigation, including EPA, which—as the government regulator—necessarily has a different perspective than that of a major regulated business such as Boeing. The Court therefore should grant Boeing's motion for leave to intervene as a Respondent.

I. The Petition for Review Intervention Standard.

Under FRAP 15(d), a party moving to intervene must do so “within 30 days after the petition for review is filed,” by providing a “concise statement of interest . . . and the grounds for intervention.” In determining whether a party may intervene, this Court looks for guidance to the criteria set forth in Federal Rule of Civil Procedure (“FRCP”) 24(a). *See Massachusetts School of Law at Andover v. U.S.*, 118 F.3d 776, 779 (D.C. Cir. 1997).

A party may intervene as of right under FRCP 24(a) if: (1) the motion is timely, (2) the movant has a protectable interest in the case, (3) proceeding without the movant would impair or impede its ability to protect its interest, and (4) no other party adequately represents the movant's interest. *See Crossroads Grassroots Policy Strategies v. F.E.C.*,

788 F.3d 312, 320 (D.C. Cir. 2015) (“*Crossroads*”); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). A party moving to intervene can demonstrate a protectable interest by showing 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) (citation omitted). With respect to impairment, FRCP 24(a) requires only that a party seeking to intervene be “so situated that disposing of the action *may* as a practical matter impair or impede the movant’s ability to protect its interest.” (emphasis added). And the burden of demonstrating inadequate representation “is not onerous”; a movant “need only show that representation of [its] interest ‘may be’ inadequate, not that representation will in fact be inadequate.” *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Boeing readily satisfies all of Rule 24(a)’s requirements and therefore has the right to intervene to defend the Rule.

Finally, Article III standing is also required under this Court’s precedent.⁵ See *Crossroads*, 788 F.3d at 316. However, “any person who

⁵ Recent Supreme Court decisions have cast doubt on this requirement, at least where an intervenor in support of government action does not seek a different outcome than the government. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) (appellate court “erred by inquiring into [the intervenor’s] (Continued...)”).

satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003); *accord Fund for Animals*, 322 F.3d at 735 (D.C. Cir. 2003). Thus, in petitions for review of EPA regulations, this Circuit has consistently granted requests by regulated entities to intervene as Respondents.⁶

II. Boeing Easily Meets the Criteria for Intervention.

Boeing's intervention motion is timely, and Boeing has a direct and significantly protectable interest in the challenged Rule, which would be impaired absent Boeing's participation in this suit and which cannot be adequately represented by any other party. Boeing therefore readily and self-evidently meets the criteria for intervention.

independent Article III standing" where the intervenor sought the same relief as the defendant-appellant); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (because an intervenor did not "invoke[e] a court's jurisdiction" below, where it supported the defendants, "it was not previously incumbent on the [intervenor] to demonstrate its standing"). But even if this Court's contrary decisions survive those cases, Boeing's strong interest in the Rule and the injury it faces should it be overturned give it both the right to intervene and Article III standing to do so.

⁶ See, e.g., *American Lung Ass'n v. EPA*, No. 19-1140 (Docs. # 1806066 & 1816311) (D.C. Cir. Sept. 11, 2019 & Nov. 18, 2019) (granting motions for leave to intervene in defense of EPA rule regulating power plant CO₂ emissions filed by numerous electricity producers and trade associations); *Sierra Club v. EPA*, No. 13-1112 (Doc.# 1436907) (D.C. Cir. May 20, 2013) (granting cement trade association's motion to intervene on behalf of its member companies in a petition to review a CAA rulemaking governing portland cement manufacturing).

A. *Boeing's motion is timely.*

Boeing's motion to intervene is timely under FRAP 15(d), as it was filed within 30 days⁷ of January 15, 2021, the date on which the petitions for review were filed.

B. *Boeing has a direct, significantly protectable interest in this case, which may be impaired without Boeing's participation.*

As a manufacturer and exporter of airplanes covered by the Rule, Boeing is directly regulated by the Rule, and thus has an obvious, direct, and significantly protectable interest in the Rule. As EPA explained when promulgating the Rule, the standards it set “will ensure control of GHG emissions, maintain uniformity of airplane standards, and allow U.S. manufacturers of covered airplanes to remain competitive in the U.S. marketplace.” 86 Fed. Reg. at 2,138. If Boeing complies with the Airplane GHG Limits set in the Rule, then it will not only meet the requirements of the CAA, but also the ICAO standards, and thus it will be able to sell its aircraft for international use.

Were, however, the Rule to be vacated or remanded, requiring EPA to issue new standards, Boeing would face the prospect of being forced to

⁷ The 30-day period ended on February 14, 2021, a Sunday preceding a Monday federal holiday, thus making the due date February 16, 2021, under FRAP 26(a)(1)(c) & (6).

demonstrate compliance with differing U.S. and international CO₂ standards, resulting in a “significant disadvantage” vis-à-vis foreign manufacturers. 86 Fed. Reg. at 2,138. This would subject Boeing to a double administrative burden experienced by no other airplane manufacturer. As importantly, to the extent that such differing U.S. standards would increase the costs of substantive compliance compared to the ICAO standard, U.S. manufacturers would clearly be placed at a competitive disadvantage, threatening tens of thousands of U.S. engineering and manufacturing jobs. As the leading U.S. manufacturer of civil aircraft subject to the Rule, Boeing is uniquely suited to address the issues in this case.⁸

There can be no question that Boeing’s significantly protectable interest in the Rule and the resolution of these petitions challenging the Rule would be impaired absent Boeing’s participation in this litigation. Petitioners have indicated that they intend to argue that the GHG emission

⁸ Given its significant and direct interest in the outcome of this litigation, Boeing also meets any applicable Article III standing requirements. *See Roeder*, 333 F.3d at 233. Any changes to the Rule as a result of this case—such as an increase in the stringency of the GHG emissions limits—would injure Boeing by imposing significant additional compliance costs and burdens. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (finding Article III standing where companies “directly subject to the challenged Rule,” “benefit[ted]” from it, and would accordingly “suffer concrete injury if the court grant[ed] the relief the petitioners s[ought]”).

limits set in the Rule are insufficiently strict.⁹ Boeing's ability to protect its interest in maintaining the final emission standards in the Rule would be severely impaired if it were not allowed to assist in the defense of the Rule, on which its future business operations supporting tens of thousands of U.S. engineering and manufacturing jobs depend. *See Order, New York v. EPA*, No. 17-1273 (D.C. Cir. Mar. 14, 2018) (Doc #1722115) (granting intervention and finding standing because "[t]he 'threatened loss' of [a] favorable action . . . constitutes a 'concrete and imminent injury'" (quoting *Fund for Animals*, 322 F.3d at 733)). Boeing therefore should be permitted to intervene to protect its interest in maintaining the Rule.

C. Boeing's interests are not adequately represented by any existing party.

Boeing also easily meets FRCP 24(a)'s requirement of demonstrating inadequate representation by the existing parties.

Petitioners obviously cannot represent Boeing's interests in this suit; they seek to overturn the Rule. *See Charles Alan Wright et al., 7C Fed. Prac. & Proc.* § 1909 (3d ed.) (explaining that parties whose interests "are adverse to the absentee" cannot adequately represent it). EPA also cannot

⁹ *See, e.g., States' Non-Binding Statement of Issues* No. 21-1018, Doc. #1884933 at 4-5 (characterizing limits in Rule as "ineffective" and arguing that EPA arbitrarily failed to consider "stricter emission standards").

represent Boeing's interests in this suit. As a government agency "charged by law with representing the public interest of its citizens," EPA may not advance Boeing's interest "at the expense of its representation of the general public interest." *Dimond*, 792 F.2d at 192-93.¹⁰ This Court therefore has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-37 (D.C. Cir. 2003) (collecting cases); *see also Crossroads*, 799 F.3d at 314 (reversing denial of motion to intervene in support of agency) ("Recognizing that doubtful friends may provide dubious representation, 'we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.'") (quoting *Fund for Animals*, 322 F.3d at 736)). That conclusion holds equally true here.

Even if Boeing's interests and EPA's interests are aligned in that both aim to defend the Rule, "that [would] not necessarily mean that adequacy of representation is ensured." *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). In *NRDC*, this Court allowed rubber and chemical companies to

¹⁰ *See also Trbovich*, 404 U.S. at 538 & n.10 (intervenor met his "minimal" burden of showing inadequate representation of his interests by the government even where the statute expressly obligated the agency to serve his interests).

intervene as respondents where they had an interest “more narrow and focused than EPA’s” in “the regulation that affects their industries,” and 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.* Boeing similarly has a “more narrow and focused” interest than EPA in the achievability and stability of the emission standards, and Boeing’s perspective as a manufacturer and exporter of aircraft that must comply with *both* the Rule’s GHG emissions standards *and* the ICAO international standard will “serve as a vigorous and helpful supplement to EPA’s defense” of the Rule. *Id.* Boeing should be permitted to provide its unique perspective and defend its different—but equally significant and protectable—interest in the Rule.

CONCLUSION

Because Boeing easily satisfies the requirements for intervention under FRAP 15(d), the Court should permit it to intervene in support of Respondent EPA and in defense of the Rule.

DATED: February 16, 2021

Respectfully submitted,

/s/ Thomas A. Lorenzen

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CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,498 words, excluding those parts exempted by Fed. R. App. P. 32(f).

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a 14-point, proportionally-spaced typeface using Microsoft Word 2010.

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen

DATED: February 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen