ORAL ARGUMENT NOT YET SCHEDULE

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 and ANDREW WHEELER, Administrator, United States Environmental Protection Agency, Respondents.	Case No. 19-1140 (and related cases)

NEVADA GOLD MINES' AND NEWMONT NEVADA ENERGY INVESTMENT'S MOTION FOR LEAVE TO INTERVENE ON BEHALF OF RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, Nevada Gold Mines LLC ("NGM") and Newmont Nevada Energy Investment LLC ("NNEI") (collectively referred to as "Intervenors") respectfully move to intervene in support of the United States Environmental Protection Agency and its

Administrator, Andrew Wheeler (collectively, "Respondents" or "EPA") in *Consolidated Edison, Inc. v. EPA*, No. 19-1188 and the other cases with which it has been consolidated for review of EPA's final rule entitled "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations (the "Final Rule"). *See* 84 Fed. Reg. 32,520 (July 8, 2019), Docket No. EPA-HQ-OAR-2017-0355.

Intervenors are directly subject to the Final Rule and have a substantial interest in the outcome of this matter. This motion is timely because it is filed within 30 days of the date that the Petition for Review was filed in *Consolidated Edison, Inc. v. EPA*, No. 19-1188. *See* Fed. R. App. P. 15(d); Cir. R. 15(b). The *Consolidated Edison* case has been consolidated with *American Lung Association v. EPA*, No. 19-1140 and the following other cases: Nos. 19-1165; 19-1166; 19-1173; 19-1175; 19-1176; 19-1177; 19-1179; 19-1185; 19-1186; 19-1187, and 19-1189.

BACKGROUND

This case is centered on EPA's efforts to regulate existing electric generating units ("EGUs") pursuant to the authority created by Section

111(d) of the Clean Air Act. 42 U.S.C § 7411(d). Section 111(d) authorizes EPA to issue guidelines for states to submit plans to EPA that establish "standards of performance" for certain existing sources. EPA used this authority to issue the Final Rule regulating greenhouse gas emissions – and specifically carbon dioxide ("CO2") emissions – from existing coal-fired EGUs.

The EPA did so first through the "Clean Power Plan" ("CPP"). 80 Fed. Reg. 64,510 (Oct. 23, 2015). But the CPP set standards of performance that could only be achieved by largely shifting electricity production away from coal-fired generation. *See* 84 Fed. Reg. at 35,523 ("In contrast to its traditional regulations that set performance standards based on the application of equipment and practices at the level of an individual facility, the EPA in the CPP set standards that could only be achieved by a shift in the energy generation mix at the grid level, requiring a shift from one type of fossil-fuel fired generation to another, and from fossil-fuel-fired generation as a whole towards renewable sources of energy.").

EPA's next action in this area came with the promulgation of the Final Rule, which contained three separate and distinct rulemakings:

first, EPA repealed the CPP; second, EPA enacted the Affordable Clean Energy rule ("ACE Rule"), and third, EPA finalized new regulations outlining the implementation of the ACE Rule by the states. *Id.* at 32,520. In contrast to the CPP, the ACE Rule determined that heat rate improvement[1] is the Best System of Emission Reduction ("BSER") for reducing greenhouse gas emissions from existing EGUs under section 111(d). *Id.* at 32,521. Additionally, the ACE Rule provided guidance to the states to develop plans for implementing BSER and authorized States to consider source-specific factors in doing so. *Id.*

NNEI – which is a wholly-owned subsidiary of NGM – owns and operates the TS Power Plant, a state of the art 242-megawatt pulverized coal-fired electric generating unit located in Eureka County, Nevada.[2] The TS Power Plant would have been subject to the requirements of the

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[1] Heat rate is a measure of efficiency of an EGU; the lower a facility's heat rate is, the more efficient an EGU is at converting heat into electrical output. In turn, heat rate improvements led to reductions in CO2 emissions because as an EGU becomes more efficient the facility is required to combust less fuel. *Id.* at 32,535.

[2] NGM became the owner of NNEI on July 1, 2019, through a Joint Venture Agreement between Barrick Gold Corporation and Newmont Goldcorp Corporation. NGM's northern Nevada operations include 10 underground mines and 12 open pit mines.

CPP, if that rule had been left in place, and is subject to the requirements of the ACE Rule.[3]

ARGUMENT

Given that the TS Power Plant is directly impacted by the repeal of the CPP and is directly regulated by the ACE Rule, Intervenors have a significant interest in the outcome of the Petition for Review. Indeed, as the state of Nevada proceeds to implement the ACE Rule, the TS Power Plant will be evaluated for BSER and may be required to implement additional controls and make operational changes to meet the requirements of the ACE Rule. Given these substantial interests in the rules that are subject to review under the Petition for Review, Intervenors should be allowed to intervene as a matter of right into this case.

I. Grounds for Intervention

Federal Rule of Appeal Procedure 15(d) requires a party moving for intervention to do so "within 30 days after the petition for review is filed"

[3] NNEI commented on the ACE Rule and filed a judicial challenge to the CPP. *See* Letter re NNEI Comments on EPA's Emission Guidelines for Greenhouse Gast Emissions, Docket No. EPA-HQ-OAR-2017-0355; *NNEI v. EPA*, Case No. 15-1432 (D.C. Circuit).

and provide a "concise statement of the interest of the moving party and the grounds for intervention." In applying Rule 15(d) of the Federal Rules of Appellate Procedure to would-be intervenors, the D.C. Circuit has relied upon the standard for intervention under Federal Rule of Civil Procedure 24. *See Amalgamated Transit Union v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) (*citing Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965)).

For intervention as of right under Rule 24(a)(2), a would-be intervenor must demonstrate that: (1) the motion to intervene is timely; (2) the movant claims an interest relating to the subject of the action; (3) disposition of the action my, as a practical matter, impair the movant's ability to protect its interest; and (4) existing parties may not adequately represent the movant's interest. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003).

Additionally, this Court has stated that an intervenor must also establish Article III standing. *Id.* at 731-732. However, the D.C. Circuit has clarified that "any person who 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).

II. Intervenors Meet the Criteria for Intervention

Intervenors are entitled to intervene into this case as a matter of right because they meet the requirements for intervention under Rule 24(a). Because Intervenors have demonstrated that it meets the intervention requirements, Intervenors also have Article III standing.

A. Intervenors' Motion is Timely

Timely application to intervene is a threshold requirement under Rule 15(d) of the Federal Rule of Appellate Procedure. Pursuant to this Rule, a motion to intervene must be filed within 30 days after the petition for review is filed. Fed. R. App. P. 15(d). The Petition for Review in *Consolidated Edison, Inc. v. EPA*, No. 11-1188, was filed on September 6, 2019, thus Intervenors' motion is within the 30-day requirement.

B. Intervenors Have Significant Interest in this Case that May be Impaired by the Disposition of the Petition

Intervenors' interest in the outcome of this case is straightforward: the TS Power Plant is a coal-fired electric generating unit that was directly regulated by the CPP and is now regulated through the ACE Rule and EPA's regulations providing guidance to the States regarding

the implementation of the ACE Rule. Petitioners have challenged all three rulemakings contained in the Final Rule.[4] Consequently, Intervenors have a significant interest in the outcome of this case because the challenge to the Final Rule will determine how the TS Power Plant is regulated under Clean Air Act section 111(d) and how the TS Power Plant will be required to control CO2 emissions.

Furthermore, Intervenors' significant interest may be impaired by the outcome of the Petition for Review. The ACE Rule and the CPP regulated existing fossil-fuel fired EGUs differently. A determination to vacate or modify the Final Rule – either by reinstating the CPP, or vacating or remanding the ACE Rule or implementing regulations – could impose additional compliance requirements and costs on the TS Power Plant. Intervenors' ability to protect this interest may be impaired if it is not allowed to intervene in this case.

[4] Petitioners docketing statement and statement of issues was filed on October 7, 2019, the same day that Intervenors are filing their Motion for Leave to Intervene.

C. The Existing Parties Cannot Adequately Represent Intervenors' Interests

Intervention is appropriate when a movant's interests may not be adequately represented by the parties and such is the case here. The burden for this showing is "not onerous" and "should be treated as minimal." *See Funds for Animals*, 322 F.3d at 735 (internal citations and quotation marks omitted).

Petitioners cannot represent Intervenors' interests because Petitioners' are challenging the Final Rule.

EPA cannot adequately represent Intervenors' interests either. As a governmental entity, EPA represents the "general public interest." *See Diamond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986) ("The [governmental entity] would be shirking its duty were it to advance this narrower interest at the expense of its representation of the general public interest."). In contrast, a private entity "is seeking to protect a more narrow . . . interest not shared by the" general public. *Id.* Intervenors are the subject of the regulations at issue in the Final Rule and seek to protect the more narrow interest – that being how the TS Power Plant is regulated under section 111(d) – that does not necessarily align with the interest of the general public.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that they be permitted to intervene into this case.

Dated October 7, 2019

/s/ Jacob A. Santini

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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 1,646 words, excluding parts of the brief exempted by Fed. R. App. P. 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 in a proportionally spaced typeface using Microsoft Word 2010, in 14-point Century Schoolbook type.

Dated: October 7, 2019.

s/ Jacob A. Santini
Jacob A. Santini

CERTIFICATE OF PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), Nevada Gold Mines LLC and Newmont Nevada Energy Investment LLC 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 for leave 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); Chesapeake Bay Foundation, Inc. (case

no. 19-1173); The North American Coal Corporation (case no. 19-1179); 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 (case no. 19-1175); Westmoreland Mining Holdings, LLC (case no. 19-1176); Biogenic CO2 Coalition (case no. 19-1185); City and County of Denver (CO) (case no. 19-1177); North American Coal Corporation (case no. 19-1179); Biogenic CO2 Coalition (case no. 19-1185); Advanced Energy Economy (case no. 19-1186); American Wind Energy Association, Solar Energy Industries Association (case no. 19-1187); 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 (case no. 19-1188); state of Nevada (case no. 11-1189).

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: Intervenors in this Case are the National Rural Electric Cooperative Association; the Chamber of Commerce of the United States of America; the 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., and Wheeling Power Company; Westmoreland Mining Holding LLC; and Murray Energy Corporation, State of North Dakota; Indiana Energy Association; Indiana Utility Group; State of West Virginia; State of Alabama; State of Alaska; State of Arkansas; State of Georgia; State of Indiana; State of Kansas; State of Kentucky, by and through Governor Matthew G. Bevin; State of Louisiana; Phil Bryant, Governor of the State of Mississippi; Mississippi Public Service Commission; State of Missouri; State of Montana; State of Nebraska; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Texas; State of Utah; State of Wyoming; Basin Electric Power Cooperative, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers,

AFL-CIO, International Brotherhood of Electrical Workers, AFL-CIO, United Mine Workers of America, AFL-CIO.

Amici Curiae: To the knowledge of NGM and NNEI, there are no amici curiae as of the time of this filing.

Dated: October 7, 2019.

s/ Jacob A. Santini
Jacob A. Santini

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RULE 26.1 DISCLOSURE STATEMENT OF
NEVADA GOLD MINES, LLC

The following statement is submitted pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1:

Nevada Gold Mines LLC ("NGM") is a limited liability corporation engaged in mining and processing of gold and other ores in northern Nevada. NGM is a joint venture between Barrick Gold Corporation and Newmont Goldcorp Corporation, both of which are publicly-traded

corporations. Barrick Nevada Holding LLC and Newmont USA Limited are parent companies of Nevada Gold Mines.

Newmont Nevada Energy Investment LLC ("NNEI") owns and operates the TS Power Plant, which provides energy for NGM's mining operations in northern Nevada and operates under a Power Purchase and Sales Agreement with NV Energy, a regional utility. NNEI is a wholly-owned subsidiary of NGM.

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Jacob A. Santini
Jacob A. Santini