ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN LUNG ASSOCIATION, *et al.*,	)	
Petitioners,	)	**No. 11-1396**
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	
Respondents.	)	

MOTION OF THE OZONE NAAQS LITIGATION GROUP AND THE UTILITY AIR REGULATORY GROUP FOR LEAVE TO INTERVENE AS RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the Ozone NAAQS Litigation Group ("ONLG") and the Utility Air Regulatory Group ("UARG") respectfully move for leave to intervene as respondents in the above-captioned case. The petition for review in this case challenges the announcement by the Administrator of the United States Environmental Protection Agency ("EPA" or "Agency") on September 2, 2011, that she was withdrawing a proposed reconsideration of the national ambient air quality standards ("NAAQS" or "standards") for ozone (hereinafter the "EPA Announcement"). Pursuant to Federal Rule of Appellate Procedure 15(d), this

motion is being filed within 30 days after the filing of Petitioners' petition for review.

ONLG is a coalition of not-for-profit trade associations whose member companies represent a broad cross-section of American industry. ONLG's purpose is to advance the interest of the companies represented by its member associations in the regulatory and judicial arenas.

UARG is a not-for-profit association of individual electric utilities and other electric generating companies and national trade associations. UARG's purpose is to participate on behalf of its members collectively in administrative proceedings under the Clean Air Act ("CAA" or "Act"), and in litigation that arises from those proceedings that affects electric generators. The individual electric utilities and other electric generating companies that are members of UARG own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, institutional, and governmental customers.

Facilities owned and operated by ONLG's and UARG's member associations and companies emit nitrogen oxides ("NOx") and volatile organic compounds ("VOCs"), precursors to ozone, which are subject to regulation under the ozone NAAQS. For reasons explained below, a decision in favor of Petitioners in this case would harm the interests of ONLG and UARG and their member

associations and companies. The Court therefore should grant ONLG's and UARG's motion for leave to intervene as respondents.

BACKGROUND

EPA regulates levels of air pollutants in the ambient air through the establishment and implementation of NAAQS under the CAA, 42 U.S.C. § 7401, *et seq*. Under the Act, EPA must review the NAAQS periodically and revise them "as may be appropriate" pursuant to statutory criteria. CAA § 109(d)(1), 42 U.S.C. § 7409(d)(1). EPA must set "primary" NAAQS at the level that is, in the Administrator's judgment, "requisite to protect the public health" with "an adequate margin of safety" and "secondary" NAAQS at the level that is, again in the judgment of the Administrator, "requisite to protect the public welfare." *Id.* § 109(b)(1), (2), 42 U.S.C. § 7409(b)(1), (2). The Supreme Court has held that EPA's statutory obligation to set the NAAQS at "the level that is 'requisite'" means that the NAAQS must be neither "lower [n]or higher than is necessary." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475–76 (2001); *id*. at 473 ("Requisite … 'means sufficient, but not more than necessary.'") (citation omitted). NAAQS are implemented in accordance with EPA regulations through state implementation plans adopted by states and approved by EPA under section 110 of the Act. 42 U.S.C. § 7410; *see Whitman*, 531 U.S. at 479.

In 2008, EPA established identical primary and secondary ozone NAAQS with an 8-hour average set at a level of 0.075 parts per million ("ppm"). 73 Fed. Reg. 16436 (Mar. 27, 2008). In September 2009, on its own initiative, EPA announced that it would reconsider those NAAQS, leading to a January 2010 proposal to reduce the level of the 8-hour primary standard promulgated in 2008 from 0.075 ppm to an 8-hour standard within the range of 0.060 to 0.070 ppm and to replace the 8-hour secondary standard with a seasonal one. 75 Fed. Reg. 2938 (Jan. 19, 2010) (hereinafter "Reconsideration Proposal").

UARG filed comments with EPA on the Reconsideration Proposal,[1] as did members of ONLG.[2] Those comments urged EPA not to reconsider the ozone NAAQS and specifically asked the Agency to withdraw the Reconsideration

[1] "Comments of the Utility Air Regulatory Group on EPA's Proposed Rule on Reconsideration of the Primary and Secondary National Ambient Air Quality Standards for Ozone," Docket Entry EPA-HQ-OAR-2005-0172-12233 (Mar. 22, 2010) (hereinafter "UARG Comments").

[2] *See, e.g.*, "Comments of the National Association of Manufacturers on: Proposed Rule Regarding the National Ambient Air Quality Standards for Ozone ('Ozone NAAQS'), January 19, 2010," Docket Entry EPA-HQ-OAR-2005-0172-12439 (Mar. 22, 2010); "Comments on the Proposed Rule Regarding the National Ambient Air Quality Standards for Ozone ('Ozone NAAQS')," Docket Entry EPA-HQ-OAR-2005-0172-12162 (Mar. 22, 2010) (filed by the American Petroleum Institute).

Proposal. Petitioners, on the other hand, submitted comments urging EPA to finalize the Reconsideration Proposal.[3]

On September 2, 2011, the EPA Administrator made the EPA Announcement that is the subject of this litigation and withdrew the Reconsideration Proposal, indicating that EPA would examine the ozone NAAQS in the future in accordance with the CAA.

ARGUMENT

The Court should grant ONLG's and UARG's motion for leave to intervene as respondents because these groups both meet the standard for intervention in the petition for review proceedings in this Court.

I. The Standard for Intervention in Petition for Review Proceedings in This Court.

Intervention in the 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." This Court has held that this rule "simply requires the

[3] "Comments on the U.S. Environmental Protection Agency's Proposed Reconsideration of the National Ambient Air Quality Standards for Ozone," Docket Entry EPA-HQ-OAR-2005-0172-12445 (Mar. 22, 2010) (filed by American Lung Association, Earthjustice, Environmental Defense Fund, Sierra Club, and Natural Resources Defenses Council) (hereinafter "ALA Comments").

intervenor to file a motion setting forth its interest and the grounds on which intervention is sought." *Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991). Under the Federal Rules of Civil Procedure, "the 'interest' test [for intervention] 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); *see also Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967), *quoted in Nuesse*, 385 F.2d at 701. Appellate courts, including this Court, have recognized that policies supporting district court intervention under Federal Rule of Civil Procedure 24, while not binding in cases originating in courts of appeals, may inform their intervention inquiries. *See, e.g., Int'l Union 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).

Some cases have suggested that Article III standing is a prerequisite to intervention. *E.g., Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 537-39 (D.C. Cir. 1999); *Military Toxics Project v. EPA*, 146 F.3d 948, 953-54 (D.C. Cir. 1998). More recently, this Court has stated that Article III standing should not be required of any party seeking to intervene as a defendant. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("Requiring standing of someone who seeks to intervene as a defendant … runs into the doctrine that the standing inquiry

is directed at those who invoke the court's jurisdiction.") (citing *Virginia v. Hicks*, 539 U.S. 113, 123 S. Ct. 2191, 2196–98 (2003)); *see also Jones v. Prince George's Cnty.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003). Presumably, this conclusion would apply equally to parties seeking to intervene as respondents. In any event, this Court determined in *Roeder* that an intervenor applicant that meets the requirements for intervention of right under Federal Rule of Civil Procedure 24(a) demonstrates Article III standing. *Roeder*, 333 F.3d at 233 ("[A]ny person who satisfies Rule 24(a) will also meet Article III's standing requirement.") (citing *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000)). As discussed below, ONLG and UARG meet the elements of the intervention-of-right test under Federal Rule of Civil Procedure 24(a)(2)[4] and thus satisfy any standing test that might arguably apply to intervention.[5]

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[4] Rule 24(a)(1) does not apply here; it authorizes intervention when a federal statute confers an unconditional right to intervene.

[5] An association such as ONLG or UARG has standing to litigate 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 Adver. Comm'n, 432 U.S. 333, 343 (1977). For reasons discussed in this motion, the interests of ONLG and UARG members will be harmed if Petitioners prevail in this litigation. ONLG and UARG members, therefore, would have standing to intervene in their own right. Moreover, the

The requirements for intervention of right under Federal Rule of Civil Procedure 24(a)(2) are: (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).

II. ONLG and UARG Meet the Standard for Intervention in This Case.

A. The Motion Is Timely.

ONLG and UARG meet 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. Moreover, because this motion is being filed at an early stage of the proceedings and before proposal or establishment of a schedule and format for briefing, granting this motion will not disrupt or delay any proceedings. ONLG and UARG will comply with any briefing schedule established by the Court.

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interests that ONLG seeks to protect are germane to that organization's purpose of advancing its members' interests in the regulatory and judicial arenas. Likewise, the interests that UARG seeks to protect are germane to its purpose of participating collectively in EPA's CAA proceedings and in related litigation. Finally, participation of individual ONLG and UARG members in this litigation is not required.

B. The Members of ONLG and UARG Have Interests that Will Be Impaired If Petitioners Prevail.

The various industries and specific facilities represented by ONLG and UARG are subject to extensive CAA regulation, including regulation to reduce their emissions of NOx and VOCs for the purpose of attaining and maintaining the ozone NAAQS. The Reconsideration Proposal, the withdrawal of which by the EPA Administrator is at issue in this case, involved possible revisions to the primary and secondary ozone NAAQS that would have necessitated the members of ONLG and UARG to implement additional controls to reduce their emissions of NOx and VOCs. This, in turn, would have increased operational costs for ONLG and UARG members, significantly impacted their business decisions, and required substantial planning and implementation measures to ensure compliance with any revised, more stringent NAAQS.

In this action, Petitioners challenge the EPA Announcement to withdraw the Reconsideration Proposal. If the Court were to agree with Petitioners in this case and vacate the EPA Announcement and require the Agency to finalize its Reconsideration Proposal, such a holding would harm ONLG and UARG members, which would then have the prospect of complying with a more stringent ozone NAAQS. That result, as discussed above, would create the likelihood of adverse effects on ONLG and UARG members' operations and may subject

ONLG and UARG members to costly and burdensome additional regulatory obligations.

Where parties are objects of governmental regulation, as ONLG and UARG members are with respect to the ozone NAAQS, "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); *see also CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (where there is "no doubt" a rule causes injury to a regulated party, standing is "clear"); *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) (in many cases, standing is "self-evident").

In addition, Petitioners have taken positions directly at odds with those expressed by ONLG and UARG. *Compare, e.g.*, ALA Comments (supporting the Reconsideration Proposal and advocating reduction of the level of the 8-hour primary NAAQS to 0.060 ppm or lower) *with* UARG Comments (urging EPA to withdraw the Reconsideration Proposal and asserting the science does not support revisions to the ozone NAAQS). As these administrative docket materials indicate, ONLG and UARG have positions that cannot be reconciled with the positions of Petitioners.

In sum, if Petitioners were to prevail in their challenge to the EPA Announcement, ONLG and UARG members' interests would be harmed. As a result, ONLG and UARG should be granted leave to intervene as Respondents.

C. Existing Parties Cannot Adequately Represent the Interests of ONLG or UARG.

Under Federal Rule of Civil Procedure 24(a)(2), the burden of showing inadequate representation in a motion for intervention "is not onerous"; "[t]he applicant need only show that representation of his 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) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Envtl. Def. Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 911 (D.C. Cir. 1977)). Assuming *arguendo* that inadequate representation is an applicable test for intervention under Federal Rule of Appellate Procedure 15(d),[6] ONLG and UARG easily pass that test here.

The interests of Petitioners are directly opposed to those of ONLG and UARG; Petitioners cannot adequately represent the interests of ONLG or UARG.

Moreover, EPA cannot adequately represent the interests of ONLG or UARG. The Agency, as a governmental entity, necessarily represents the broader "general public interest." *See, e.g., Dimond*, 792 F.2d at 192–93 ("A government entity … is charged by law with representing the public interest of its citizens ….

[6] Federal Rule of Civil Procedure 24(a)(2)'s "adequate representation" prong has no parallel in Federal Rule of Appellate Procedure 15(d), but ONLG and UARG address it here to inform the Court fully.

The District [of Columbia] 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."). Unlike EPA, ONLG and UARG have the comparatively narrow interest of avoiding the imposition of costly and burdensome emission limitations on their members.

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 . . . ." *Natural Res. Def. Council*, 561 F.2d at 912. In *Natural Resources Defense Council*, manufacturers sought to intervene in support of EPA. 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 omitted). Similarly, the unique perspective that ONLG and UARG bring to this case will supplement EPA's position.[7]

[7] This Court granted intervention to ONLG and UARG as respondents in support of EPA in another action involving the ozone NAAQS. *See Mississippi v. EPA*, No. 08-1200 (D.C. Cir.). This Court's rationale for granting intervention to UARG and ONLG in that case applies equally to ONLG and UARG in this case.

Furthermore, that EPA does not and cannot adequately represent ONLG and UARG 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 ONLG and UARG, as the frequent targets of EPA regulations under the Act. This relationship features substantial litigation under the Act in which UARG, ONLG, and members of the ONLG oppose each other.[8]

In sum, the existing parties do not and cannot adequately represent either the interests of ONLG or UARG interests in this case.

CONCLUSION

For the foregoing reasons, ONLG and UARG respectfully request leave to intervene as Respondents.

Respectfully submitted,

/s/ Allison D. Wood

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[8] *See, e.g.*, *American Petroleum Institute and Utility Air Regulatory Group v. EPA*, No. 10-1079 (D.C. Cir.); *Ozone NAAQS Litigation Group and Utility Air Regulatory Group v. EPA*, No. 08-1204 (consolidated with lead case No. 08-1200) (D.C. Cir.).

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of November, 2011, a copy of the foregoing Motion of the Ozone NAAQS Litigation Group and the Utility Air Regulatory Group for Leave To Intervene as Respondents was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Allison D. Wood
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