

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

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

No. 15-1363

ENVIRONMENTAL PROTECTION AGENCY,
and REGINA A. MCCARTHY,
Administrator, United States Environmental
Protection Agency,

Respondents.

**MOTION OF THE AMERICAN WIND ENERGY
ASSOCIATION FOR LEAVE TO INTERVENE IN SUPPORT
OF RESPONDENT**

The American Wind Energy Association (“AWEA”) hereby moves pursuant to Fed. R. App. P. 15(d) to intervene in support of respondent in the Petition for Review filed in this Court by the State of West Virginia, *et al.*, in the above captioned proceeding, and in any future petitions for review challenging the same agency action.¹ The petition seeks judicial review of the final rulemaking

¹ See D.C. Circuit Rule 15(b) (a motion to intervene in a case concerning “direct review of an agency action will be deemed a motion to intervene in all cases before

promulgated by the U.S. Environmental Protection Agency (“EPA”) titled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units” and published at 80 Fed. Reg. 64,662 (Oct. 23, 2015) (“Clean Power Plan”).

Petitioners have authorized AWEA to state that they take no position on this motion at this time, and counsel for the respondent has indicated they consent to this motion.

BACKGROUND

A. The Clean Power Plan

In June 2013, the President announced his “Climate Action Plan,” describing action the Administration intended to take to address climate change. As part of that plan, the President directed EPA to work expeditiously to complete carbon dioxide (“CO₂”) emission standards for existing fossil fuel-fired electric utility generating units, or “power plants.” In accordance with the President’s directive, on June 18, 2014, EPA proposed rate-based emissions guidelines for states to

this court involving the same agency action or order, including later filed cases[.]”).

follow in their development of state plans to address CO₂ emissions from existing power plants pursuant to 42 U.S.C. § 7411(d).²

After soliciting and considering extensive comments on all aspects of the Proposed Rule, as well as engaging in unprecedented outreach and public engagement, President Obama and the EPA announced the Clean Power Plan on August 3, 2015. The rule has two main elements: (1) state-specific emission CO₂ goals, to be achieved collectively by all of a state's regulated coal- and natural gas-fired sources; and (2) guidelines for the development, submission, and implementation of state plans. 80 Fed. Reg. at 64,664-67. While the Clean Power Plan lays out individualized CO₂ goals for each state, it does not prescribe how a state should meet its goal. *Id.* Rather, each state would have the flexibility to design a program that reflects its circumstances and energy and environmental policy objectives. *Id.*

Under this framework, states electing to develop state implementation plans shall submit these plans for EPA review and approval by September 2018. *Id.* at 64,669. Before then, a very basic, nonbinding initial submittal is due in September 2016. *Id.* at 64,669. If a state does not submit a plan on time, or if it submits one that does not meet EPA standards, the Clean Power Plan anticipates

² Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule, 79 Fed. Reg. 34,830 (June 18, 2014) (“Proposed Rule”).

that EPA will develop and directly administer a federal plan that establishes CO₂ emission standards for existing power plants in that state, pursuant to its authority under the Clean Air Act. 42 U.S.C. § 7411(d)(2)(A). Under both state- and EPA-implemented plans, the compliance period under which emission reduction standards for power plants take effect does not begin until 2022. 80 Fed. Reg. at 64,743-44.

B. Movant-Intervenor: The American Wind Energy Association

AWEA is a national nonprofit trade association representing a broad range of entities with a common interest in encouraging the deployment and expansion of wind energy resources in the United States. AWEA members include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, renewable energy supporters, utilities, marketers and customers.

AWEA submitted extensive comments to EPA during the Clean Power Plan's development.³ The rule is projected to drive significant investments in

³ See, e.g., American Wind Energy Ass'n, *AWEA Comments on Establishing Flexible & Cost-Effective Carbon Pollution Standards for Existing Power Plants under Section 111(d) of the Clean Air Act* (Dec. 6, 2013); American Wind Energy Ass'n, *Supplemental Comments of AWEA on Establishing Flexible & Cost-Effective Carbon Pollution Standards for Existing Power Plants under Section 111(d) of the Clean Air Act* (Mar. 7, 2014); American Wind Energy Ass'n, *AWEA Comments on EPA's Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources and Supplemental Proposed Rule* (Dec. 1, 2014) in Docket Numbers EPA-HQ-OAR-2013-0602-0001, EPA-HQ-OAR-2013-0602-21640.

renewable energy (in particular, wind energy),⁴ and as a result, AWEA's and its members' activities and businesses would be adversely affected by a reversal, weakening, delay, or inadequate implementation of the Clean Power Plan.

AWEA's interests and that of its members will consequently be directly affected by the outcome of this proceeding and this Court's review of the Clean Power Plan. Accordingly, for reasons further detailed below, AWEA seeks to intervene in the above-captioned petition to oppose the challenges to the Clean Power Plan.

C. The Petitioners' Challenges to the Clean Power Plan

On October 23, 2015, the State of West Virginia, *et al.*, petitioned for review of the Clean Power Plan. The petitioners seek to overturn, weaken, or delay the rule. AWEA and its members have a strong interest in maintaining both the level of stringency of the CO₂ reduction targets under the Clean Power Plan and the role wind energy can play to help reduce CO₂ pollution to meet those targets.

⁴ See, e.g., U.S. ENERGY INFO. ADMIN., ANALYSIS OF THE IMPACTS OF THE CLEAN POWER PLAN (2015) (concluding wind power consistently emerges as the lowest cost option for reducing emissions for Clean Power Plan compliance), *available at* <http://www.eia.gov/analysis/requests/powerplants/cleanplan/pdf/powerplant.pdf>; MAGGIE SCHOVER, *ET AL.*, ANTICIPATING COMPLIANCE STRATEGIES AND FORECASTS FOR SATISFYING CLEAN POWER PLAN REQUIREMENTS 12 (2015) (concluding that in all of Navigant Consulting's analysis scenarios regarding the Clean Power Plan, there is a significant increase in wind energy development, resulting in as much as 105 gigawatts of incremental wind generation), *available at* http://www.navigant.com/~media/WWW/Site/Insights/Energy/2015/EN_CPPWhitePaper_TL_0715_16page.ashx.

Accordingly, AWEA meets the standards for intervention in this proceeding, as further detailed below.

STATEMENT OF INTEREST AND GROUNDS FOR INTERVENTION

Under Fed. R. App. P. 15(d), a motion to intervene need only make “a concise statement of the interest of the moving party and the grounds for intervention.” This Court has noted that “in the intervention area the interest test 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) (internal quotation marks omitted) (reversing denial of intervention under Fed. R. Civ. P. 24(a)).

AWEA should be permitted to intervene in this proceeding because it has been significantly involved in the development of the Clean Power Plan. In addition, AWEA’s and its members’ interests in this matter will be harmed if the Clean Power Plan is overturned or weakened. This motion to intervene is being timely filed within the thirty-day period allowed under Fed. R. App. P. 15(d). AWEA’s participation in this proceeding will not result in undue delay in the proceedings, nor cause prejudice to any party. This Court has yet to establish a schedule for briefing on the merits or oral argument.

A. AWEA's Involvement in Proceedings Related to EPA's Clean Power Plan Supports Its Intervention.

AWEA's extensive involvement in the rulemaking process that culminated in the Clean Power Plan demonstrates its substantial interest in the rule. In December 2013, AWEA submitted comments, *see supra* note 3, responding to EPA's "Considerations in the Design of a Program to Reduce Carbon Pollution from Existing Power Plants."⁵ Those comments explained that wind energy is an effective, widely available, affordable, reliable and rapidly scalable method for both reducing CO₂ emissions in the power sector and complying with the Clean Power Plan. Accordingly, the comments encouraged EPA to adopt a "system-based approach" for the purposes of determining the emission standards for existing power plants (*i.e.*, setting targets based on opportunities for compliance in the electric power sector) and to allow states to build on existing programs, such as renewable energy measures, to serve as compliance tools in state plans to meet those targets.

After EPA issued the Proposed Rule, on December 1, 2014, AWEA submitted lengthy comments on the Proposed Rule. *See supra* note 3. Those comments strongly supported EPA's proposal to allow states to meet the proposed

⁵ *See* EPA, *Considerations in the Design of a Program to Reduce Carbon Pollution from Existing Power Plants*, (Sep. 23, 2013), available at <http://www2.epa.gov/sites/production/files/2013-09/documents/20130923statequestions.pdf>.

required CO₂ reductions through the use of system-wide programs and policies, such as wind energy, and made recommendations for the final rule to allow states to fully leverage wind energy as a compliance tool to meet the goals of the rule.

When the Clean Power Plan was announced on August 3, 2015, AWEA released a press release expressing its strong support for the rule and explaining how wind energy could provide a majority of the clean power that states will need to reduce CO₂ pollution from existing electric power plants in order to comply with the rule.⁶ AWEA has also released an extensive handbook intended as a guide for states that are considering using wind energy as a compliance tool to meet their goals under the Clean Power Plan.⁷

AWEA's significant participation in the rulemaking process related to the development of EPA's Clean Power Plan and support thereof demonstrates its interest in the outcome of this proceeding. This Court has regularly permitted intervention by industry organizations, among others, seeking to support EPA

⁶ See Press Release, American Wind Energy Ass'n, *Wind Energy a Major Solution under the Clean Power Plan* (Aug. 3, 2015), available at <http://www.awea.org/MediaCenter/pressrelease.aspx?ItemNumber=7759>.

⁷ See American Wind Energy Ass'n, *A Handbook for the States: Incorporating Renewable Energy into State Compliance Plans for EPA's Clean Power Plan* (Feb. 2015), available at <http://awea.files.cms-plus.com/FileDownloads/pdfs/Handbook%20for%20States%20final.pdf>.

actions.⁸ Comparable circumstances warrant a grant of intervention to AWEA here.

B. AWEA and its Members Will Be Harmed if Petitioners Succeed in Undermining the Rule.

AWEA's history of engagement with the development and implementation of the Clean Power Plan is consistent with the strong interest it has in supporting regulations that result in real cuts of CO₂ pollution from existing stationary electric power sources and, in turn, the likely expansion and use of renewable energy sources, such as wind energy.

In the U.S., power plants alone account for approximately 40 percent of national CO₂ emissions.⁹ The Clean Power Plan will significantly reduce CO₂ pollution from existing electric stationary sources, like coal-fired power plants,

⁸ See, e.g., *Natural Res. Def. Council v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009) (National Petrochemical and Refiners Association and other industry groups intervened in support of EPA); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) (industry groups intervened in support of EPA); *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008) (chemical industry groups intervened in support of EPA).

⁹ See, e.g., Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources; Electric Utility Generating Units; Proposed Rule, 77 Fed. Reg. 22,392, 22,395 (Apr. 13, 2012); see also, e.g., EPA, Overview of Greenhouse Gases (2013) available at <http://www3.epa.gov/climatechange/ghgemissions/gases/co2.html>; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Ottmar Edenhofer, et al. eds., 2014) available at <http://www.ipcc.ch/report/ar5/wg3/>.

through the deployment of wind energy to offset such emissions, among other things.

Numerous studies have established that wind energy can reliably and affordably provide a large share of the emissions reductions called for in the Clean Power Plan due to its ability to reduce CO₂ emissions in regions with the greatest need for emission reductions. *See supra* note 4. As a result, wind energy is predicted to become increasingly important for jurisdictions to meet the Clean Power Plan's emission standards. *Id.* AWEA and its members have been working diligently with states and other stakeholders to develop Clean Power Plan implementation plans that serve to reduce CO₂ levels through the expanded use of wind energy.

AWEA and its members will benefit directly from the Clean Power Plan's requirement to reduce CO₂ pollution, and correspondingly, they would be injured if that rule were overturned or weakened.¹⁰ If successful, petitioners' challenge will

¹⁰ These economic benefits establish AWEA's "interest" both under Rule 15(d) and our standing to sue under Article III of the Constitution, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), whether or not standing is independently required of parties who, as here, seek to intervene in support of a respondent. *See 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, 117-22 (2003)) (discussing district court intervention under Fed. R. Civ. P. 24); *cf. Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003) (overturning district court decision denying intervention in support of defendant under Fed. R.

frustrate ongoing efforts to finance, purchase and build wind energy facilities for compliance with the rule, and invalidate the considerable amount of resources invested by the wind industry so far in both the Clean Power Plan itself and the implementation strategies of states to comply with the rule. Harms to AWEA's and its members' activities and businesses are sufficient to establish injury, and demonstrate our interest under Rule 15(d).

Because AWEA's and its members' "injur[ies] suffice[] for standing purposes," causation and redressability "rationally follow." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015). The potential injuries to AWEA's interests are "directly traceable" to the outcome of this proceeding and redressable by a decision of this Court denying the requested relief. *See id.*

C. AWEA's Organizational Interests in this Proceeding.

AWEA has Article III standing to represent its members' interest in supporting EPA in its defense of the Clean Power Plan. *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (holding that an association had standing

Civ. P. 24, and rejecting court's conclusion that proposed intervenor lacked Article III standing); *Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533, 538-39 (D.C. Cir. 1999) (discussing standing to intervene question). For the same reasons, AWEA falls squarely within the "zone of interests" protected or regulated by the relevant provisions of the Clean Air Act. *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (quoting *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

because its members benefitted from the EPA final rule at issue and would suffer injury if the court granted the relief the petitioners sought). AWEA is devoted as an institution to ensuring that EPA adopts rational and otherwise lawful regulatory policies that are of interest to its members. *Id.* AWEA has members that individually meet Article III requirements with respect to the potential for reversal of the rule. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-33 (1977). The issues on which AWEA seeks to have a voice in this proceeding do not require the participation of its individual members because this Court's review will be based on the Clean Air Act and an established rulemaking record. *Id.*; *see also Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Because AWEA and its members "indisputably will be directly affected" by EPA's rules, its standing is "self-evident[.]" *See American Library Ass'n v. FCC*, 401 F.3d 489, 491-92 (D.C. Cir. 2005).

D. AWEA Brings an Important Perspective to this Action.

AWEA's and its members' interests related to the subject matter of this action (1) may be impaired by disposition in our absence and (2) is not adequately represented by the existing parties to this action or (3) identical to those of any other party. *See Fed. R. App. P. 15(d)*; *see also International Union v. Scofield*, 382 U.S. 205, 216 n. 10 (1965). Although AWEA and EPA share an interest in seeing that the Clean Power Plan is upheld and implemented, AWEA's status as a

private organization with a mission focusing solely and systematically on objectives related to the interests of the wind industry provides it with a unique and distinctive perspective on the issues at stake. Moreover, as an agency of the federal government, the EPA cannot be expected to necessarily represent the private interests of AWEA and its members adequately. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) (stating “we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors”); *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (referring to “the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties”).

This Court’s practice of granting intervention to private organizations – including trade organizations and others – supporting agency actions in which they have an interest reflects a recognition that such private entities have a distinctive perspective that contributes to this Court’s careful and exhaustive consideration of challenges to important agency actions.

CONCLUSION

For the reasons above, the Court should grant AWEA's leave to intervene in support of respondent.

Respectfully submitted,
/s/ Gene Grace

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Dated: Oct. 26, 2015

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and D.C. Circuit Rule 26.1, the American Wind Energy Association (“AWEA”) is a non-profit 501(c)(6) organization organized under the laws of the state of Michigan. AWEA is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States. AWEA’s members include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, renewable energy supporters, utilities, marketers and customers. Pursuant to Circuit Rule 26.1, AWEA is a non-profit corporation and, as such, no entity has any ownership interest in

it. AWEA does not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

Respectfully submitted,
/s/ Gene Grace

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Dated: Oct. 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015, the foregoing MOTION OF THE AMERICAN WIND ENERGY ASSOCIATION FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENT, and RULE 26.1 DISCLOSURE STATEMENT, was served upon all registered counsel via the Court's ECF system.

/s/ Gene Grace

Dated: October 26, 2015