

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

NATIONAL ENVIRONMENTAL)
DEVELOPMENT ASSOCIATION'S)
CLEAN AIR PROJECT, *et al.*)
)
Petitioners,)
)
v.) No. 10-1252 (and consolidated cases)
)
ENVIRONMENTAL)
PROTECTION AGENCY)
)
Respondent.)

MOTION TO INTERVENE BY AMERICAN LUNG ASSOCIATION AND ENVIRONMENTAL DEFENSE FUND

American Lung Association and Environmental Defense Fund hereby move pursuant to Fed. R. App. P. 15(d) to intervene in support of Respondents in the Petition for Review filed in this Court by the SO₂ NAAQS Coalition and Utility Air Regulatory Group, No. 10-1255. The petition seeks review of the final rulemaking promulgated by the U.S. Environmental Protection Agency (“EPA”) titled “National Ambient Air Quality Standards for Sulfur Dioxide,” published at 75 Fed. Reg. 35,520 (June 22, 2010). Pursuant to D.C. Circuit Rule 15(b), this motion also constitutes a motion to intervene in all petitions for review of the challenged regulation.

Counsel for petitioners the SO₂ NAAQS Coalition and Utility Air Regulatory Group has authorized the undersigned to represent that they do not oppose this motion. The Department of Justice takes no position on it.

BACKGROUND

I. The EPA Rulemakings

The Clean Air Act (“CAA”) requires EPA to adopt and periodically update National Ambient Air Quality Standards (“NAAQS”) for harmful air pollutants. CAA § 109, 42 U.S.C. § 7409. The NAAQS must include “primary” standards requisite to protect public health with an adequate margin of safety. *Id.* § 109(b)(1), 42 U.S.C. § 7409(b)(1). Once in place, NAAQS are implemented by enforceable regulatory programs sufficient to ensure that air quality will meet the NAAQS. CAA §§ 110(a) & (c), 172, 42 U.S.C. §§ 7410(a) & (c), 7502.

The consolidated petitions in this case address EPA’s 2010 revision of the primary NAAQS for sulfur dioxide (“SO₂”). Short-term exposure to SO₂ pollution, which is associated with other gaseous sulfur oxide pollutants, is linked to aggravation of asthma and other respiratory symptoms, decreased lung function, and increased hospital and emergency room visits for respiratory conditions, especially in children, senior citizens, and asthmatics. 75 Fed. Reg. at 35,525-27; U.S. EPA, *Fact Sheet: Revisions to the Primary National Ambient Air Quality Standard, Monitoring Network, and Data Reporting Requirements for*

SulfurDioxide 2 (2010), <http://www.epa.gov/air/sulfurdioxide/pdfs/20100602fs.pdf>
[hereinafter U.S. EPA, *Fact Sheet*].

On June 22, 2010, EPA published a notice of final rulemaking announcing its latest revisions of the primary SO₂ NAAQS. 75 Fed. Reg. 35,520. Among other things, EPA decided to replace the existing 24-hour and annual SO₂ standards with a short-term standard that uses “the 3-year average of the 99th percentile of the yearly distribution of 1-hour daily maximum SO₂ concentrations.” *Id.* at 35,521. EPA then set the standard at 75 parts per billion (“ppb”). *Id.* In addition, EPA modified its rules on data handling and monitoring stations necessary for the effective implementation of the SO₂ NAAQS. *Id.*

The American Lung Association is a national nonprofit organization dedicated to the conquest of lung disease and the promotion of lung health. Environmental Defense Fund is a national nonprofit environmental organization dedicated, among other things, to protecting the public health from air pollution. Both organizations submitted extensive comments about the SO₂ NAAQS to EPA during the rule’s development, and both organizations have members who live and conduct other activities in areas that exceed (or may exceed) the SO₂ NAAQS, as revised by EPA in 2010, and whose health would be threatened if the NAAQS were weakened, delayed, or inadequately implemented. Accordingly, for reasons further detailed below, American Lung Association and Environmental Defense

Fund seek to intervene in the above-captioned petitions to oppose the challenges to EPA's actions in this case.

II. The Petitioners' Challenges to the SO₂ Designations.

On August 23, 2010, the SO₂ NAAQS Coalition and Utility Air Regulatory Group petitioned for review of EPA's June 22, 2010, NAAQS promulgation for SO₂. Several states and other industry interests also petitioned for review of the rule. These petitions have been consolidated by order of this Court.

The petitioners will likely seek to weaken the EPA rules at issue here. Approximately 73 percent of SO₂ emissions come from power plants, with another 20 percent coming from other industrial facilities. U.S. EPA, *Fact Sheet, supra*, at 5. Because the SO₂ NAAQS Coalition represents a variety of industry trade associations and the Utility Air Regulatory Group represents electric generating utilities and trade associations, these petitioners can be expected to argue for less protective SO₂ NAAQS or less protective measures for implementing the NAAQS than those adopted by EPA.

American Lung Association and Environmental Defense Fund both have a strong interest in maintaining the level of health protection provided by the SO₂ NAAQS to their members throughout the nation, and in ensuring that the NAAQS are effectively implemented. Accordingly, they meet the standards for intervention

in the SO₂ NAAQS Coalition and Utility Air Regulatory Group’s petition, as further detailed below.

ARGUMENT

I. Introduction

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 removed) (reversing denial of intervention under Fed. R. Civ. P. 24(a)). American Lung Association and Environmental Defense Fund seek intervention to oppose attempts to weaken public health and environmental safeguards that benefit their members. As discussed further below, that interest is sufficient to support intervention in this case.

This court has previously allowed both American Lung Association and Environmental Defense Fund to intervene in petitions for review challenging EPA actions under the Clean Air Act — including NAAQS promulgations. *See, e.g., Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) (listing American Lung Association and Environmental Defense Fund as intervenors in industry

challenges to 2006 EPA rulemakings on particulate matter (“PM”) NAAQS); *Am. Trucking Ass’ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (listing American Lung Association and Environmental Defense Fund as intervenors in industry challenges to 1997 EPA actions revising ozone and PM NAAQS); *see also* Order of August 17, 2004, *Alcoa, Inc. v. EPA*, No. 04-1189 (D.C. Cir.) (granting intervention to American Lung Association and Environmental Defense Fund in suits by industry and governmental entities challenging designations of areas as “nonattainment” for ozone NAAQS); Order of August 19, 2004, *S. Coast Air Quality Mgmt. Dist. v. EPA*, No. 04-1200 (D.C. Cir.) (granting intervention to American Lung Association and Environmental Defense Fund in industry petitions challenging EPA rules implementing ozone NAAQS); Order of June 26, 2003, *New York v. EPA*, No. 02-1387 (D.C. Cir.) (granting intervention to American Lung Association and Environmental Defense Fund in industry suits challenging national EPA rules governing increased pollution from major factories and power plants). Comparable circumstances warrant a grant of intervention to American Lung Association and Environmental Defense Fund here.

II. Petitioners’ Challenges Threaten the Health of American Lung Association and Environmental Defense Fund Members

American Lung Association and Environmental Defense Fund both have an interest in this action because their organizational purposes include the protection of public health from air pollution and because they have members whose health is

threatened by the sulfur dioxide pollution that EPA's rule seeks to remedy. *See* attached declarations. Members live in areas that exceed EPA's SO₂ standards, and the health of these members is threatened by SO₂ pollution in their communities. *See id.*; U.S. EPA, Design Values (1-Hour) by County for Sulfur Dioxide (Table, June 15, 2010), <http://www.epa.gov/air/sulfurdioxide/pdfs/20100602table0709.pdf>; U.S. EPA, Counties With Monitors Currently Violating the Revised Primary 1-Hour Sulfur Dioxide (SO₂) Standard of 75 ppb (Map, June 15, 2010), <http://www.epa.gov/air/sulfurdioxide/pdfs/20100602map0709.pdf>.

The health interest of movants' members is central to the underlying Clean Air Act provisions governing EPA's adoption and revision of the NAAQS. Those provisions require EPA to adopt primary NAAQS "requisite to protect the public health" and "allowing an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). Indeed, the Supreme Court has expressly ruled that EPA must base the primary NAAQS solely on public health considerations. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001).

American Lung Association and Environmental Defense Fund's interests are especially strong here, because the Clean Air Act grants this Court exclusive jurisdiction to review the challenged rules. 42 U.S.C. § 7607(b)(1), (e). Accordingly, this proceeding will determine the rule's validity. Movants' interest

in preventing weakening of the rules, and of health protections for its members under the Clean Air Act, will be prejudiced if movants are not allowed to intervene.

American Lung Association and Environmental Defense Fund's interests here are further demonstrated by their prior advocacy for adoption of a short-term SO₂ standard. The two groups successfully sued in this Court to force a remand to EPA of a previous iteration of SO₂ NAAQS revision to explain why it was not adopting a short-term standard. *See Am. Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998). The rule at issue today represents, at last, EPA's response to the earlier litigation. The two groups also filed extensive comments on EPA's proposal to adopt the standards at issue in this case. *E.g.*, Am. Lung Ass'n, Env'tl. Def. Fund, Natural Res. Def. Council, & Sierra Club, *Comments on the US Environmental Protection Agency's Proposed Revisions to the Ambient Air Quality Standards for Sulfur Dioxide* (EPA-HQ-OAR-2007-0352-1170.1, Feb. 8, 2010).

In addition, the interests of American Lung Association and Environmental Defense Fund are not adequately represented by the existing parties. As matters now stand, the Court will hear only EPA's arguments against weakening the challenged rules. This Court "ha[s] 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 (D.C. Cir. 2003); *see also Natural Res. Def.*

Council v. Costle, 561 F.2d 904, 913 (D.C. Cir. 1977) (holding that industry intervenors' interests may not be adequately represented by EPA and that intervention as a matter of right is thus justified). That is especially true here, where American Lung Association and Environmental Defense Fund have frequently disagreed with — and challenged in rulemaking comments and court proceedings — EPA's actions and inaction under the Clean Air Act. *See, e.g., Am. Farm Bureau Fed'n*, 559 F.3d 512 (challenge by American Lung Association, Environmental Defense, and others to EPA PM NAAQS); *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006) (challenge by American Lung Association, Environmental Defense Fund, and others to EPA rules to implement ozone NAAQS); *Am. Lung Ass'n v. EPA*, 134 F.3d 388 (challenge by American Lung Association and Environmental Defense Fund to EPA SO₂ NAAQS).

American Lung Association and Environmental Defense Fund simply cannot rely on EPA to present the full range of legitimate arguments available to oppose weakening of the rules. Movants respectfully submit that the Court's adjudication will be assisted by hearing from leading non-governmental advocates of the Clean Air Act's public health protections.

In short, American Lung Association and Environmental Defense Fund have met the requirements for intervention: They each have an interest relating to the subject matter of this action that may be impaired by disposition in their absence,

and that interest is not adequately represented by the existing parties. *See* Fed. R. App. P. 15(d).¹ Moreover, the motion to intervene is being timely filed within the thirty-day period allowed under Fed. R. App. P. 15(d). For all of the foregoing reasons, American Lung Association and Environmental Defense Fund respectfully request leave to intervene in case No. 10-1255, and, under D.C. Cir. Rule 15(b), in all other petitions for review of the EPA final action at issue in these cases.

Dated: September 22, 2010

Respectfully submitted,

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¹ Indeed, for reasons shown above, movant's showing would even meet the more detailed requirements governing intervention of right in a district court proceeding, Fed. R. Civ. P. 24(a)(2), as well as the lesser prerequisites for permissive intervention in such a proceeding, Fed. R. Civ. P. 24(b)(1)(B).

* Application for admission to the D.C. Circuit is pending.