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TEXAS RAILROAD COMMISSION,)
TEXAS GENERAL LAND OFFICE,)
STATE OF TEXAS,)
)
Petitioners,) Docket No. 10-1222
) (consolidated with No.
v.) 10-1200 as lead case)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

**MOTION FOR LEAVE TO INTERVENE ON
BEHALF OF PETITIONERS**

Pursuant to Federal Rules of Appellate Procedure Rule 15(d) and 27 and Circuit Rules Rule 15(b) and 27, the National Association of Manufacturers, American Frozen Food Institute, American Petroleum Institute, Corn Refiners Association, Glass Association of North America, Independent Petroleum Association of America, Indiana Cast Metals Association, Michigan Manufacturers Association, National Association of Home Builders, National Oilseed Processors Association, National Petrochemical and Refiners Association, Tennessee

Chamber of Commerce and Industry, Western States Petroleum Association, West Virginia Manufacturers Association and Wisconsin Manufacturers & Commerce (collectively “Movants”) respectfully request leave to intervene on behalf of the Petitioners in the above-captioned cases.

Petitioners in these cases filed their petitions for review under Section 307(b)(1) of the Clean Air Act (“CAA”), 42 U.S.C. § 7607(b)(1), to challenge a Final Action of Respondent, the U.S. Environmental Protection Agency (“EPA”) entitled “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule.” 75 Fed. Reg. 31,514 (June 3, 2010) (hereinafter, “Final Action”). Petitioners in Case No. 10-1211 filed their petition on July 30, 2010. Petitioners in Case Nos. 10-1221 and 10-1222 filed their petitions for review on August 2, 2010.

I. Introduction and Interests of Intervenor

Movants are business organizations and trade associations whose members include many companies engaged in key business sectors in the United States, including manufacturing, construction, retail, and production and refining of petroleum. Members of the movant associations own and operate facilities that emit greenhouse gases (“GHGs”), including carbon dioxide (“CO₂”). Because GHGs have never before been subject to the Clean Air Act’s (“CAA”) Prevention of Significant Deterioration (“PSD”) permitting program (42 U.S.C. §§ 7470-

7479) or Title V permitting program (42 U.S.C. §7661, *et seq.*), the GHG emissions of Movants' members are not regulated under those programs.

The Final Action under review establishes EPA's plan to retroactively limit its previous approval of PSD permitting threshold levels and significance levels found in State Implementation Plans ("SIP"). In challenging the Final Action in this Court, Petitioners are likely to argue that EPA has violated the CAA by the Final Action's reinterpretation of existing SIP regulations. *See, e.g., Comments of the South Carolina Dep't of Health and Env'tl. Control*, EPA-HQ-OAR-2009-0517-4521.1, *Comments of Secretary Harrold Legget, Louisiana Dep't of Environmental Quality*, EPA-HQ-OAR-2009-0517-5063.1, *Comments of the Texas Comm'n on Env'tl. Quality*, EPA-HQ-OAR-2009-0517-2797.2.

Movants' members' facilities are directly regulated by SIPs. By declining to revise SIPs through the proper procedure, EPA would impose significant costs on Movants and undercut Movants' procedural rights under state law. This casts serious doubt on the appropriateness, finality and continuing legality of permits that Movants' members have obtained or may obtain under various SIPs. In addition, it could require them to defend enforcement actions and citizen suits. The Final Action at issue could compel many of Movants' members to undergo a

new and costly permitting process. As such, Movants have a substantial interest in the outcome of this case.¹

II. Reasons For Granting Intervention

Movants should be permitted to intervene in this case because they have a significant, direct interest in the outcome of this case that will be harmed if the Final Action is sustained, and that interest will not be adequately represented in the absence of intervention. In addition, the motion to intervene is timely, and granting intervention will not adversely affect any party or the timely resolution of the case.

A. Movants have a direct and substantial interest in the outcome of this case.

Movants have a substantial interest in the subject matter of this case because its members are subject to the regulations at issue.² Movants anticipate that Petitioners will argue that the CAA prohibits EPA's decision to regulate GHGs under the Act's permitting programs as embodied in their existing SIPs or to reach back in time to revise its approvals of SIPs. Such approvals occurred years and, in some cases, decades ago.

¹ A corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 and a certificate of parties pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A) are attached as an addendum to this Motion.

² Movants meet Article III standing requirements because its members are the subject of the provisions in question in this case, and the individual participation of the members in the case is not required. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (finding trade association had standing in challenge of EPA regulation where some of its members were subject to challenged regulation).

EPA's chosen approach is particularly problematic for companies that are operating facilities, as are many of Movants' members, because the CAA requires these facilities to hold certain permits.³ If a court sustains EPA's approach to revising the SIPs embodied in the Final Action, permits issued to Movants' members under the approved SIP may be deemed invalid by EPA. Movants' members could then have to defend EPA enforcement actions and potentially citizen suits under federal law for failure to hold necessary permits.

In cases where a SIP is not revised to meet EPA's new standards, EPA would be responsible for creating a new Federal Implementation Program ("FIP"). Movants' members could then be required to seek new permits under this program. This would necessitate a needless duplication of effort that was already properly conducted under the applicable SIP. Because the Final Action has the potential to bring Movants' members under new and burdensome governmental regulation, Movants clearly have interests sufficient to merit intervention.

B. The interests of Movants are not adequately represented by any of the existing parties.

Intervention is appropriate and necessary to adequately protect Movants' interests. The burden of showing inadequate representation "is not onerous," and an "applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of*

³ 42 U.S.C. § 7661a(a).

Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Because the Respondent supports the Final Action that Movants would challenge, Respondent cannot, of course, adequately represent Movants' interests.

Nor can Petitioners adequately represent Movants' interests. States represent the interests of both the business sector and the general public. In contrast, Movants admittedly have a "narrower interest," namely, helping ensure that their members are not thrust into a new and potentially unwarranted permitting process, with dire economic consequences, in the absence of a thorough administrative analysis of the impacts of that regulation. Particularly at a time when American industry is reeling from the effects of a deep recession, Movants cannot rely solely on a government body to safeguard their concerns.

In addition, the Final Action would place different burdens on Petitioners and Movants. Although States are given authority to administer SIPs once they have received federal approval, the primary responsibility for obtaining and maintaining CAA permits rests on individual sources.⁴ Petitioners' interests in implementing permit programs and Movants' interest in navigating such programs do not entirely coincide. As such, intervention is necessary to allow Movants to adequately represent their interests.

⁴ 42 U.S.C. § 7661a(a).

C. The requested intervention would be timely and consistent with the orderly resolution of the case.

Under Federal Rule of Appellate Procedure 15(d), 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.” The current motion is being filed within 30 days after the filing of the petition for review by Petitioners in this case and, therefore, is timely.

Moreover, this case is in its early stages, and no schedule for the filing of briefs has been issued to date. Granting the instant motion to intervene in this action, therefore, will not delay the proceedings in this Court and will not cause undue prejudice to any party. On the other hand, if intervention is not granted, Movants’ ability to defend the interests of its members in this proceeding will be severely prejudiced. Movants agree to follow any schedule issued by this Court.

Conclusion

For the reasons stated above, Movants respectfully request that the Court enter an order granting leave to intervene in support of Petitioners.

Respectfully submitted,

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CERTIFICATE AS TO PARTIES AND AMICI

As required by Circuit Rule 27(a)(4) and pursuant to Circuit Rule 28(a)(1)(A), the following Certificate as to Parties and Amici is made on behalf of the National Association of Manufacturers National Association of Manufacturers, American Frozen Food Institute, American Petroleum Institute, Corn Refiners Association, Glass Association of North America, Independent Petroleum Association of America, Indiana Cast Metals Association, Michigan Manufacturers Association, National Association of Home Builders, National Oilseed Processors Association, National Petrochemical and Refiners Association, Tennessee

Chamber of Commerce and Industry, Western States Petroleum Association, West Virginia Manufacturers Association and Wisconsin Manufacturers & Commerce:

Parties and Amici

This case involves consolidated petitions for review of an informal rulemaking action undertaken by the United States Environmental Protection Agency entitled “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule.” 75 Fed. Reg. 31,514 (June 3, 2010). There was no action in the district court, and so there were no parties in the district court.

The parties in this Court in these consolidated petitions for review are:

Petitioners

Georgia Coalition for Sound Environmental Policy, Inc.
(Case No. 10-1200);

National Mining Association (Case No. 10-1201);

American Farm Bureau Federation (Case No. 10-1202);

Peabody Energy Company (Case No. 10-1203);

Center for Biological Diversity (Case No. 10-1205);

Energy-Intensive Manufacturers’ Working Group on Greenhouse Gas Regulation (Case No. 10-1206);

South Carolina Public Service Authority (Case No. 10-1207);

Mark R. Levin, Landmark Legal Foundation (Case No. 10-1208);

National Alliance of Forest Owners, American Forest and Paper Association Inc. (Case No. 10-1209);

National Environmental Development Association's Clean Air Project
(Case No. 10-1210);

State of Alabama, State of North Dakota, State of South Dakota, Haley Barbour, Governor of Mississippi, State of South Carolina, State of Nebraska (Case No. 10-1211);

Utility Air Regulatory Group (Case No. 10-1212);

Missouri Joint Municipal Electric Utility Commission (Case No. 10-1213);

Sierra Club (Case No. 10-1215);

Clean Air Implementation Project (Case No. 10-1216);

National Association of Manufacturers, American Frozen Food Institute, American Petroleum Institute, Brick Industry Association, Corn Refiners Association, Inc., Glass Association of North America, Glass Packaging Institute, Independent Petroleum Association of America, Michigan Manufacturers Association, Mississippi Manufacturers Association, National Oilseed Processors Association, National Petrochemical and Refiners Association, Tennessee Chamber of Commerce and Industry, Western States Petroleum Association, West Virginia Manufacturers Association, Wisconsin Manufacturers & Commerce, National Association of Home Builder (Case No. 10-1218);

National Federation of Independent Business (Case No. 10-1219);

Portland Cement Association (Case No. 10-1220);

Louisiana Department of Environmental Quality (Case No. 10-1221);

Rick Perry, Governor of Texas, Greg Abbott, Attorney General of Texas, Texas Commission on Environmental Quality, Texas Department of Agriculture, Texas Public Utilities Commission, Texas Railroad Commission, Texas General Land Office, State of Texas
(Case No. 10-1222).

Respondents

Lisa P. Jackson, Administrator, United States Environmental Protection Agency;

United States Environmental Protection Agency.

We are unaware that this Court has granted any interventions at this time on these petitions for review. We also believe that no entity has been admitted as an amicus at this time. We are aware of the following consolidated petitions that involve the same agency action at issue in this case and for which a motion to consolidate was filed on August 8, 2010:

Petitioners

Southeastern Legal Foundation, Inc., John Linder, U.S. Representative, Georgia 7th District, Dana Rohrabacher, U.S. Representative, California 46th District, John Shimkus, U.S. Representative, Illinois 19th District, Phil Gingrey, U.S. Representative, Georgia 11th District, Lynn Westmoreland, U.S. Representative, Georgia 3rd District, Tom Price, U.S. Representative, Georgia 6th District, Paul Broun, U.S. Representative, Georgia 10th District, Steve King, U.S. Representative, Iowa 5th District, Jack Kingston, U.S. Representative, Georgia 1st District, Michele Bachmann, U.S. Representative, Minnesota 6th District, Kevin Brady, U.S. Representative, Texas 8th District, John Shadegg, U.S. Representative, Arizona 3rd District, Marsha Blackburn, U.S. Representative, Tennessee 7th District, Dan Burton, U.S. Representative, Indiana 5th District, The Langdale Company, Langdale Forest Products Company, Langdale Farms, LLC, Langdale Fuel Company, Langdale Chevrolet-Pontiac, Inc., Langdale Ford Company, Langboard, Inc. - OSB; Langboard, Inc. - MDF; Georgia Motor Trucking Association, Inc., Collins Industries, Inc., Collins Trucking Company, Inc., Kennesaw Transportation, Inc., J&M Tank Lines, Inc., Southeast Trailer Mart, Inc., Georgia Agribusiness Council, Inc. (Case No. 10-1131);

Coalition for Responsible Regulation, Inc., Industrial Minerals Association - North America, National Cattlemen's Beef Association, Great Northern Project Development, L.P., Rosebud Mining Company, Alpha Natural Resources, Inc. (Case No. 10-1132);

The Ohio Coal Association (Case No. 10-1145);

American Iron and Steel Institute (Case No. 10-1147);

Gerdau Ameristeel US Inc. (Case No. 10-1148);

Chamber of Commerce of the United States of America (Case No. 10-1199).

Respondents

Lisa P. Jackson, Administrator, United States Environmental Protection Agency;

United States Environmental Protection Agency.

Movant-Intervenors for Respondent

Natural Resources Defense Council, Sierra Club, Environmental Defense Fund, Conservation Law Foundation, Georgia Forest Watch, Natural Resources Defense Council of Maine, Inc., Wild Virginia, State of New York, State of California, State of Illinois, State of Iowa, State of Maine, Commonwealth of Massachusetts, State of Maryland, State of New Hampshire, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania Department of Environmental Protection, State of Rhode Island, South Coast Air Quality Management District (Case No. 10-1131).

We are unaware that this Court has granted any interventions at this time on these petitions for review. We also believe that no entity has been admitted as an amicus at this time.

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vital role of manufacturing to America's economic future and living standards. NAM has no parent company, and no publicly held company has a 10 percent or greater ownership interest in NAM.

The American Frozen Food Institute ("AFFI") states that it is a trade association that serves the frozen food industry by advocating its interests in Washington, D.C., and communicating the value of frozen food products to the public. AFFI is comprised of 500 members including manufacturers, growers, shippers and warehouses, and represents every segment of the \$70 billion frozen food industry. As a member-driven association, AFFI exists to advance the frozen food industry's agenda in the 21st Century. AFFI has no parent company, and no publicly held company has a 10 percent or greater ownership interest in the AFFI.

The American Petroleum Institute ("API") states that it is a national trade association representing all aspects of America's oil and natural gas industry. API has approximately 400 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of industry. API has no parent company, and no publicly held company has a 10 percent or greater ownership interest in API.

The Corn Refiners Association (“CRA”) states that it is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture starches, sweeteners, corn oil, bioproducts (including ethanol), and animal feed ingredients. CRA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in CRA.

The Glass Association of North America (“GANA”) is the leading association serving flat glass manufacturers, fabricators and glazing contractors. GANA’s mission is to provide industry leadership and guidance, education and knowledge; promote the use of value-added glass and glazing products; provide a forum for exchanging information and ideas through its divisions and membership; and provide a unified voice on matters affecting the glass and glazing industry.

The Independent Petroleum Association of America (“IPAA”) states that it is the leading, national upstream trade association representing more than 5,000 independent oil and natural gas producers that drill 90 percent of the nation’s oil and natural gas wells. These companies account for 68 percent of America’s oil production and 82 percent of its natural gas production. Independent producers represent the exploration and production segment of the industry. IPAA has no

parent company, and no publicly held company has a 10 percent or greater ownership interest in IPAA.

The Indiana Cast Metals Association (“INCMA”) states that it is a not-for-profit trade association organized for the purposes of promoting the general commercial, professional, and legislative interests of its approximately 70 foundry and associate members throughout Indiana. INCMA’s membership includes entities that manufacture metal castings that in general are found in more than 90 percent of all manufactured goods or other manufacturing processes such as automotive, defense, agriculture, energy and renewable energy, and many more. INCMA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in INCMA.

The Michigan Manufacturers Association (“MIMA”) states that it is a private nonprofit organization and is the state of Michigan’s leading advocate exclusively devoted to promoting and maintaining a business climate favorable to industry. MIMA represents the interests and needs of over 2,500 members, ranging from small manufacturing companies to some of the world’s largest corporations. MIMA’s members operate in the full spectrum of manufacturing industries, which account for 90 percent of Michigan’s industrial workforce and employ over 500,000 Michigan citizens. MIMA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in MIMA.

The National Association of Home Builders (“NAHB”) states that it is a not-for-profit trade association organized for the purposes of promoting the general commercial, professional, and legislative interests of its approximately 175,000 builder and associate members throughout the United States. NAHB’s membership includes entities that construct and supply single family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB has no parent company, and no publicly held company has a 10 percent or greater ownership interest in NAHB.

The National Oilseed Processors Association (“NOPA”) states that it is a national trade association that represents 15 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA’s member companies process more than 1.7 billion bushels of oilseeds annually at 64 plants located throughout the country, including 59 plants that process soybeans. NOPA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in NOPA.

The National Petrochemical and Refiners Association (“NPRA”) states that it is a national trade association whose members comprise more than 450 companies, including virtually all United States refiners and petrochemical manufacturers. NPRA’s members supply consumers with a wide variety of products and services that are used daily in homes and businesses. These products

include gasoline, diesel fuel, home-heating oil, jet fuel, asphalt products, and the chemicals that serve as “building blocks” in making plastics, clothing, medicine and computers. NPRA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in NPRA.

The Tennessee Chamber of Commerce and Industry (“TCCI”) states that it is Tennessee’s largest statewide, broad-based business and industry trade association, representing small and large businesses and organizations in every economic sector across the state. TCCI exists to protect and enhance the business climate in Tennessee, enabling Tennessee companies to be competitive and to grow and create jobs. TCCI has no parent company, and no publicly held company has a 10 percent or greater ownership interest in TCCI.

The Western States Petroleum Association (“WSPA”) states that it is headquartered in California and is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation, and marketing in the six western states of Arizona, California, Hawaii, Nevada, Oregon and Washington. WSPA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in WSPA.

The West Virginia Manufacturers Association (“WVMA”) states that it is a non-profit, statewide organization that has been continuously representing the interests of the manufacturing industries in West Virginia since 1915. Its

membership currently consists of one hundred fifty (150) member companies employing twenty-five thousand (25,000) men and women in West Virginia. The average wage of employees of WVMA's members in West Virginia is forty-four thousand two hundred dollars (\$44,200). WVMA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in WVMA.

The Wisconsin Manufacturers & Commerce ("WMC") states that it is a business trade association with nearly 4,000 members and is dedicated to making Wisconsin the most competitive state in the nation to do business through public policy that supports a healthy business climate. WMC's members are Wisconsin businesses that operate throughout the state in the manufacturing, energy, commercial, health care, insurance, banking, and service industry sectors of the economy. Roughly one-fourth of Wisconsin's workforce is employed by a WMC member company. WMC has no parent company, and no publicly held company has a 10 percent or greater ownership interest in WMC.

Respectfully submitted,

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UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
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Respondent.)

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2010, I caused to be electronically filed the foregoing Motion for Leave to Intervene on Behalf of Petitioners, Rule 26.1 Statement and Certificate as to Parties and Amici with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court’s CM/ECF system.

The following participants in the case are registered CM/ECF users and will be served by the Court’s CM/ECF system:

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