ORAL ARGUMENT NOT YET SCHEDULED

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

CLEAN WISCONSIN, *Petitioner* v. ENVIRONMENTAL PROTECTION AGENCY AND ANDREW WHEELER, ACTING ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondents*	)	No. 18-1203 and consolidated cases

MOTION OF THE STATE OF TEXAS AND THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY FOR LEAVE TO INTERVENE AS RESPONDENTS

In accordance with Federal Rules of Appellate Procedure 15(d) and 27 and D.C. Circuit Rules 15(b) and 27, the State of Texas and the Texas Commission on Environmental Quality ("TCEQ") (together, the "Proposed Intervenors") move for leave to intervene as respondents in the above-referenced case and consolidated cases. On August 1, 2018, Clean Wisconsin became the first of several parties to petition this Court for review of the final action of the United States Environmental Protection Agency ("EPA") entitled "Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards," 83 Fed. Reg. 25776 (June 4,

2018) (the "Challenged Action"). This motion is timely filed under Federal Rule of Appellate Procedure 15(d) within thirty days of that petition.

Counsel for the Proposed Intervenors contacted counsel for all parties regarding this motion. Petitioner Clean Wisconsin (No. 18-1203) is unopposed. Petitioners Board of County Commissions of Boulder County, Center for Biological Diversity, and National Parks Conservation Association (No. 18-1205) are unopposed "so long as [the Proposed Intervenors] will only be addressing areas in Texas." E-mail from Robert Ukeiley, counsel for petitioners, No. 18-1205, to Bill Davis, counsel for Proposed Intervenors (Aug. 28, 2018). Petitioners Environmental Law and Policy Center and Respiratory Health Association (No. 18-1206) are unopposed, based on the understanding that the Proposed Intervenors' interest is in "[s]upporting EPA's 'Attainment/Unclassifiable' designation for El Paso County, Texas." E-mail exchange between Scott Strand, counsel for petitioners, No. 18-1206, and Bill Davis, counsel for Proposed Intervenors (Aug. 29, 2018). Petitioners State of Illinois and City of Chicago (No. 18-1208) take no position. Petitioners the City of Sunland Park, New Mexico, Familias Unidas del Chamizal (No. 18-1212), and Sierra Club (No. 18-1214) are unopposed "provided all intervenor-defendants concerned with El Paso share a single brief (or divide pages between themselves)." E-mail from David Baake, counsel for petitioners, Nos. 18-1212, 18-1214, to Bill Davis, counsel for Proposed Intervenors (Aug. 29, 2018). Respondents EPA and Andrew Wheeler, Acting EPA Administrator, are unopposed.

Background

A. In 2015, EPA replaced the preexisting primary and secondary national ambient air quality standards ("NAAQS") for ground-level ozone with more stringent NAAQS of 0.070 parts per million ("ppm") (or 70 parts per billion ("ppb")). National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292 (Oct. 26, 2015). Petitions for review of that action are currently pending in this Court under lead case number 15-1385.

B. Under 42 U.S.C. § 7407(d)(1), States are entitled to collaborate with EPA when designating geographic areas within their borders as "nonattainment," "attainment," and "unclassifiable" with respect to a NAAQS. As with plans to implement NAAQS, *see id.* § 7410, States have the initial opportunity to make area designations, with EPA stepping in only after a State has acted or declined to act. *Id.* § 7407(d)(1). In this case, Texas relied on air-quality monitoring data for the period of 2014–2016 and an exceptional-event demonstration to designate El Paso County an attainment area with respect to the 2015 ozone NAAQS. *See* Letter from Greg Abbott, Governor of Texas, to Scott Pruitt, EPA Administrator, at 1 (Sept. 27, 2017) (EPA Docket No. EPA-HQ-OAR-2017-0548-0214); Letter from Richard A. Hyde, TCEQ Executive Director, to Samuel Coleman, EPA Acting Regional Administrator, at 1-2 (Aug. 23, 2017) (EPA Docket No. EPA-HQ-OAR-2017-0548-0216).

Exercising its authority under section 7407(d)(1)(B), EPA promulgated designations for areas in multiple States for that NAAQS. Challenged Action, 83 Fed. Reg. 25776; Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards (NAAQS), 82 Fed. Reg. 54232 (Nov. 16, 2017). In the Challenged Action,

EPA designated El Paso County, Texas, as "Attainment/Unclassifiable." 83 Fed. Reg. at 25832.

C. One group of parties that petitioned this Court for review of the Challenged Action targeted EPA's El Paso County, Texas, designation in particular. Petition for Review of the City of Sunland Park, New Mexico and Familias Unidas del Chamizal at 1, No. 18-1212 (D.C. Cir. Aug. 3, 2018) ("Petitioners seek a determination that this action is unlawful, and must be vacated, to the extent it designates El Paso County, Texas, as attainment/unclassifiable for the 2015 ozone [NAAQS]"). As reflected by Texas's own designation of El Paso County as an attainment area, and in light of the consequences to them if EPA's designation were changed to "nonattainment," the Proposed Intervenors have an interest in supporting this portion of the Challenged Action.

ARGUMENT

A motion to intervene in this Court need contain only "a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d); *see Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991). Intervention is appropriate if the movants are directly affected by the agency action and the motion is timely. *See, e.g.*, *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986). Those conditions are satisfied here.

A. EPA's designation of areas of Texas under 42 U.S.C. § 7407(d)(1)(B) directly affects the Proposed Intervenors. Under section 7407(d)(1)(A), Texas (through its Governor) is entitled to make area designations, and TCEQ is the arm of the State with primary responsibility for implementing plans to meet NAAQS.

Accordingly, Texas has an interest in seeing that its designations are not modified by EPA and, when they are not modified, in providing support for a challenged EPA designation of a Texas area. TCEQ has an interest in avoiding alteration of a designation when, as here, the alteration would both be contrary to TCEQ's recommendation and result in a more onerous regulatory task. *See* 42 U.S.C. §§ 7501-7511f (reflecting the increased burdens that come with a nonattainment designation); Letter from Richard A. Hyde, *supra*, at 1-2 (TCEQ's recommendation that El Paso County be designated an attainment area for the 2015 ozone NAAQS).

Under Federal Rule of Civil Procedure 24, intervention is appropriate when a proposed intervenor can show that "representation of his interest 'may be' inadequate[,] and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Assuming that burden also applies under Federal Rule of Appellate Procedure 15(d), *see Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Scofield*, 382 U.S. 205, 217 n.10 (1965), the Proposed Intervenors satisfy it.

Although EPA will defend its designation of El Paso County, Texas, it is but one of two governmental actors under the Clean Air Act's structure of cooperative federalism. *See Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). EPA's reasons for making area designations sometimes differ from those of the States, and here, Texas provided EPA with its own analysis supporting an attainment designation for El Paso County. The Proposed Intervenors should be permitted to brief their position to this Court. *See NRDC v. Costle*, 561 F.2d 904, 912–13 (D.C. Cir. 1977) (concluding that participation by parties "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"); Order, *North Dakota v. EPA*, No. 16-1242 (D.C. Cir. Dec. 19, 2016) (granting States leave to intervene in support of EPA in another Clean Air Act case); Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 11, 2016) (same); Order, *EME Homer Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Jan. 5, 2012) (same).

B. This motion is being filed within 30 days of the first-filed petition for review of the Challenged Action. *See* Docket, No. 18-1203 (reflecting that Clean Wisconsin's petition for review was filed August 1, 2018). It is therefore timely under Federal Rule of Appellate Procedure 15(d), and granting the motion will not delay the proceedings or prejudice any party.

Conclusion

The Court should grant the Proposed Intervenors leave to intervene.

Respectfully submitted.

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* Application for admission forthcoming

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CERTIFICATE AS TO PARTIES AND AMICI*

In accordance with D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), the Proposed Intervenors certify that the parties, including intervenors, and amici in these consolidated cases are as follows:

Petitioners: Clean Wisconsin (No. 18-1203); Board of County Commissions of Boulder County, Center for Biological Diversity, and National Parks Conservation Association (No. 18-1205); Environmental Law and Policy Center and Respiratory Health Association (No. 18-1206); State of Illinois and City of Chicago (No. 18-

* As governmental parties, the Proposed Intervenors are not subject to the requirements of Federal Rule of Appellate Procedure 26.1.

1208); the City of Sunland Park, New Mexico and Familias Unidas del Chamizal (No. 18-1212); Sierra Club (No. 18-1214)

Respondents: United States Environmental Protection Agency; Andrew Wheeler, Acting Administrator, United States Environmental Protection Agency

Intervenors: None as of the time of this filing

Amici Curiae: None as of the time of this filing

Respectfully submitted.

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Certificate of Compliance

The foregoing motion complies with Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it is written in 14-point Equity typeface. It complies with Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(f) and (g) because it contains 1,314 words, excluding exempted portions, according to Microsoft Word.

/s/ Scott A. Keller
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Solicitor General

Certificate of Service

On August 30, 2018, the foregoing motion and certificate as to parties and amici were served via CM/ECF on all registered counsel.

/s/ Scott A. Keller
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Solicitor General