

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

HEARTH, PATIO & BARBECUE)	
ASSOCIATION,)	
)	
<i>Petitioner,</i>)	
)	
v.)	No. 15-1056
)	
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
<i>Respondent.</i>)	

MOTION TO INTERVENE IN SUPPORT OF RESPONDENT

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27, and Rule 15(b) of this Court, American Lung Association, Clean Air Council, and Environment and Human Health, Inc. (collectively, “Movants”) hereby move for leave to intervene in support of Respondent (“EPA”) in case No. 15-1056, and in any other similar cases involving the same agency action. Counsel for Petitioner Hearth, Patio & Barbecue Association (the “Hearth Association”) and EPA have been contacted for their position on this motion. Counsel for the Hearth Association stated that it does not intend to oppose this motion, and counsel for EPA stated that the agency takes no position on this motion. In support of their motion, Movants state as follows, and also rely on the declarations that accompany this motion.

INTRODUCTION

This case seeks review of the final rule promulgated by EPA entitled “Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces,” published at 80 Fed. Reg. 13,672 (Mar. 16, 2015) (the “Final Rule”). As described below, the Final Rule updates air pollution standards for wood-fired residential heating equipment that is a significant source of air pollutant emissions and provides crucial health and environmental safeguards for Movants’ members. Although the Final Rule does not provide the degree of protection that the Clean Air Act requires, Movants nonetheless have a demonstrable interest in defending the Final Rule against challenges brought by industry groups seeking to further weaken or delay it.

BACKGROUND

I. Wood Heaters

As used herein, the term “wood heaters” covers a variety of devices that burn wood or wood pellets to provide heat to a living space, and includes, among other equipment, wood room heaters, furnaces, and boilers. Smoke from these devices contains, among other harmful compounds, fine particulate matter, exposure to which “has been associated with a range of health effects, including aggravation of heart or respiratory problems, changes in lung function and increased respiratory symptoms, as well as premature death.” 80 Fed. Reg. at

13,675/3. These emissions “cause[] many counties in the U.S. to either exceed the EPA’s health-based national ambient air quality standards (NAAQS) for fine particles or place[] them on the cusp of exceeding those standards.” *Id.* at 13,673/3

II. Movant Environmental Groups

Movants are national and local non-profit groups that have as part of their missions the objective of protecting human health and the environment from air pollution. *See* Declaration of Harold P. Wimmer ¶¶ 2-3. Movants have long-standing interests and involvement in advocating and working for the reduction of emissions of fine particulate matter and other air pollutants emitted by residential wood heaters. *See id.* ¶¶ 3-7. Movants American Lung Association and Clean Air Council also have members living in parts of the country where wood heaters are common and where installation of additional new wood heaters is expected to occur. *See id.* ¶¶ 6-7; Declaration of Jane Z. Reardon ¶¶ 8-10.

III. The Final Rule

The Clean Air Act (“CAA” or the “Act”) aims “to protect and enhance the quality of the Nation’s air resources.” 42 U.S.C. § 7401(b)(1). To help meet this goal, section 111 of the Act requires EPA to establish standards of performance for new and modified stationary sources of air pollution. *Id.* § 7411. Section 111(b)(1) requires EPA to issue standards of performance for each category of sources that “causes, or contributes significantly to, air pollution which may

reasonably be anticipated to endanger public health or welfare.” *Id.*

§ 7411(b)(1)(A). These “New Source Performance Standards” (NSPS) must reflect “the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) [EPA] determines has been adequately demonstrated.” *Id.*

§ 7411(a)(1). The Act requires EPA to “review and, if appropriate, revise” those standards at least every 8 years. *Id.* § 7411(b)(1)(B).

In 1987, EPA made the determination that wood heaters “contribute[] significantly to air pollution which may reasonably be anticipated to endanger public health and welfare,” and one year later, the agency issued NSPS that limited particulate matter emissions from certain types of wood heaters. *See* 52 Fed. Reg. 5065, 5065-66 (Feb. 18, 1987) (determination); 53 Fed. Reg. 5860, 5872 (Feb. 26, 1988) (NSPS). Notwithstanding the Act’s 8-year review requirement, EPA did not complete a review of the 1988 NSPS until Movants and others sued the agency in district court to compel the long overdue update. *See* Partial Consent Decree, *New York v. McCarthy*, 13-cv-01553-GK (D.D.C. July 3, 2014) (ordering completion of the Final Rule).

In the Final Rule, EPA adopted revised standards “to capture the technology improvements and enhanced performance of such units since 1988 and to expand

the applicability of [NSPS] to include additional wood-burning residential heating devices that are available today.” 80 Fed. Reg. at 13,673/2. For example, the Final Rule reduces the allowable particulate matter emissions from those wood room heaters previously covered by the 1988 standards. *Compare id.* at 13,678 tbl. 3 (revised standards), *with* 40 C.F.R. § 60.532 (2014) (1988 standards). In addition, the Final Rule establishes standards for wood furnaces, which heat air that is circulated through ducts, and wood boilers, which heat water or other liquid for circulation in radiators. 80 Fed. Reg. at 13,676/1.

Although the Clean Air Act requires stronger measures than those EPA adopted, the Final Rule will significantly reduce the amount of air pollution new wood heaters emit. For example, EPA estimates that the new standards will reduce emissions of three air pollutants (fine particulates, carbon monoxide, and volatile organic compounds) from new wood furnaces and new wood boilers by more than 50 percent and more than 90 percent, respectively. *See id.* at 13,693 tbl. 6 (estimating annual average air quality impacts of the Final Rule). Although Movants do not concede that EPA’s projected emissions reductions are accurate, these two categories of wood heaters were not controlled at all under the 1988 standards. *See* 40 C.F.R. § 60.530(h) (2014) (exempting wood furnaces and boilers). Therefore, a court order vacating the Final Rule would restore a blanket exemption to these two types of wood heaters, which EPA has determined are

responsible for the vast majority of emissions from all covered wood heaters. *See* 80 Fed. Reg. at 13,693 tbl. 6 (showing that wood furnaces and boilers are together responsible for more than 80 percent of baseline emissions of fine particulates, carbon monoxide, and volatile organic compounds from wood heaters).

IV. The Hearth Association's Challenge to the Final Rule

The Hearth Association will likely seek to weaken or delay the Final Rule's requirements, as their comments during the rulemaking sought to weaken protective measures required under the Final Rule. For example, the Hearth Association objected to EPA's use of emissions testing as a quality assurance tool to verify manufacturers' ongoing compliance with emission standards. *See* Comments of Hearth Association at 9-11 (May 2, 2014) (EPA Docket No. EPA-HQ-OAR-2009-0734-1435). In addition, the Hearth Association argued that EPA should establish a heat output capacity threshold to exempt large wood boilers from the NSPS. *See* Comments of Hearth Association at 17 (May 2, 2014) (EPA Docket No. EPA-HQ-OAR-2009-0734-1643). The Hearth Association also urged EPA to allow retailers an unlimited period of time in which to sell room heaters certified as meeting only the superseded 1988 standards, instead of terminating this sell-through allowance after a defined period. *See id.* at 38.

In contrast, Movants have a strong interest in ensuring the Final Rule delivers health and environmental benefits for Movants' members, many of whom

live in areas where wood heaters are frequently used and where new wood heaters covered by the standards in the Final Rule are likely to be installed in the future. Accordingly, Movants meet the standards for intervention, as further detailed below.

ARGUMENT

Movants should be permitted to intervene in these proceedings in order to support their organizational interests and the specific interests of their members whose health and welfare are threatened by the air pollution that the Final Rule seeks to limit. As demonstrated below, Movants meet the requirements for intervention. Further, this motion is timely filed within 30 days of March 16, 2015, when the petition for review in which Movants seek to intervene was filed. Fed. R. App. P. 15(d); *Ala. Power Co. v. ICC*, 852 F.2d 1361, 1367 (D.C. Cir. 1988).

I. Standard Applicable to a Motion to Intervene

Under Federal Rule of Appellate Procedure 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) (reversing denial of intervention under Fed. R. Civ. P. 24(a)).

II. Movants meet the standard for intervention.

Movants seek intervention to oppose attempts to weaken public health and environmental safeguards that will protect their members and advance their organizational interests. As discussed further below and shown in the attached declarations, those interests are sufficient to support intervention in this case.

This Court has previously allowed Movants American Lung Association and Clean Air Council to intervene in industry petitions challenging EPA actions under the Clean Air Act, including EPA’s issuance of emission standards for other sources of air pollution. *See, e.g.*, Order of Apr. 3, 2013, *Am. Petroleum Inst. v. EPA*, No. 12-1405 (D.C. Cir.) (granting intervention to Movant Clean Air Council in industry suits challenging the NSPS for oil and gas operations); Order of May 18, 2012, *White Stallion Energy Center v. EPA*, No. 12-1100 (D.C. Cir.) (granting intervention to Movants American Lung Association and Clean Air Council in industry suits challenging mercury and air toxics emission standards for electric power plants). Comparable circumstances warrant a grant of intervention to Movants here.

The health and welfare of Movants American Lung Association’s and Clean Air Council’s members are threatened by air emissions generated by wood heaters

where they live, work, and recreate. Their members live, work, and engage in recreation and other activities in areas impacted by wood heater emissions and where wood heaters covered by the Final Rule are likely to be installed in the future. *See* Reardon Decl. ¶¶ 8-10; Wimmer Decl. ¶¶ 6-7. As a result, Movants' members experience harm, including exposure to air pollution and a greater risk of harm to their health, caused by emissions from wood heaters, including respiratory and other health impacts associated with exposure to fine particulate matter and other air pollutants emitted by wood heaters, now and in the future. *See* Reardon Decl. ¶¶ 3-6, 8-10. Because of this air pollution and because of their concern about additional health impacts and risks due to this pollution, Movants' members refrain from or curtail recreational, aesthetic, and associational activities that they have enjoyed in the past, and emissions from wood heaters diminish their enjoyment of these and other activities. *See id.* ¶ 8. Movants' members also are harmed as a result of their increased concern about their health and the health of others close to them and with whom they associate. *See id.* ¶¶ 3-6, 8-10.

Although these members would benefit from—and the Clean Air Act requires—greater control of air emissions than provided in the Final Rule, Movants have a strong interest in intervening to prevent further weakening of the Final Rule that would harm their and their members' legally protected interests. These health and environmental benefits and concerns establish both Movants' "interest" under

Rule 15(d) and their standing to sue under Article III of the Constitution, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), assuming such standing were required of parties who, as here, seek to intervene in support of respondents.¹ For the same reasons, Movants fall squarely within the “zone of interests” protected or regulated by the relevant provisions of the Clean Air Act. *See FEC v. Akins*, 524 U.S. 11, 20 (1998) (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

Reflecting the importance of the health and welfare protection provided in the Final Rule, Movants were active participants in the rulemaking that led to this rule. In addition to suing to compel the issuance of the Final Rule, Movants submitted written comments and testified at EPA’s public hearings on the agency’s proposed regulations, urging EPA to maintain or strengthen the protections the agency proposed. *See, e.g.*, Comments of American Lung Association at 4 (May 5, 2014) (EPA Docket No. EPA-HQ-OAR-2009-0734-1520) (urging stronger standards for room heaters); Comments of Clean Air Council, *et al.* at 22 (May 5,

¹ *See, e.g.*, *Deutsche Bank Nat’l Trust Co. v. FDIC*, 717 F.3d 189, 193-94 (D.C. Cir. 2013); *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013); *but see Bond v. United States*, 131 S. Ct. 2355, 2361-62 (2011) (Article III requirements apply to those “who seek[] to initiate or continue proceedings in federal court,” not to those who *defend* against such proceedings); *McConnell v. FEC*, 540 U.S. 93, 233 (2003) (holding that where the position of the respondent-intervenors is identical to that of the agency and the agency’s standing is unquestionable, no separate inquiry regarding intervenor standing is necessary), *overruled on other grounds by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

2014) (EPA Docket No. EPA-HQ-OAR-2009-0734-1487) (supporting expedited compliance with stronger standards); Testimony of Environment and Human Health, Inc. at 1 (Mar. 11, 2014) (EPA Docket No. EPA-HQ-OAR-2009-0734-0942) (detailing the consequences of the 1988 standards' failure to protect the public from wood heater emissions).

In sum, Movants' intervention is appropriate under Federal Rule of Appellate Procedure 15(d). Movants seek to oppose the Hearth Association's attempts to vacate, further weaken, or delay the Final Rule—attempts that threaten Movants' interests in fulfilling their missions and protecting their members' health and ability to continue enjoying recreational and aesthetic activities. The disposition of this case therefore “‘may as a practical matter impair or impede [Movants'] ability to protect [their] interest[s].’” *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)).

Movants' participation as intervenors in support of EPA on certain issues will not delay the proceedings or prejudice any party. This motion to intervene is being timely filed within the 30-day period allowed under Federal Rule of Appellate Procedure 15(d). The Court has not yet scheduled oral argument or established a briefing schedule. Further, Movants share common interests in defending the NSPS requirements for wood heaters and intend to file their brief in support of Respondent jointly, as directed by D.C. Circuit Rule 28(d)(4).

Movants' participation will not undermine the efficient and timely adjudication of this case. Indeed, because they include nonprofit health and environmental citizens' groups with members living in areas where wood heaters are frequently used, Movants are likely to offer a distinct perspective that will be of assistance to the Court as it considers challenges to the Final Rule.

CONCLUSION

Movants meet the requirements for intervention: they have a demonstrated interest relating to the subject matter of this action that may be impaired by disposition in their absence and they have filed a timely motion. *See* Fed. R. App. P. 15(d). For all of the foregoing reasons, Movants American Lung Association, Clean Air Council, and Environment and Human Health, Inc. respectfully request leave to intervene in case No. 15-1056, and, under D.C. Circuit Rule 15(b), in all other petitions for review of the challenged EPA action.

DATED: April 15, 2015

Respectfully submitted,

/s/ Timothy D. Ballo

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **Motion to Intervene in Support of Respondent** on all parties through the Court's electronic case filing (ECF) system.

DATED: April 15, 2015

/s/ Timothy D. Ballo

Timothy D. Ballo