

**ORAL ARGUMENT NOT YET SCHEDULED**

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

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STATE OF NEW YORK, <i>et al.</i> ,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 17-1273
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, <i>et al.</i> ,	)	
	)	
Respondents.	)	

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**MOTION OF THE STATE OF NORTH CAROLINA  
FOR LEAVE TO INTERVENE AS A RESPONDENT**

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Circuit Rule 15(b), the State of North Carolina hereby moves this Court for leave to intervene in this case. North Carolina seeks intervention as a respondent to support the November 3, 2017 decision of Respondent United States Environmental Protection Agency (“EPA”) to deny a petition submitted by Petitioner States to add North Carolina and seven other states to the Ozone Transport Region pursuant to section 176A of the Clean Air Act. *See* 82 Fed. Reg. 51238 (Nov. 3, 2017).

As demonstrated below, North Carolina has satisfied all requirements for intervention. The undersigned counsel has conferred by e-mail with counsel for Respondents and counsel for Petitioners. Respondents do not oppose this Motion.

Petitioners take no position with regard to this Motion and do not intend to file an opposition.

## **BACKGROUND**

### **I. The Clean Air Act and the Ozone Transport Region**

Section 176A of the Clean Air Act authorizes EPA to create “interstate transport regions” when it determines that transport of a particular air pollutant from one or more states contributes significantly to violations of National Ambient Air Quality Standards (“NAAQS”) in downwind states. 42 U.S.C. § 7506a. In section 184 of the Clean Air Act, Congress specifically created the Ozone Transport Region to address the interstate transport of ozone-causing pollution in the northeast United States. 42 U.S.C. § 7511c. The Ozone Transport Region is composed of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont, and the Consolidated Metropolitan Statistical Area that includes the District of Columbia. 42 U.S.C. § 7511c(a).

States in the Ozone Transport Region are required to adopt minimum control requirements to address the interstate transport of ozone-causing pollution. In particular, each state must: adopt enhanced vehicle inspection and maintenance programs, 42 U.S.C. § 7511c(b)(1)(A); require major sources of volatile organic compounds (“VOCs”) in areas that are attaining the ozone NAAQS to adhere to the

same control requirements as major sources in ozone nonattainment areas, 42 U.S.C. § 7511c(b)(2); and implement controls for gasoline vapors at gas station pumps. *Id.* In addition, the Ozone Transport Commission, which includes the governors from each state in the Ozone Transport Region, may recommend based on a majority vote of the governors on the Commission that the Administrator impose additional control requirements beyond what the Clean Air Act requires. 42 U.S.C. §§ 7506a(b), 7511c(c). These requirements apply state-wide regardless of whether an area of the state is designated attainment or nonattainment with respect to the ozone NAAQS.

Section 176A(a) of the Clean Air Act provides that, upon the petition of the governor of a state, the Administrator “may . . . add any State or portion of a State to any [interstate transport] region . . . whenever the Administrator has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of the [NAAQS] in the transport region.” 42 U.S.C. § 7506a(a)(1). Once admitted to the Ozone Transport Region, a state must submit a State Implementation Plan satisfying the requirements of section 184(b). 42 U.S.C. § 7511c(b). In short, a state that is added to the Ozone Transport Region will be required to adopt and implement control requirements beyond those otherwise required by the Clean Air Act.

## **II. North Carolina’s Successful Efforts to Reduce Ozone-Forming Pollution**

North Carolina has been a national leader in reducing emissions of ozone precursors, particularly nitrogen oxides (“NO<sub>x</sub>”). In 2002 the State enacted the North Carolina Clean Smokestacks Act, a landmark statute that set emissions caps for utilities in North Carolina for NO<sub>x</sub>. N.C. Sess. Laws 2002-4 § 1(i) (2002) (codified as amended at N.C. Gen. Stat. § 143-215.107D). The statute required coal-fired power plants to achieve a 77% reduction in NO<sub>x</sub> emissions by 2009. *Id.*

Another driver of North Carolina’s reductions in ozone forming pollution has been the growth of the State’s renewable energy sector. In 2007, North Carolina became the first state in the Southeast to adopt a Renewable Energy and Energy Efficiency Portfolio Standard. N.C. Gen. Stat. § 62-133.8. Under this program, North Carolina’s investor-owned utilities are required to meet up to 12.5% of their retail electricity sales through renewable energy resources or energy efficiency measures by 2021. *Id.* These measures have contributed significantly to reductions in NO<sub>x</sub> emissions from the electric utilities sector, which have, in turn, led to reductions in ozone formation both within the state and in downwind states.<sup>1</sup>

EPA’s most recent analysis of North Carolina’s emissions demonstrates that North Carolina’s pollution control efforts have been successful both at maintaining

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<sup>1</sup> See, e.g., NC Utilities Commission, Annual Report Regarding Renewable Energy and Energy Efficiency Portfolio Standard in North Carolina, at App. 1 (Oct. 1, 2015), available at <http://www.ncuc.commerce.state.nc.us/reports/repreport2015.pdf>.

compliance with the ozone NAAQS within the State and curbing the State's contribution to ozone formation in downwind states. For instance, all areas of North Carolina have been designated by EPA as attainment for both the 2008 ozone NAAQS and the more stringent 2015 ozone NAAQS. *See* 77 Fed. Reg. 30088 (May 21, 2012); 80 Fed. Reg. 44873 (July 28, 2015); 82 Fed. Reg. 54232 (Nov. 16, 2017).

More importantly for this case, EPA has determined that North Carolina is *not contributing to any ozone attainment problems in other states*. On October 26, 2016, EPA published an update to the Cross State Air Pollution Rule in which it concluded that North Carolina does not “contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to the 2008 ozone NAAQS.” 81 Fed. Reg. 74504, 74506 (Oct. 26, 2016); *see also id.* at 74,537-38 (stating that North Carolina is “not linked to any identified downwind nonattainment or maintenance receptors with respect to the 2008 ozone standard”).

EPA's conclusion confirmed what North Carolina already documented in prior submissions to EPA. On December 10, 2015, North Carolina certified, as part of the State's required State Implementation Plan, that emissions activities within North Carolina will not significantly contribute to attainment or interfere with maintenance of the 2008 ozone NAAQS in downwind states. EPA approved North Carolina's plan, confirming that North Carolina is not causing ozone problems for downwind states. 82 Fed. Reg. 46134 (Oct. 4, 2017).

### III. The Petition

On December 9, 2013, the Petitioner States submitted a petition pursuant to section 176A of the Clean Air Act requesting that EPA expand the Ozone Transport Region to include North Carolina and seven other states. The Petitioner States contended that North Carolina and the other states named in the Petition are significantly contributing to nonattainment of the 2008 ozone NAAQS in the Ozone Transport Region.

On January 19, 2017, then-Administrator Gina McCarthy published a proposed denial of the Petition in the Federal Register. 82 Fed. Reg. 6509 (Jan. 19, 2017). In the proposed denial, EPA stated that the Clean Air Act confers authority on EPA to exercise reasonable discretion when determining whether to approve or deny a petition under Section 176A. *Id.* at 6513. Specifically, EPA observed that section 176A(a) provides that upon receiving a petition, “the Administrator . . . *may* add any State or portion of a State to [a transport region].” 42 U.S.C. 7506a(a) (emphasis added); *see also* 82 Fed. Reg. at 6513. EPA then noted that several court decisions, including decisions from this Court, have interpreted similar language in the Clean Air Act to allow the Administrator to “exercise reasonable discretion.” 82 Fed. Reg. at 6513-14 (citing, *inter alia*, *Michigan v. EPA*, 213 F.3d 663, 672 (D.C. Cir. 2000)).

In proposing to exercise its discretion to deny the Petition, EPA reasoned that other federal regulations expected to reduce emissions of ozone precursors are a more effective means for addressing interstate transport of ozone. EPA explained that, in its judgment,

an expansion of the [Ozone Transport Region] is unnecessary at this time and would not be the most efficient way to address the remaining interstate transport issues for the 2008 NAAQS in states currently included in the [Ozone Transport Region]. Additional local and regional ozone precursor emissions reductions are expected in the coming years from already on-the-books rules[,] . . . and as described elsewhere in this document, the EPA has the authority through other Clean Air Act provisions (including Clean Air Act sections 110 and 126) to develop a more effective remedy to address the particular pollutants and sources for this air quality situation.

82 Fed. Reg. at 6515. Importantly, in contrast with the other upwind states named in the Petition, EPA had previously determined that North Carolina “was not linked to any downwind receptors and, therefore, will not significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in any other state.” *Id.* at 6518.

On March 22, 2017, NCDEQ submitted comments in support of EPA’s proposed denial of the Petition. EPA Doc. ID No. EPA-HQ-OAR-2016-0596-0034 (Mar. 22, 2017) (“NCDEQ Comments”). In its comments,<sup>2</sup> NCDEQ concurred with

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<sup>2</sup> NCDEQ’s comments also cited additional bases for denying the Petition, including the fact that the technical support document that forms the basis for the petition

EPA's exercise of its discretion to address interstate transport of ozone through other regulatory mechanisms. NCDEQ Comments at 3-4. In addition, NCDEQ commented that EPA was required to deny the Petition with respect to North Carolina because EPA had determined that North Carolina is not contributing to any downwind nonattainment of the 2008 ozone NAAQS. *Id.* at 1-2. Having reached that conclusion, EPA lacked authority to add North Carolina to the Ozone Transport Region under section 176A which allows EPA to do so *only if* "the Administrator has reason to believe that the interstate transport of air pollutants from such State contributes to a violation of the standard in the transport region." 42 U.S.C. 7506a(a)(1).

NCDEQ's comments also explained that including North Carolina in the Ozone Transport Region would require the State to implement statewide controls on sources of VOCs that would have no impact on the downwind formation of ozone. NCDEQ Comments at 4-5. Studies have repeatedly determined that North Carolina is "NO<sub>x</sub>-limited," meaning that ozone concentrations are most effectively reduced by lowering NO<sub>x</sub> emissions rather than lowering emissions of VOCs.<sup>3</sup> *Id.* at 5.

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contains outdated information and does not reflect current and expected future emissions. *See* NCDEQ Comments at 2-3.

<sup>3</sup> EPA has acknowledged this state of affairs on several occasions, concluding in its four transport rules that among ozone precursors it is most effective to reduce NO<sub>x</sub> when addressing regional transport of ozone in the eastern U.S. *See* NCDEQ Comments at 5 n.4.



Therefore, inclusion of North Carolina in the Ozone Transport Region would not address the environmental problem that the Ozone Transport Region was established to resolve.

On November 3, 2017, after considering public comments and responding to those comments, EPA published its final denial of the Petition for the reasons articulated in the proposal issued by Administrator McCarthy. 82 Fed. Reg. 51238. EPA continued to acknowledge in the final denial that North Carolina is not “linked to any downwind air quality problems” and, specifically, is not “significantly contributing to nonattainment or interfering with maintenance of the 2008 ozone NAAQS in other states.” *Id.* at 51243.

## **ARGUMENT**

### **I. Standard for Intervention**

Under Rule 15(d) of the Federal Rules of Appellate Procedure, a motion to intervene in a Court of Appeals proceeding “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 Rule “simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought.” *Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir 1991).

In determining whether to allow intervention under Rule 15(d) this Court has looked to whether the movant would satisfy the standards for intervention under Federal Rule of Civil Procedure 24(a). *See Building & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). Pursuant to Rule 24(a), intervention of right is appropriate when: (1) the application is timely; (2) the applicant has an interest relating to the subject of the action; (3) as a practical matter, disposition of the action may impair or impede the applicant's ability to protect that interest; and (4) the existing parties may not adequately represent the applicant's interest. *Id.* North Carolina easily satisfies the requirements of Rule 24. Therefore, this motion should be granted.

## **II. North Carolina Has a Right to Oppose Its Inclusion in the Ozone Transport Region.**

North Carolina's intervention easily satisfies the four criteria for intervention as of right set forth in Rule 24(a).

With regard to the first factor, North Carolina's Motion for Leave to Intervene is timely. The Petition for Review was filed in this Court on December 27, 2017. This Motion for Leave to Intervene is being filed and served "within 30 days after the petition for review is filed." Fed. R. App. P. 15(d). In addition, North Carolina is filing this motion at the earliest stages of the proceeding, before any preliminary submissions by any other party. North Carolina's intervention would not unduly delay or prejudice the adjudication of the rights of the original parties.

With regard to the second factor, North Carolina has a substantial interest in ensuring that the State is not unlawfully included in the Ozone Transport Region. Inclusion of North Carolina into the Ozone Transport Region will needlessly increase the State's regulatory burden. The State would be required to develop a State Implementation Plan to implement the requirements of section 184(b) of the Clean Air Act as well as any additional measures imposed by the Administrator on the recommendation of other states' governors. As discussed above, such requirements include enhanced inspection and maintenance programs, additional requirements for sources of VOCs, and vapor recovery programs. All of these measures would increase costs to regulated entities and consumers. However, as thoroughly described in NCDEQ's comments in support of the denial of the Petition, these requirements are unnecessary and do not address the environmental problem that the Ozone Transport Region was meant to resolve.

Inclusion of North Carolina in the Ozone Transport Region would also discount the substantial gains that North Carolina has made in reducing emissions of ozone-precursors and ignore the facts on the ground. North Carolina is committed to a fact-based approach to its environmental problems. Here, the evidence establishes that North Carolina has been successful at curbing any contribution to downwind air quality problems in the Ozone Transport Region.

For similar reasons, the third factor is readily met as well. Ultimately at stake in EPA's administrative proceeding is whether North Carolina (and other states) will have significant additional burdens placed upon them. Should the Court adjudicate that EPA incorrectly denied the Petition, the matter will be remanded to EPA for further action in accordance with the decision reached in this case. If this litigation proceeds without North Carolina's participation, North Carolina will have lost the opportunity to weigh in on this Court's review of a decision that directly impacts the State's interests.

Finally, the existing parties in the litigation – the Petitioner States and EPA – do not adequately represent the interest of the State of North Carolina. This Court has held that a party “seeking intervention ordinarily is required to make only a minimal showing that representation of his interest *may* be inadequate. *Env'tl. Defense Fund Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) (emphasis added). Neither EPA nor the Petitioner States stand in the position of a State that is sought to be compelled into joining the Ozone Transport Region.

In addition, although North Carolina supports EPA's exercise of discretion to deny the Petition, North Carolina also contends that the record compelled EPA to deny the Petition as to North Carolina. This is a legal position that EPA may not advance. In that same vein, North Carolina's interests diverge from the other states sought to be included the Ozone Transport Region. Of those states, North Carolina

is the only one that EPA determined is not linked to any downwind nonattainment or maintenance monitors for the 2008 ozone NAAQS.

### **CONCLUSION**

For the foregoing reasons the Court should grant North Carolina's Motion for Leave to Intervene as a Respondent in this matter.

Date: January 25, 2018

Respectfully submitted,

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## CERTIFICATE OF PARTIES

Pursuant to Circuit Rule 27(a)(4) and 28(a)(1)(A), I certify that the parties and amici curiae are set forth below:

Petitioners: State of New York, State of Connecticut, State of Delaware, State of Maryland, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, State of Rhode Island, and State of Vermont.

Respondents: United States Environmental Protection Agency, and E. Scott Pruitt, in his official capacity as the Administrator of EPA.

Intervenors: Utility Air Regulatory Group, State of Ohio, State of Indiana, State of Michigan, State of West Virginia, and the Kentucky Energy and Environment Cabinet (motions to intervene pending).

/s/ Asher P. Spiller  
Asher P. Spiller

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(f) and (g), I hereby certify that the foregoing motion complies with Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(a)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,618 words.

This document complies with Fed. R. App. P. 32(a)(5) and (6) because this document was prepared in 14-point Times New Roman Font.

/s/ Asher P. Spiller  
Asher P. Spiller

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of January, 2018, I caused a true and correct copy of the foregoing Motion for Leave to Intervene to be served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Asher P. Spiller  
Asher P. Spiller