

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GENON REMA, LLC,)
)
 Petitioner,)
)
 v.)
)
)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY, and)
 LISA P. JACKSON, Administrator,)
 United States Environmental)
 Protection Agency,)
)
 Respondent.)
)

Docket No. 12-1022

**MOTION BY THE STATE OF NEW JERSEY TO INTERVENE IN SUPPORT OF
RESPONDENT**

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, the State of New Jersey ("New Jersey") hereby moves this Court for leave to intervene in support of Respondent United States Environmental Protection Agency ("EPA") in the Petitioner's challenge to EPA's final action, "Final Response to Petition From New Jersey Regarding SO₂ Emissions From the Portland Generating Station," 76 Fed. Reg. 69,052 (November 7, 2011). Petitioner GenOn REMA, LLC filed a petition for review on January 6, 2012. New Jersey has a direct and substantial interest in the outcome of this challenge. In addition, neither party may adequately represent the

interests of New Jersey.

The challenger to EPA's final action is the current owner of the coal-fired power plant, the Portland Generating Station ("Portland" or "Portland Plant"), which sits within 500 feet of New Jersey's northwestern border on the Delaware River. Seeking relief from the impact of Portland's sulfur dioxide emissions ("SO₂") emissions on it, New Jersey submitted a petition with EPA pursuant to Section 126 of the Clean Air Act ("Act"), 42 U.S.C. § 7426, based on evidence demonstrating that these emissions from the Portland Plant -- without contribution from any other source of air pollution in the area -- were significantly and adversely impacting the air quality of New Jersey. See <http://www.state.nj.us/dep/bagp/petition/126petition.htm>. Section 126 of the Act allows a state to seek direct EPA regulation of a source or group of sources of air pollution that significantly contribute to nonattainment or interfere with maintenance of any National Ambient Air Quality Standard ("NAAQS") in another state. See 42 U.S.C. § 7426(b). The Petitioner challenges EPA's final decision to grant New Jersey's Section 126 Petition.

ARGUMENT

I. APPLICABLE STANDARD

Pursuant to Fed. R. App. P. 15(d), a motion to intervene in a Court of Appeals proceeding "must contain a concise statement of the interest of the moving party and the grounds for intervention."

For guidance, Appellate Courts have looked to the standard for intervention applicable in District Courts pursuant to Fed. R. Civ. P. 24(a)(2). See Sierra Club v. EPA, 358 F.3d 516, 517-18 (7th Cir. 2004). See also Building and Construction Trades Dept., AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994) ("the policies underlying intervention [in district court] may be applicable in appellate courts"); Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (intervention allowed under Rule 15(d) where applicant was "directly affected" by agency action); New Mexico Dep't of Human Services v. HCFA, 4 F.3d 882, 884, n. 2 (10th Cir. 1993) (allowing medicaid beneficiaries to intervene since their benefits "h[un]g in the balance"); Bales v. NLRB, 914 F.2d 92, 94 (6th Cir. 1990) (intervention granted to a party with a "substantial interest in the outcome of the petition").

Fed. R. Civ. P. 24(a)(2) provides that intervention is proper "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties" (emphasis added). See also Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003). An intervenor "need only show that the representation of his interest 'may be' inadequate, not that representation will in fact be inadequate."

Dimond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) (quoting Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972)).

II. BACKGROUND

Recognizing that the prior 24-hour and annual SO₂ NAAQS did not adequately protect the public against adverse respiratory effects associated with short term (5 minutes - 24 hour) SO₂ exposure, on June 22, 2010, EPA revoked the annual and 24-hour SO₂ NAAQS and set a new, more stringent 1-hour standard. 75 Fed. Reg. 35, 520, 35,581 (June 22, 2010). Pursuant to Section 110 of the Act, New Jersey, like other states, is responsible for creating, implementing and enforcing a "State Implementation Plan," or "SIP," which must ensure that the NAAQSs, such as the 1-hour SO₂ standard, are being met. 42 U.S.C. §§ 7410, 7502(c). NAAQSs are ambient air quality standards "requisite to protect the public health." Id. at § 7409(b)(1). EPA designates areas as either meeting ("attainment") or failing to meet ("nonattainment") the NAAQS. Id. at 7407(d)(1)(B). The Act requires that a state must attain the applicable NAAQS as expeditiously as practicable but in no case later than five years from the effective date of the nonattainment designation. 42 U.S.C. § 7514a (a).

On November 7, 2011, EPA granted New Jersey's Section 126 petition, finding that "[SO₂ emissions] from Portland significantly contribute to nonattainment and interfere with maintenance of the

1-hour SO₂ [NAAQS] in New Jersey." 76 Fed. Reg. 69,052 (November 7, 2011). The final rule provides that the Portland Plant must reduce its SO₂ emissions by 60% by January 2013 and by 81% by January 2015. A compliance plan must also be provided to EPA by January 2013. In making its proposed finding to grant New Jersey's petition, EPA stated:

Given the magnitude of the modeling violations, which were nearly seven times the 1-hour SO₂ NAAQS based on AERMOD modeling of maximum allowable emissions, and the fact that significant exceedances of the NAAQS were also shown based on modeling of estimated actual emissions, the EPA concluded that the [New Jersey Department of Environmental Protection, "NJDEP"] had clearly shown that SO₂ emissions from Portland cause violations of the 1-hour SO₂ NAAQS in New Jersey."

[76 Fed. Reg. 69,057.]

EPA also independently modeled Portland's emissions. Id. EPA used its analysis to calculate the emission reductions necessary to eliminate the Section 126 violations at the Portland Plant with respect to New Jersey. 76 Fed. Reg. 69,063.

III. NEW JERSEY HAS A DIRECT AND SUBSTANTIAL INTEREST IN PETITIONER'S CHALLENGE TO EPA'S DECISION ON NEW JERSEY'S SECTION 126 PETITION

New Jersey has a direct and substantial interest in the outcome of this challenge, primarily (1) protecting the health of New Jersey citizens and the environment and (2) protecting New Jersey's air quality as the Act requires.

First, New Jersey is concerned with the health of its citizens

and the environment and has responsibilities to protect the public health. See, e.g., Dep't of Health v. Owens-Corning Fiberglass Corp., 100 N.J. Super. 366, 381 (App. Div. 1968) ("The safeguarding of the public health has long been considered an essential government function of the police power of the State.").

In this regard, the Portland Plant has emitted significant quantities of SO₂ (in 2009, it emitted approximately 30,000 tons per year, see <http://camddataandmaps.epa.gov/gdm/>) and has no SO₂ controls. In addition, Portland sits in a river valley. and its SO₂ emissions travel directly into the elevated terrain in New Jersey causing significant adverse impact on New Jersey's air quality. Health effects of SO₂ include coughing, wheezing, shortness of breath, nasal congestion and inflammation, inflammation of asthma, low birth weight, and increased percentage of infant death. See Clean Air Task Force, *Dirty Air, Dirty Power Mortality and Health Damage Due to Air Pollution from Power Plants*, at 10 (June 2004), available at <http://www.catf.us/resources/publications/view/24>. EPA found that as SO₂ concentrations increase, so do respiratory symptoms such as asthma. See "Risk and Exposure Assessment to Support the Review of SO₂ Primary National Ambient Air Quality Standards: Final Report," at 32 (July 2009), available at http://www.epa.gov/ttn/naaqs/standards/so2/s_so2_cr_rea.html. See also www.epa.gov/air/sulfurdioxide. In tightening the SO₂ NAAQS,

EPA concluded that five-ten minutes of exposure of 200 parts per billion ("ppb") SO₂ can cause adverse health effects in some asthmatics, and the same exposure of greater than or equal to 400 ppb SO₂ results in clear adverse effects in general (including decrements in lung function and increases in respiratory symptoms). See, e.g., 75 Fed. Reg. 35,526.

In addition, under Section 107 of the Act, states like New Jersey have the primary responsibility for ensuring air quality in their state. 42 U.S.C. § 7407(a). See also Southwestern Pa. Growth Alliance v. Browner, 121 F.3d 106, 110 (3d Cir. 1997). As such, New Jersey must provide for attainment of the 1-hour SO₂ NAAQS within the deadlines proscribed by the Act. New Jersey's Section 126 Petition, which demonstrated that Portland's emissions alone were causing NAAQS exceedances in New Jersey, also indicated that abatement of the Section 126 violations at Portland was necessary to ensure that New Jersey could timely attain EPA's new 1-hour SO₂ standard. Should the within challenge modify or overturn EPA's decision to grant New Jersey's petition, New Jersey's interests will be directly and substantially affected.

IV. NEW JERSEY'S INTERESTS WILL NOT BE ADEQUATELY REPRESENTED BY THE PARTIES

The only petitioner in this matter is the current owner of the at-issue Portland power plant, who likely seeks to overturn the decision of EPA to grant New Jersey's Section 126 petition. Thus, petitioner's interest here is in conflict with New Jersey's

interests. Moreover, there are no other petitioners in this challenge, including no other state or governmental entity petitioner. In addition, EPA as the federal government may not adequately represent the interests of New Jersey. The unique focus that New Jersey would bring to this action -- that the existing parties cannot bring -- is the impact of SO₂ emissions from the Portland plant on human health and environment in New Jersey, and the importance of EPA's decision for attainment of the 1-hour SO₂ NAAQS in New Jersey.

V. ALTHOUGH IT IS NOT NECESSARY TO DEMONSTRATE STANDING, NEW JERSEY HAS STANDING TO INTERVENE IN THIS CHALLENGE

New Jersey need not demonstrate standing because it is seeking to intervene in support of an agency decision on an established record. See Comcast Corp. v. FCC, 579 F.3d 1, 6 (D.C. Cir. 2009) (finding that intervenors need not show standing where other parties had standing). Nevertheless, New Jersey has standing here. Standing is established by showing: (1) injury in fact; (2) causation; and (3) redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). New Jersey has recommended to EPA that several areas be designated nonattainment for the 1-hour SO₂ standard, showing that air quality is a problem in New Jersey. And New Jersey's citizens are harmed by SO₂ emissions. New Jersey's Section 126 Petition demonstrates that Portland's emissions are causing certain areas in New Jersey to fall out of attainment of this air quality standard. In granting New Jersey's petition, EPA

is requiring SO₂ emission reductions at Portland. Reducing emissions at Portland would, at least in part, redress the harm caused to New Jersey by these emissions.

CONCLUSION

New Jersey has a direct and substantial interest in the outcome of the challenge to EPA's final Section 126 Rule. In addition, neither EPA nor the only petitioner in this challenge -- who seeks to overturn New Jersey's Section 126 petition -- can adequately represent New Jersey's interests. Accordingly, pursuant to Fed. R. App. P. 15(d), proposed intervenor New Jersey respectfully requests that its application for intervention in this action be granted.

Dated: February 6, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 6, 2012, a copy of the foregoing Motion by the State of New Jersey for Leave to Intervene in Support of Respondent was filed electronically with the Clerk of Court using CM/ECF which will send notification of such filings to all Counsel of Record.

I further certify that on February 6, 2012, I caused the foregoing Motion by the State of New Jersey for Leave to Intervene in Support of Respondent to be served by U.S. Mail upon the following individuals:

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Dated: February 6, 2012

Respectfully submitted,

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