

ORAL ARGUMENT NOT YET SCHEDULED

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

SOUTHEASTERN LEGAL)	
FOUNDATION, INC., <i>et al.</i> ,)	
)	
Petitioners,)	
v.)	No. 10-1131 and
)	consolidated cases
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**MOTION FOR LEAVE TO INTERVENE AS RESPONDENTS OF
CONSERVATION LAW FOUNDATION, GEORGIA FORESTWATCH,
NATURAL RESOURCES COUNCIL OF MAINE, AND WILD VIRGINIA**

Conservation Law Foundation, Inc. (“CLF”), Georgia ForestWatch (“GFW”), Natural Resources Council of Maine (“NRCM”), and Wild Virginia (“WV”) (collectively “Proposed Intervenors”) respectfully move this Court for leave to intervene in support of Respondent U.S. Environmental Protection Agency (“EPA” or “the Agency”) in the above-captioned matter, pursuant to Fed. R. App. P. 15(d) and D.C. Circuit Rule 15(b). In support, Proposed Intervenors state as follows:

1. Petitioners Southeastern Legal Foundation, Inc., *et al.*, filed the initial petition in this proceeding on June 3, 2010, seeking review of a final action (including promulgation of regulations) of the EPA under the Clean Air Act (“the Act” or “CAA”), 42 U.S.C. § 7401 *et seq.*, taken at 75 Fed. Reg. 31,514 *et seq.* (June 3, 2010) and entitled “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule” (“Tailoring Rule”). This Court also has consolidated other petitions for review of the same rule with this case. Orders, No. 10-1131 (June 14 & July 2, 2010).

2. The Tailoring Rule finalizes regulations applying the Act’s Prevention of Significant Deterioration (“PSD”) and Title V operating permit programs, 42 U.S.C. §§ 7475, 7479, 7661-7661f, to stationary sources of greenhouse gases (“GHGs”), specifically carbon dioxide (“CO₂”), methane, nitrous oxide, hydrogen fluorocarbons, perfluorocarbons, and sulfur hexafluoride. 75 Fed. Reg. 31,519, 31,522. In particular, EPA finalized a two-phased approach to “tailoring” the applicability criteria that determine which GHG emission sources become subject to the PSD and Title V programs, in order to relieve overwhelming permitting burdens, and otherwise to make these permitting requirements administratively feasible as applied to GHG emissions sources. EPA’s rule also commits the Agency to undertake future rulemakings further defining the

obligations (as they apply to GHGs) of stationary sources under these programs.

Id. 31,607 & 31,608 (publishing new 40 C.F.R. §§ 52.22(b), 71.13(b)).

3. In its Tailoring Rule, EPA rejected requests to exclude GHGs produced by the combustion of biomass (which EPA refers to as “biogenic” emissions) from counting toward the statutory and regulatory thresholds for determining which stationary sources will be subject to the PSD and Title V permitting requirements for GHGs (the “applicability” or “threshold” accounting).

Id. 31,526-27, 31,591. In discussing this aspect of the final rule, EPA asserted that “the ‘absurd results,’ ‘administrative necessity,’ and one-step-at-a-time legal rationales that support [the] rule” “do not provide sufficient basis to exclude emissions of CO₂ from biogenic sources” *Id.* 31,591.

4. Proposed Intervenors are regional membership organizations whose missions include the protection and conservation of public health and the natural environment, including from the adverse effects of climate change and air pollution, and the preservation of regional forest resources and ecosystems. As described herein, and in the Declarations attached,¹ Proposed Intervenors’

¹ The specific health and environmental benefits of EPA’s Tailoring Rule, as described herein, establish Proposed Intervenors’ “interest” under Rule 15(d), as well as their standing to sue under Article III of the Constitution, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555(1992), whether or not proof of standing is independently required of parties who, as here, seek to intervene in support of a Respondent. Out of an abundance of caution, however, Proposed Intervenors here attach in Appendix A the standing declarations for each of their organizations.

members will benefit directly from the reductions in GHG air pollution being phased in under the Tailoring Rule, as they already are directly impacted by the adverse environmental, public health, and in some cases economic consequences of climate change caused by emissions of GHGs, and the environmental and public health consequences of the other air pollutants emitted by large stationary sources of GHGs. In particular, Proposed Intervenors' members live and recreate in areas near existing large stationary sources that combust biomass to generate energy, and in coastal and mountain resort areas where the impacts of climate change already are experienced by them. As such they also will benefit directly from the provision of the Tailoring Rule they seek to defend, which includes the CO₂ produced by the combustion of biomass in determining whether permits must be sought and GHG and other air pollution controls imposed on those sources.

5. Recent scientific evidence indicates that combusting certain kinds of biomass actually may have more adverse GHG consequences than burning other kinds of fuels to generate energy. See Declaration of Ellen Baum ¶¶ 9-10 (in Appendix A hereto) (“Baum Decl.”). EPA’s decision to include biogenic GHG emissions in the applicability accounting for PSD permitting not only means that large stationary biomass combusters will be subject to permitting and controls on GHGs, it also reduces the incentive for other facilities to switch to biomass fuel

burning, thereby exacerbating the adverse effects on air quality and public health already associated with such facilities.

6. Proposed Intervenors have a unique interest in preserving this aspect of the Tailoring Rule against challenges by Petitioners, both because of their missions to preserve regional public health and natural resources, and because their members currently live near biomass energy facilities, or recreate in areas already damaged by climate change caused by GHGs, and that are at risk of over-harvesting and loss of habitat for existing native species and degradation of water quality associated with increased demand for biomass energy production. Therefore, Proposed Intervenors seek leave to intervene in this proceeding in support of EPA's Tailoring Rule, and particularly EPA's decision to include biogenic GHGs in the applicability accounting for the PSD and Title V programs.

Background

7. Clean Air Act section 165 establishes preconstruction requirements for "major emitting facilities" located in areas of the country that are either in attainment or (as is the case for GHGs) unclassifiable for any air pollutant. *See* 42 U.S.C. §§ 7475, *see also* §§ 7470, 7471 (describing the purposes of the PSD program generally). Before commencement of construction, such facilities must be subject to, and hold permits that, *inter alia*, contain emissions limits based on "the best available control technology [BACT] for each pollutant subject to

regulation under this chapter emitted from, or which results from, such facility[.]” *Id.* § 7475(a). The term “construction” also is defined to include the modification of any source or facility, as defined in 42 U.S.C. § 7411(a). *Id.* § 7479(2)(C).

8. Major emitting facilities subject to the PSD program are defined by the statute as a list of certain industrial stationary sources which emit or have the potential to emit 100 tons per year (“tpy”) of any air pollutant, or as “any other source” with the potential to emit 250 tpy or more of any air pollutant. *Id.* § 7479(1). Any source that must hold a PSD permit and that has the potential to emit more than 100 tpy of an air pollutant must also hold an operating permit pursuant to CAA Title V. *See id.* § 7661a. While not imposing additional substantive permitting requirements, Title V requires all emissions and monitoring and reporting requirements applicable to a source to be included in one permit.

9. While BACT limits must be set for pollutants “subject to regulation” under the Act, that term is not defined in the statute. *Id.* § 7549(3). The Supreme Court in *Massachusetts v. EPA* held that certain GHGs are “air pollutants” as defined in the Act, 549 U.S. 497, 528-529 (2007), and the question of when GHGs become “subject to regulation” is under review in other proceedings currently before this court, *see e.g. Sierra Club v. EPA* (D.C. Cir. No. 09-1018) and *American Iron & Steel Inst. v. EPA* (D.C. Cir. No. 10-1109), but EPA in the Tailoring Rule has determined that GHGs will become “subject to regulation”

under the Act when the separately finalized regulations for motor vehicle GHG emissions standards take effect on January 2, 2011. 75 Fed. Reg. 31,521-22. At that time, under EPA's interpretation, GHGs emitted by stationary sources also will become "subject to regulation" within the meaning of the PSD and Title V programs.

10. Additionally, EPA's regulations implementing the PSD program for other air pollutants include provisions establishing "significance" levels of emissions that trigger the application of PSD permitting requirements to modified existing sources. 75 Fed. Reg. 31,556 (citing *Alabama Power v. EPA*, 636 F.2d 323 (D.C. Cir. 1980)).

11. Because CO₂ is the product of combustion, and not emitted as a by-product of combustion, it is produced in far larger amounts than other air pollutants regulated by the PSD program. For this reason, applying the statutory 100 tpy and 250 tpy thresholds to CO₂ would result in an unworkably large number of required new permits. 75 Fed. Reg. 31,549, 31,603. In the Tailoring Rule, therefore, EPA establishes a phase-in for such permitting requirements so that PSD and Title V requirements apply first to the largest sources of GHGs. 75 Fed. Reg. 31,516, 31,524-25, 31,540.

12. EPA's proposed Tailoring Rule did not seek comment on whether biogenic carbon dioxide emissions could be excluded from these calculations. *See*

75 Fed. Reg. 31,590. Nevertheless, EPA received comments on this issue, which primarily urged EPA either 1) to exempt biogenic CO₂ emissions entirely based on the theory (most simply stated) that because biomass grows back over time, taking up CO₂ in the process, that all biomass therefore is inherently “carbon neutral,” or 2) to include such emissions in the applicability accounting because robust scientific evidence significantly refutes that theory. *Id.* In the final Tailoring Rule, EPA did not exclude biogenic CO₂ emissions from the PSD applicability calculation for new and modified stationary sources of GHGs, both because an exclusion is not justified by the legal doctrines on which EPA relied, and “because such an exclusion alone, while reducing burdens from some sources, would not address ... overwhelming permitting burdens....” *Id.* 31,591.

13. The record underlying the Tailoring Rule, however, demonstrates that only through an accurate lifecycle analysis of the emissions associated with a given type of biomass can the GHG implications be determined. Commenters submitted to EPA various published studies demonstrating the need for accurate biomass lifecycle emissions analysis, including a published peer-reviewed study entitled “Fixing a Critical Climate Accounting Error.” T. Searchinger *et al.*, *Fixing a Critical Climate Accounting Error*, 326 *SCIENCE* 527, 528 (2009), referenced in the docket for the underlying rule at EPA-HQ-OAR-5519.2. That study asserts that analysis of the GHG impacts of a given type of biomass “must reflect net changes

in carbon stocks, emissions of non-CO₂ greenhouse gases, and leakage emissions resulting from changes in land-use activities to replace crops or timber diverted to bioenergy.” *Id.* at 528.

The Interests of Proposed Intervenors and Their Members

14. Proposed Intervenors individually and collectively have interests in this litigation, particularly in supporting Respondent EPA in these challenges to the Tailoring Rule to defend EPA’s decision to include biogenic emissions in the applicability determination for the PSD and Title V programs. More specifically, Proposed Intervenors seek to further the climate change and sustainable biomass policies for which they advocate, and to protect their members’ interests against current and future harms due to GHG and other air pollutant emissions from biomass combustion, as described in the Declarations included in Appendix A.

15. CLF is a nonprofit, membership organization devoted to protecting the environment of New England and the public health and welfare in New England communities, including protecting New England environments against the current and future harmful effects of climate change, and protecting its members from emissions of the other air pollutants from uncontrolled biomass combustion for energy production. Declaration of Timothy Harwood ¶¶ 2-15. CLF’s approximately 3,200 members live in twenty-six states and the District of Columbia, with the majority residing in New England. *Id.* ¶¶ 4-5. In furtherance

of this mission and to protect the specific interests of its members, CLF works to promote effective climate change policies (including sustainable biomass combustion policies) and reduced ground-level ozone in New England, and has been party in proceedings to enforce the requirements of the Act, particularly the regulation of GHG emissions, including *Massachusetts v. EPA*. *Id.* ¶¶ 8, 9-12.

16. CLF’s members live in coastal communities that are adversely impacted by sea level rise caused by the warming of the earth’s climate due to GHG emissions from among other sources the combustion of biomass to generate power. *Id.* ¶¶ 13-14; Declaration of Michael Moskow ¶¶ 5, 8, 16-18 (“Moskow Decl.”). CLF’s members also are affected directly by high ozone levels in the areas where they live and recreate, and that are exacerbated both by increased summertime temperatures and by the GHG methane. Moskow Decl. ¶¶ 4, 9, 15; Declaration of Emily Bateson ¶¶ 6, 7, 15-16 (“Bateson Decl.”).

17. GFW is a not-for-profit, membership-supported organization dedicated to restoring, protecting and increasing appreciation of the national forests in the state of Georgia and the watersheds, native plants and wildlife that exist within those forests. Declaration of Wayne Jenkins ¶¶ 3-4 (“Jenkins Decl.”). To achieve its mission and further the interests of its members, GFW pursues policies that address the global problem of climate change and anthropogenic GHG emissions, reduce emissions of conventional pollutants, such

as nitrogen oxides, that adversely affect Georgia's national forests, and contain the growing threat of using the trees on those public lands as a feedstock source for power plants and other facilities that combust woody biomass. *Id.* ¶¶ 5, 18-19.

18. GFW's members live near and use the lands and waters located within the national forests of Georgia that are adversely impacted by increased temperatures and changing precipitation patterns caused by the warming of the earth's climate due to GHG emissions from biomass combustion facilities and other sources. Declaration of David Govus ¶¶ 3-9 ("Govus Decl."). GFW's members also are threatened by incentives that increase demand for biomass combustion, because those incentives add to the existing pressure to harvest trees from the national forests to feed those facilities. *Id.* ¶ 10; Jenkins Decl. ¶ 18.

19. NRCM is a nonprofit membership organization whose mission is to protect, restore, and conserve Maine's environment, now and for future generations, including by reducing harmful air pollution and the CO₂ and other GHGs from power plants and other sources. Declaration of William Houston ¶ 6 ("Houston Decl."). NRCM advocates for sustainable biomass combustion policies that protect Maine forest ecosystems, in order to promote its mission and the particular interests of its members in not increasing the GHG emissions that already occur from power production. See *Id.* ¶¶ 6, 13-18 ; Baum Decl. ¶¶ 5-11.

20. NRCM's members also are individually harmed by existing biomass combustion facilities in Maine, and therefore have an interest in ensuring that regulatory incentives are not created for the expansion of such facilities in EPA's Tailoring Rule. See Houston Decl. ¶¶ 7-17. William Houston, for example, lives within 30 miles of such a facility, and has recently been diagnosed with adult onset asthma. *Id.* ¶¶ 12, 15. He therefore has a direct interest in defending EPA's Tailoring Rule requirement that GHG emissions from that facility will "count" toward requirements for pollution control.

21. Wild Virginia is a not-for-profit, membership-supported organization incorporated under the laws of Virginia; its mission is to preserve forest ecosystems in Virginia's national forests. Declaration of Nathan Van Hooser ¶¶ 3, 4 ("Van Hooser Decl."). To further its mission, Wild Virginia advocates against biomass sourcing and biomass combustion practices that may compromise the vitality of Virginia's national forests. *Id.* ¶¶ 5, 8, 10-11. It does this by promoting policies that avoid, reduce, or eliminate GHG emissions from biomass harvesting and combustion, the emissions of conventional pollutants from biomass combusting facilities, and the harmful conversion of national forests into land to produce woody biomass to feed biomass facilities. *Id.*

22. Wild Virginia's members also are individually harmed by the effects of climate change being felt in Virginia's national forestlands and are threatened

by the additional GHG emissions that exacerbate those effects. Declaration of Peyton Coyner ¶¶ 4-7 (“Coyner Decl.”). Wild Virginia member Peyton Coyner, for example, has always lived within 20 miles of Virginia’s national forests, and it has been his lifetime habit to enjoy and experience those forests through hiking, camping, and fishing, among other outdoor activities, and to protect them through his membership and participation in Wild Virginia. *Id.* ¶¶ 3-9. He therefore has a direct interest in defending EPA’s Tailoring Rule requirement that biomass combustion facilities will not be able to escape review and pollution control requirements based on their GHG emissions.

Argument

23. Fed. R. App. P. 15(d) states that a motion to intervene “must contain a concise statement of the interest of the moving party and the grounds for intervention.” The standards for intervening in a District Court proceeding pursuant to Fed. R. Civ. P. 24 can further help guide review of a motion to intervene in a Court of Appeals. *See Building and Constr. Trades Dep’t v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (quoting *Int’l Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965)).² Under Fed. R. Civ. P. 24(a), intervention of right requires that: (1) intervenor’s motion be timely; (2) intervenor has an interest relating to the subject of the action; (3) disposition of the action may impair or impede

² While Fed. R. Civ. P. 24 may help guide this Court, it by no means sets forth the requirements for intervention in this Court. *See Scofield*, 382 U.S. at 217 n.10.

intervenor's ability to protect that interest as a practical matter; and (4) existing parties to the lawsuit may not be able to represent intervenor's interests adequately.

A. *Proposed Intervenors' Motion is Timely.*

24. The initial petition for review in this now-consolidated proceeding was filed on June 3, 2010. Therefore, this motion is timely because it is filed within 30 days of that date. Fed. R. App. P. Rules 15(d) & 26. This intervention will not unduly delay these proceedings, as the period for filing petitions for review of EPA's Tailoring Rule extends until August 2, 2010, pursuant to 42 U.S.C. § 7607(b)(1) (requiring petitions for judicial review of a final action by the Administrator to be filed within 60 days of its publication in the Federal Register). Furthermore, this intervention will not broaden or complicate the scope of this review proceeding, but simply will allow Proposed Intervenors to protect their organizational interests, as well as their members' individual and particularized interests, in defending EPA's Tailoring Rule against challenges already brought in this case, and in subsequent cases challenging the same final rule.

B. *Proposed Intervenors Have an Interest in Defending EPA's Tailoring Rule.*

25. This Court has described the interest for intervention as "primarily a practical guide to disposing of law suits 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)). This review proceeding directly and significantly affects the mission and interests of Proposed Intervenor and their members.

26. NRCM Declarant Ellen Baum explains the scientific evidence indicating that use of biomass as a fuel can, in some cases, lead to dramatic increases in GHG emissions when compared to the continued use of fossil fuels, and as well biomass energy facilities produce other harmful air pollutants, including ozone precursors. Baum Decl. ¶¶ 8, 9-10. EPA's decision not to exclude biomass GHG emissions avoids creating incentives for additional biomass combustion at existing facilities or the switch from fossil fuels to biomass for the production of energy. Should EPA's Tailoring Rule be overturned on these points, however, such incentives would be created. *Id.* ¶¶ 13-15.

27. Proposed Intervenor and their individual members have a direct, demonstrated, and concrete interest in preventing future adverse impacts on forest resources and ecosystems resulting from the combustion of biomass and incentives to increase the combustion of biomass. *Id.*; Bateson Decl. ¶¶ 14&27; Houston Decl. ¶¶ 16-18; Jenkins Decl. ¶¶ 20-25; Coyner Decl. ¶¶ 6-9; Van Hooser Decl. ¶¶ 5-16; Govus Decl. ¶¶ 3-11. Proposed Intervenor's members are directly affected by existing facilities that combust biomass for energy production.

28. Proposed Intervenor's members further include persons who currently breathe high levels of ground level ozone on a daily basis, recreate in

areas with high ozone levels, are themselves asthmatics, or have active outdoor children. Moskow Decl. ¶¶ 2, 4, 9, 15-16; Bateson Decl. ¶¶ 2, 7; Houston Decl. ¶¶ 3, 12, 14; Coyner Decl. ¶¶ 2, 4, 6-7.

29. Proposed Intervenors' members also currently experience the impacts of climate change on the coastal and mountain areas where they own property, live, and recreated. Moskow Decl. ¶ Houston Decl. ¶ Govus Decl. ¶¶ 4-9; Van Hooser Decl. ¶¶ 6, 9-10; Coyner Decl. ¶¶ 2, 4-7; Jenkins Decl. ¶¶ 6-12.

C. *Vacatur or Other Adverse Disposition of the Tailoring Rule Will Impair Proposed Intervenors' Ability to Protect the Health and Well-Being of Its Members.*

30. As EPA has correctly recognized, without significant GHG reductions in the near future, there is every reason to believe that the impacts already being felt from climate change will increase in number, magnitude, and frequency. *See* 74 Fed. Reg. 66,518-19. By attempting to overturn the Tailoring Rule and thus the likelihood of federal regulation GHG emissions from stationary sources in the near future, Petitioners' challenge directly conflicts with Proposed Intervenors' interests and the interests of their members.

31. Petitioners are further expected to challenge EPA's decision to include biogenic GHG emissions from major emitting facilities and to require them to comply with the Act's permitting requirements, in particular the requirement to

install BACT. As described above, Proposed Intervenors' members are particularly harmed by current unregulated emissions of GHGs from biomass combustion, and they have an interest in preventing unchecked expansion of those facilities and in otherwise preventing emissions of harmful air pollutants from those facilities and new biomass combustion facilities. Moreover, Petitioners' challenge threatens directly the missions and interests of Proposed Intervenors in sustainable biomass GHG regulation and policy.

D. U.S. EPA May Not Adequately Protect Proposed Intervenors' Interests.

32. The U.S. Supreme Court has explained that the requirement of Fed. R. Civ. P. 24(a) that an intervenor's interest not be adequately represented by existing parties "is satisfied if the [intervenor] applicant shows that representation of [its] interest 'may be' inadequate," a showing for which the burden of proof should be "minimal." *See Trvovich v. United Mine Workers of America*, 404 U.S. 528, 538-39 and n.10 (1972). Proposed Intervenors more than meet the "minimal" burden of proving that the representation of its interests "may be" inadequate.

33. Petitioners' interests are plainly opposed to the interests of Proposed Intervenors and their members, insofar as they seek to void a significant step towards regulating GHGs, including the GHG emissions from biomass combustion. Petitioners and their members include businesses and trade

associations of businesses that would likely be subject to regulation under the Act for GHGs, including GHGs from biomass combustion.

34. Although EPA and its attorneys are fully competent to represent EPA's current interests and to defend EPA's Tailoring Rule, Proposed Intervenors are not confident that EPA will necessarily adequately represent their particular interests throughout the course of this proceeding. While EPA, at least for now, has decided not to exclude biogenic GHG emissions in the applicability accounting for GHG permitting, it based its determination on the legal doctrines supporting its Tailoring Rule, specifically the lack of evidence that overwhelming burdens would result from its decision, and not on the scientific evidence already in the record. 75 Fed. Reg 31,590-91; *see also* ¶¶ 12-13 *supra* (describing the record). In addition, the Agency has indicated that it may in the future exempt such emissions from the permitting requirements of the Clean Air Act on the basis of administrative burdens or "some other rationale." 75 Fed. Reg. 31,591. These statements are not the robust defense of the decision to include biomass GHG emissions in the applicability accounting that Proposed Intervenors will provide this Court.

35. Furthermore, while EPA is charged with protecting the public health and welfare of the nation as a whole, Proposed Intervenors' organizational interests and activities are particularized and regional and local in nature, with a focus on New England, and the Southeast, in particular areas in which biomass facilities

exist and may expand and in which new ones may be built. Proposed Intervenors and their members currently experience harms to regional forest resources and to their members health and well-being as a result of these facilities, and these harms will continue and worsen if EPA is precluded from regulating GHGs from stationary sources, in particular from facilities that combust biomass.

36. Given the very specific nature of Proposed Intervenors' and their members' interests and their particular expertise with regard to climate change impacts in New England and in the Southeast, as compared to EPA's broader, more expansive regulatory responsibility, Proposed Intervenors safely meet the minimal burden required to show that EPA may not adequately represent their members' interests.

Conclusion

37. Proposed Intervenors meet the requirements for intervention, as described above, and respectfully request leave to intervene as Respondents in the above-captioned proceeding.

RESPECTFULLY SUBMITTED, this 6th day of July 2010, by:

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