

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

AEP Ohio, on behalf of affiliates)
 Cardinal Operating Co.)
 Columbus Southern Power Co.) Case No. 09CVH 09 14494
 Ohio Power Co.)
1 Riverside Plaza)
Columbus, Ohio 43215)
)
Ashland, Inc.)
5200 Blazer Parkway)
Dublin, Ohio 43017) Judge Sheeran
)
Clean Harbors Recycling Services of Ohio)
581 Milliken Dr.)
Hebron, Ohio 43025)
)
Columbus Steel Castings Co.)
2211 Parsons Ave.)
Columbus, Ohio 43226)
)
Duke Energy Ohio, Inc., fna)
 The Cincinnati Gas & Electric Co.)
 and on behalf of affiliate)
 Cinergy Solutions of St. Bernard)
139 Fourth St.)
Cincinnati, Ohio 45202)
)
FirstEnergy Corp., on behalf of affiliates)
 Cleveland Electric Illuminating)
 Ohio Edison)
 Toledo Edison)
76 S. Main St.)
Akron, Ohio 44308)
)
Ford Motor Company)
One American Road)
Dearborn, Michigan 48126)
)
Kraton Polymers U.S. LLC)
2419 State Route 618)
Belpre, Ohio 45714)
)
Millennium Inorganic Chemicals, Inc.)

2426 Middle Rd.)
Ashtabula, Ohio 44004)
)
Momentive Performance Materials)
as successor to)
GE Quartz, Inc.)
22 Corporate Woods Blvd.)
Albany, New York 12211)
)
PPG Industries, Inc.)
One PPG Place)
Pittsburgh, Pennsylvania 15252)
)
The Procter & Gamble Company)
1 Procter & Gamble Plaza)
Cincinnati, Ohio 45202)
)
Plaintiffs,)
)
and)
)
Natural Resources Defense Council)
2 N. Riverside Plaza, Suite 2250)
Chicago, IL 60606)
)
Buckeye Environmental Network)
2319 Park Ridge Court)
Grove City, Ohio 43123)
)
Citizens Against American Landfill Expansion)
5871 Indian Run Ave SE)
Waynesburg, Ohio 44688)
)
Environmental Community Organization)
515 Wyoming Avenue)
Cincinnati, Ohio 45215)
)
National Parks Conservation Association)
1300 19th Street, NW, Suite 300)
Washington, DC 20036)
)
Ohio Association of Justice)
395 E. Broad St., Suite 200)
Columbus, Ohio 43215)
)
Ohio Citizen Action)

614 W. Superior Avenue #1200)
Cleveland, Ohio 44113)

Ohio Environmental Council)
1207 Grandview Ave., Suite 201)
Columbus, Ohio 43212)

Sierra Club)
131 N. High St., Suite 605)
Columbus, Ohio 43215)

SunCoke Watch, Inc.)
5984 Niederland Lane)
Middletown, Ohio 45044-7820)

Jill Van Voorhis)
5871 Indian Run Ave., SE)
Waynesburg, Ohio 44688)

Vivian Baier)
4584 Indian Run Ave., SE)
East Canton, Ohio 44730)

Ann McCoy)
8922 Chapel St., SE)
Waynesburg, Ohio 44688)

Proposed Intervening Plaintiffs,)

v.)

State of Ohio)
Statehouse)
Columbus, Ohio 43215)

and)

The Ohio Environmental Review Appeals)
Commission)
309 S. Fourth St., Room 222)
Columbus, Ohio 43215)

and)

Christopher Korleski)
Director of Environmental Protection)

Lazarus Government Center)
50 W. Town St., Suite 700)
Columbus, Ohio 43215)
)
Defendants.)

**MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE**

Pursuant to Ohio Rule of Civil Procedure 24, Intervenor-Plaintiffs Natural Resources Defense Council, Buckeye Environmental Network, Citizens Against American Landfill Expansion, Environmental Community Organization, National Parks Conservation Association, Ohio Association of Justice, Ohio Citizen Action, Ohio Environmental Council, Sierra Club, SunCoke Watch, Inc., Jill Van Voorhis, Vivian Baier, and Ann McCoy (collectively, “Citizen Groups”) respectfully move to intervene in the above-captioned proceeding filed by American Electric Power-Ohio and twelve other entities (collectively, “Industry Plaintiffs”). The Industry Plaintiffs have filed a two-count complaint challenging the Ohio Environmental Review Appeals Commission’s (“ERAC”) recent decision to limit Plaintiffs to only one-hour hearings and to impose other restrictions on the Plaintiffs’ ability to present their cases in pending ERAC appeals. Intervention should be granted because ERAC has imposed the same limits in the Citizen Groups’ pending ERAC appeals and, therefore, the outcome of this proceeding will directly impact the Citizen Groups’ interests in their appeals. Such interests are not adequately represented in this proceeding because the Industry Plaintiffs are not parties to the Citizen Groups’ ERAC appeals and may have different interests regarding ERAC appeals. This motion is timely, as it is being filed three days after the Industry Plaintiffs’ petition and granting the motion would not prejudice the existing parties. As such, the Court should grant intervention and allow the Citizen Groups to fully participate in this proceeding.

I. Factual Background

The Citizen Groups are public interest, non-profit environmental organizations, each of which has numerous members in Ohio, and three individuals who have appeals pending before ERAC. Combined, the Citizen Groups and their member organizations have thirty-three (33) appeals pending before ERAC.

Natural Resources Defense Council (“NRDC”) is a national, non-profit, environmental organization with more than 420,000 members nationwide, including 13,853 members in Ohio. NRDC is dedicated to the protection of the environment and public health and, as part of achieving its mission, has actively supported effective enforcement of the Clean Air Act, Clean Water Act, and other environmental statutes on behalf of its members for over 30 years. NRDC currently has four (4) appeals pending before ERAC. (ERAC Case Nos. 996158, 996243, 996259, and 996266).

Buckeye Environmental Network (“BEN”) works with grassroots individuals in low income and minority communities across Ohio. These communities are the first to be affected by the declining air quality in the state. Additionally, its members include people who live and breathe air in Ohio and who are affected by Ohio air quality. BEN currently has one (1) appeal pending before ERAC. (ERAC Case No. 256006).

Citizens Against American Landfill Expansion (“CAALE”) is a non-profit Ohio corporation whose major purpose is to address the environmental problems posed by the operations at the American Landfill in Stark County, Ohio. CAALE’s board and the members of the community whose interests it represents include people who live and/or own property in the vicinity of the landfill and who are or may be adversely affected by the operations at the landfill.

CAALE currently has three (3) appeals pending before ERAC. (ERAC Case Nos. 765939, 765943, and 766079).

Environmental Community Organization (“ECO”) is a Greater Cincinnati area network of dedicated individuals that preserves community and environmental health through organizing with communities, action to hold industry and government accountable, and education efforts. Its members include people who live and breathe air in Ohio and who are affected by the quality of Ohio air. ECO currently has one (1) appeal pending before ERAC. (ERAC Case No. 256005).

National Parks Conservation Association (“NPCA”) is a national non-profit organization that works to protect and enhance America’s National Parks. NPCA has 325,000 members nationwide, including 12,247 members in Ohio. NPCA currently has one (1) appeal pending before ERAC. (ERAC Case No. 996161).

The Ohio Association of Justice, fka the Ohio Academy of Trial Lawyers, (“OAJ”) is the state's largest victims-rights advocacy association, comprised of 2,000 attorneys dedicated to promoting the public good through efforts to secure safe products, a safe workplace, a clean and safe environment, and quality health care. Its members consist of attorneys who live and/or work in Ohio and represent clients that live and/or work in Ohio. Consequently, the members have an interest in the quality of Ohio’s air that they breathe. OAJ currently has one (1) appeal pending before ERAC. (ERAC Case No. 256004).

Ohio Citizen Action (“OCA”) is the state’s largest environmental organization, with 100,000 dues-paying members. OCA has devoted most of its resources over the past five years to “good neighbor campaigns,” which use the power of community organizing to cause major polluters to prevent pollution at their facilities. Its members include people who live and breathe

air in Ohio and who are therefore affected by the quality of Ohio air. OCA currently has one (1) appeal pending before ERAC. (ERAC Case No. 256003).

The Ohio Environmental Council (“OEC”) is a statewide non-profit environmental organization with 97 member environmental/conservation organizations and 2,842 individual members throughout Ohio. OEC currently has two (2) appeals pending before ERAC (ERAC Case Nos. 256159, and 256260), and OEC’s member organizations have four (4) appeals pending. (ERAC Case Nos. 256004, 256032, 256033, and 546372).

Sierra Club is the nation’s oldest grassroots environmental organization, with approximately 641,000 members nationwide, including approximately 17,500 members in Ohio. Sierra Club’s mission is to explore, enjoy, and protect the wild places of the earth, and to educate and enlist humanity to protect and restore the quality of the natural and human environment. The Sierra Club currently has six (6) appeals pending before ERAC. (ERAC Case Nos. 995633, 996002, 996160, 996244, 996261, and 996267).

SunCoke Watch, Inc. is a non-profit organization based in Monroe, Ohio that is dedicated to preserving the environment and health of residents in the areas surrounding metallurgical coke plants. SunCoke Watch has dozens of members and affiliates, and has one (1) appeal pending before ERAC. (ERAC Case No. 256268).

Jill Van Voorhis is president of CAALE and a resident of Waynesburg, located in Stark County, Ohio. She lives and owns property at 5871 Indian Run Ave. SE, Waynesburg, OH, 44688, which is located within 15 feet of the American Landfill Facility. Ms. Van Voorhis currently has three (3) appeals pending before ERAC. (ERAC Case Nos. 765940, 765944, and 766080).

Vivian Baier is the vice-president of CAALE and a resident of East Canton, located in Stark County, Ohio. She lives and owns property at 4584 Indian Run, East Canton, OH, 44730, which is located within 1 mile of the American Landfill Facility. Ms. Baier currently has three (3) appeals pending before ERAC. (ERAC Case Nos. 765941, 765945, and 766081).

Ann McCoy is the treasurer of CAALE and a resident of East Canton, located in Stark County, Ohio. She lives and owns property at 8922 Chapel St. SE, Waynesburg, OH, 44688, which is located within 1 mile of the American Landfill Facility. Ms. McCoy currently has three (3) appeals pending before ERAC. (ERAC Case Nos. 765942, 765946, and 766082).

In reaction to the recent passage by the Ohio General Assembly of House Bill 1, which established tight deadlines for ERAC to decide all appeals pending before it, ERAC has, in each of the Citizen Groups' pending appeals identified above, issued Orders that are substantively identical to those being challenged in this proceeding. In particular, ERAC has canceled previously scheduled hearings, suspended case management schedules, noted that a one hour *de novo* hearing would be held in the appeal, and announced that it would not rule on any discovery disputes or dispositive motions in the proceedings. (*See, e.g.*, Notice and Order for Joint Response, *NRDC v. Korleski*, Case No. ERAC 996158 (Sept. 1, 2009)).¹ In fact, such motions and arguments are arbitrarily prohibited by order of ERAC. For appeals filed before April 15, 2008, ERAC scheduled one hour *de novo* hearings, announced it would not consider any requests for hearing continuances, and limited pre-hearing briefs to five pages in length. (*Id.*).

¹ To further illustrate the arbitrary and prejudicial nature of the changes, prior to the August 20, 2009 order of ERAC, the collective CAALE *et al* appeals had been scheduled for 3 weeks of hearing commencing on July 6, 2010 and prior to the August 25, 2009 order of ERAC, the Sierra Club/Ohio Citizen Action *et al* appeals had been scheduled for 4 days of hearing commencing on April 20, 2010.

Pursuant to these Orders, the Citizen Groups currently have the following one-hour de novo appeals scheduled:

NRDC:	Case No. 996158 – Dec. 1, 2009 at 8am
BEN:	Case No. 256006 – Nov. 6, 2009 at 3pm
CAALE:	Case No. 765939 – Nov. 2, 2009 at 10:30am
	Case No. 765943 – Nov. 3, 2009 at 8am
	Case No. 766079 – Nov. 17, 2009 at 3pm
ECO:	Case No. 256005 – Nov. 6, 2009 at 1:45pm
NPCA:	Case No. 996161 – Dec. 1, 2009 at 12:30pm
OAJ:	Case No. 256004 – Nov. 6, 2009 at 12:30pm
OCA:	Case No. 256003 – Nov. 6, 2009 at 10:30am
OEC:	Case No. 256159 – Dec. 1, 2009 at 9:15am
Sierra Club:	Case No. 996002 – Nov. 6, 2009 at 9:15am
	Case No. 996160 – Dec. 1, 2009 at 10:30am
Vivian Baier:	Case No. 765941 – Nov. 2, 2009 at 1:45pm
	Case No. 765945 – Nov. 3, 2009 at 10:30am
	Case No. 766081 – Nov. 18, 2009 at 9:15am
Ann McCoy:	Case No. 765942 – Nov. 2, 2009 at 3pm
	Case No. 765946 – Nov. 3, 2009 at 12:30pm
	Case No. 766082 – Nov. 18, 2009 at 10:30am
Jill Van Voorhis:	Case No. 765940 – Nov. 2, 2009 at 12:30pm
	Case No. 765944 – Nov. 3, 2009 at 9:15am
	Case No. 766080 – Nov. 18, 2009 at 8am

II. Legal Standards

Pursuant to Ohio Rule of Civil Procedure 24(A), a timely motion for intervention “shall” be granted:

- (1) when an Ohio statute confers an unconditional right to intervene; or
- (2) when
 - (a) the applicant claims an interest relating to the property or transaction that is the subject of the action, and
 - (b) 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, and
 - (c) the applicant’s interest is not adequately represented by existing parties.

Rule 24 “is generally liberally construed in favor of intervention.” *Ohio Consumers’ Counsel v. Pub. Util. Comm’n* (2006), 111 Ohio St.3d 384, 387, 856 N.E.2d 940.

III. Intervention Must Be Granted Pursuant to Rule 24(A)(2).

Intervention should be granted as of right because the Citizen Groups satisfy each of the standards for intervention set forth in Rule 24(A).

A. The Citizen Groups have a legally protected interest in this proceeding

Intervention is appropriate because the Citizen Groups have “an interest relating to the property or transaction which is the subject of the action.” Ohio R. Civ. Proc. 24(A)(2)(a). The purpose of this interest test is to help ensure that lawsuits involve “as many apparently concerned persons as is compatible with efficiency and due process.” *Fairview Gen. Hosp. v. Fletcher* (1990), 69 Ohio App.3d 827, 831-32, 591 N.E.2d 1312, citing *Nuesse v. Camp* (C.A.D.C., 1967), 385 F.2d 694, 700. Consistent with this goal, a proposed intervenor must demonstrate that it has

an interest at issue in the proceeding that is “direct, substantial and legally protectable.” *Id.* at 833.

The Citizen Groups have such a direct, substantial and legally protectable interest here because they are appellants in the exact same types of ERAC appeals that are at issue in this proceeding. The Industry Plaintiffs’ complaint presents the straightforward claim that the timing and other limits that ERAC has placed on de novo hearings violates the Plaintiffs’ due process right to a fair and adequate opportunity to present their evidence in their pending ERAC appeals. (Industry Plaintiffs’ Compl. at ¶¶ 21, 22, 26, 27). ERAC has applied the same limits to the Citizen Groups’ pending ERAC appeals and, therefore, the Citizen Groups’ direct, substantial, and legally protectable due process interest in their pending ERAC appeals are at issue in this proceeding.²

B. This proceeding may impair or impede the Citizen Groups’ ability to protect their due process interests in their pending ERAC appeals.

The Citizen Groups satisfy the second test for intervention under Rule 24(A)(2) because the disposition of this proceeding could impair the Citizen Groups’ ability to defend their due process rights in their pending ERAC appeals. For example, if the Court were to determine that the limits that ERAC placed on the Industry Plaintiffs’ appeals did not violate the Plaintiffs’ due process rights, the precedential effect of such a ruling would make it very difficult for the Citizen Groups to protect their due process rights in the exact same types of appeals facing the exact same limits. *Cf. Fairview Gen. Hosp.*, 69 Ohio App.3d at 834 (denying intervention where decision would not have a *stare decisis* effect that would make it difficult for proposed intervenor to pursue his claim). Similarly, if this proceeding were to lead to a settlement

² Given that ERAC currently requires that appeals take the form of de novo trial-like proceedings, due process requires that ERAC provide the parties with a meaningful opportunity to present their case at hearing or through summary judgment in such proceeding.

establishing different procedures for the Industry Plaintiffs' ERAC appeals, ERAC would likely try to use such new procedures in all of its appeals, including those of the Citizen Groups. As such, intervention is appropriate so that the Citizen Groups can be involved in a proceeding that is likely to impact their direct, substantial, and legally protectable interests.

C. The Citizen Groups' interests are not adequately protected by the Industry Plaintiffs.

The standards for intervention as of right are also satisfied here because the Citizen Groups' interests are not adequately protected by the Industry Plaintiffs. Ohio R. Civ. Proc. 24(A)(2)(c). The burden of demonstrating inadequate representation is "minimal," and can be satisfied when, among other things, the existing parties to a proceeding have interests that are adverse to the proposed intervenors. *Fairview Gen. Hosp.*, 69 Ohio App.3d at 835. While it is true that the Citizen Groups and Industry Plaintiffs share an interest in invalidating deficient hearing procedures established by ERAC, the necessary minimal showing of inadequate representation is made here for three reasons. First, the Industry Plaintiffs are not purporting to directly represent the Citizen Groups' interests because they have requested that this Court invalidate the limits that ERAC imposed in only the Plaintiffs' appeals, not in all pending appeals as a whole. (Industry Plaintiffs' Compl. at ¶ 29).

Second, all of the Industry Plaintiffs are companies that may at times seek permits from Ohio EPA and, therefore, could often be appellees, rather than appellants, in ERAC proceedings. As such, it is possible in any settlement discussions that might occur that the Industry Plaintiffs would have conflicting interests that would lead them to take positions that would not fully support the rights of appellants to pursue their ERAC appeals. By contrast, the Citizen Groups

are not entities that receive permits from Ohio EPA and, therefore, the Citizen Groups only appear in ERAC proceedings as appellants.

Third, while the Citizen Groups' interests in this proceeding and ERAC appeals are motivated by the environmental and public health concerns of the Groups and their members, it is likely that the Industry Plaintiffs do not fully share those same concerns and may often have interests that conflict with those concerns. As such, the Citizen Groups' interests are not adequately represented here.

D. The Citizen Groups' motion is timely.

Finally, the Citizen Groups are entitled to intervention as of right because this motion is timely filed. Ohio R. Civ. Proc. 24(A). Courts typically look at a number of factors regarding timeliness, including the point to which the suit has progressed and any prejudice to the original parties that would result from allowing intervention. *University Hosps. of Cleveland, Inc. v. Lynch* (2002), 96 Ohio St.3d 118, 127, 772 N.E.2d 105. Timeliness is easily shown in the case at bar, as this motion is filed only three days after the Industry Plaintiffs' complaint and the existing parties to the proceeding would not be prejudiced by the Citizen Groups' intervention or the timing of that intervention. The Citizen Groups intend to comply with all time limits established by the Court in this proceeding and are not seeking to raise entirely new issues that would drag out the proceeding. Instead, the Citizen Groups have made a timely motion to have a seat at the table as the question of whether ERAC procedures that have been applied to the Citizen Groups' pending appeals violate due process is either litigated or settled. The Court should grant that motion.

IV. In the Alternative, the Citizen Groups Should be Granted Permissive Intervention.

In the event that the Court denies intervention as of right to the Citizen Groups, then the Citizen Groups should be allowed permissive intervention. Under Ohio R. Civ. Proc. 24(B), a court “may” permit an entity to intervene in an action if the “applicant’s claim or defense and the main action have a question of law or fact in common.” In evaluating permissive intervention, the court is also to consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Id.* Permissive intervention is plainly appropriate because the Citizen Groups’ concerns about ERAC’s limits on pending appeals are the same as the due process claim that the Industry Plaintiffs have raised. In addition, no prejudice would result from permissive intervention, given the promptness with which the Citizen Groups have moved to intervene and the fact that the Citizen Groups are not seeking to raise entirely new subjects that are not currently at issue here.

V. Conclusion

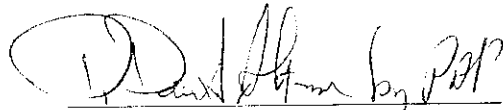
For the foregoing reasons, the Court should grant the Citizen Groups intervention as of right or, in the alternative, allow the Citizen Groups to permissively intervene in this proceeding.

Respectfully Submitted,



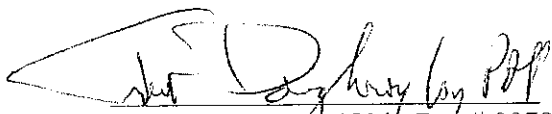
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