

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF WEST VIRGINIA  
Wheeling**

MURRAY ENERGY CORPORATION,	)	
et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 5:14-cv-00039
v.	)	Judge Bailey
	)	
GINA McCARTHY, Administrator,	)	
United States Environmental Protection	)	
Agency,	)	
	)	
Defendant		

**MEMORANDUM OF POINTS AND AUTHORITES  
IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE**

In support of their Motion to Intervene in this proceeding, Mon Valley Clean Air Coalition, Ohio Valley Environmental Coalition, And Keeper of the Mountains Foundation, West Virginia based non-governmental organizations (WV NGO's) respectfully direct the Court's attention to the Memorandum of Points and Authorities submitted herewith. As noted in the Motion to Intervene, Counsel for all parties in this case have been contacted for their position on this motion, and their positions in support or opposition thereto are recited in the Motion to Intervene.

## **I. INTRODUCTION**

Plaintiffs in this case seek declaratory and injunctive relief to address what they allege is a failure by the Environmental Protection Agency (EPA) to perform obligations under Section 321(a) of the Clean Air Act. This provision provides:

The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.

42 U.S.C. § 7621(a).

On October 17, 2016, this Court granted summary judgment in favor of Plaintiffs; ordered EPA to file a plan for compliance with Section 321(a), and authorized Plaintiffs to file a response to EPA's submission. Doc. 293. In response to EPA's submission, Plaintiffs requested extraordinary injunctive relief: they ask this Court to "[s]tay the effective date of pending regulations under the Clean Air Act for the coal industry and coal-fired utilities" and to "[e]njoin EPA from proposing or finalizing new regulations under the Clean Air Act impacting the coal industry or coal-fired electric generating units" until EPA performs the analysis Plaintiffs claim this section requires. Plaintiffs' Response to Defendant's Proposed Compliance Plan and Schedule at 17 (Nov. 14, 2016)., Doc. 297.

Movant NGOs are all West Virginia-based non-profit entities organized to protect the health and well-being of the citizens of West Virginia from documented health risks associated with coal mining and the burning of coal by electric generation plants. Defendant EPA has noted, and Plaintiffs do not contest, that 96% of the electricity in West Virginia is generated from coal-fired electric plants.

Movant NGO's include the following:

A. Mon Valley Clean Air Coalition (<http://www.monvalleycleanair.org/>) is a West Virginia non-profit corporation, organized in 2008, to promote clear air in northern West Virginia and southwestern Pennsylvania, with a focus on the Monongahela River watershed. Mon Valley Clean Air Coalition supports the environmental justice and health objectives of environmental regulation generally, and of clean air provisions in particular.

B. The Ohio Valley Environmental Coalition (OVEC) ([www.ohvec.org](http://www.ohvec.org)), is a grassroots organization with approximately 400 members headquartered in Huntington, WV. OVEC's members organize West Virginia citizens to resist destruction of West Virginia's mountains in order to provide raw materials used to operate coal-fired electric generation plants. OVEC advocates for the preservation of West Virginia's environment and mountain communities through education, grassroots organizing and supports the

environmental justice and health objectives of environmental regulation generally, and of clean air provisions in particular..

C. Keepers of the Mountains Foundation ([www.mountainkeeper.org](http://www.mountainkeeper.org)) a non-profit corporation, organized in West Virginia, with its headquarters in Charleston, WV, has since its organization in 2004, participated in legal proceedings and community organization for the purpose of ending the destruction of Appalachian mountains to supply fuel to coal-fired electric generation plants. KOTM supports the environmental justice and health objectives of environmental regulation generally, and of clean air provisions in particular. See Declaration of Paul Corbit Brown.

Movant NGOs seek to intervene on behalf of Defendant because, as set forth below, they have a demonstrable interest in defending regulations limiting dangerous pollution from coal-fired power plants and in preventing the use of Section 321(a) to interfere with existing or future regulations.

Movants are entitled to intervene as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. Rule 24(a)(2) provides that, on timely motion, the court must allow intervention by anyone who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or

impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2).<sup>1</sup>

## **II. RULE 24 (c) STATEMENT OF INTERESTS**

As environmental not-for-profit organizations, Movants are committed to protecting their members and their communities from the impacts of dangerous air pollution, including particulate, toxic and greenhouse gas pollution from the poorly controlled combustion of coal. The emissions from coal-fired power plants are major contributors to particulate pollution, smog pollution, toxics and climate change. An extensive body of public health studies documents the serious health effects associated with these pollutants including premature death, hospitalizations, illnesses, impaired neurological development and extreme weather. The American Lung Association has catalogued the adverse health effects associated with these airborne contaminants including premature death due to cardiovascular diseases and strokes, asthma attacks, increased risk of cardiac arrhythmias and heart attacks, harm to the nervous system and brain development, increased risk of cancer, increased risk of respiratory infections, shortness of breath, wheezing and

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<sup>1</sup> Even if Movants did not satisfy the requirements for intervention as of right under Rule 24(a), they easily satisfy the requirements for permissive intervention under Rule 24(b), which simply requires that the movant have “a claim or defense that shares with the main action a common question of law or fact.” See, *e.g.*, *Shaw v. Hunt*, 154 F.3d 161, 168 (4th Cir. 1998). Here, Movants have defenses in common with defendants, including that the statute precludes any relief that would restrain or delay existing or future Clean Air Act regulations.

coughing, diminished lung function, increased need for medical treatment or hospitalization, increased school absenteeism, illness related missed days of work, and other threats to human health.<sup>2</sup>

Movants do not regard regulations that seek to abate harms as evidence of a “war on coal,” and Plaintiffs have described them. Instead, Movants regard them as public health protections that (like any other pollution control requirements) simply require that those whose activities pose hazards to the public health and welfare must take steps to reduce the harms that those activities pose to third parties and the public at large. Controlling harmful pollution that causes serious harms to thousands of unwilling victims is a proper and fair cost of doing business.

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<sup>2</sup> See American Lung Association at <http://www.lung.org/our-initiatives/healthy-air/outdoor/air-pollution/particle-pollution.html#cando> (particulate pollution); <http://www.lung.org/our-initiatives/healthy-air/outdoor/air-pollution/ozone.html#howharms> (ozone); <http://www.lung.org/our-initiatives/healthy-air/outdoor/air-pollution/toxic-air-pollutants.html> (toxics); <http://www.lung.org/our-initiatives/healthy-air/outdoor/climate-change/> (climate change). See also, *e.g.*, *Coal. for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102, 121 (D.C. Cir. 2012) (discussing health and welfare from greenhouse gas emissions), cert. denied in relevant part, 134 S.Ct. 468 (2013) ; *aff'd in part, rev'd in part on other grounds sub nom. Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014); *EPA v. EME Homer City Generation, LP*, 134 S. Ct. 1584 (2014) (discussing harms from interstate air pollution and rejecting challenges to Cross-State Air Pollution Rule); National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial- Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304, 9306, 9310-11 (Feb. 12, 2012) (summarizing health impacts from power plant emissions of mercury and other air toxics as well as particulate matter).

Movants support the use of careful economic analysis to examine the effects of pollution and controls thereof, including identifiable impacts (positive or negative) on employment. Movants believe it is vital, however, that any and all such analysis be based on rigorous and sound methods, and that the public be given a full and fair opportunity to participate and to review any information and methods upon which such analysis are based. Indeed, the Clean Air Act section at issue here is in large part designed to ensure that “alleg[ations]” that the application of the Clean Air Act has caused adverse employment effects receive a careful and open investigation and scrutiny. See 42 U.S.C. 7621(b).

Movants have serious concerns about potential misuse of Section 321(a) to impede, weaken or delay the implementation and enforcement other provisions of the Clean Air Act that are to protect public health and welfare. In particular, Movants submit that Plaintiffs’ request that this Court enjoin EPA from issuing new regulations and that it stay “pending” regulations far exceeds any permissible interpretation of Section 321(a).

Section 321(d) specifies that: “Nothing in this section shall be construed to require or authorize the Administrator, the States, or political subdivisions thereof, to modify or withdraw any requirement imposed or proposed to be imposed under this chapter.” 42 U.S.C. § 7621(d).

In this light, it is apparent that even EPA, the administering agency, may not modify or withdraw requirements imposed under the Act based upon the requirements of Section 321(a)-(c). It follows that no court – even the D.C. Circuit, which has exclusive jurisdiction to hear challenges to regulations of national scope under the Clean Air Act, 42 U.S.C. 7607(b)(1) – may enjoin existing or future Clean Air Act regulations based upon Section 321. Movants have a strong interest in preventing impediments to the protection of public health, ones that Congress clearly did not intend.

## **ARGUMENT**

### **I. Movants Qualify For Intervention As Of Right.**

Movants meet the requirements for intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2). The Rule provides that

[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Under Rule 24(a)(2), a prospective intervenor must show: 1) sufficient interest to merit intervention; 2) that its interest may be impaired without intervention; and 3) that the parties do not adequately represent that interest.

*Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). The



Fourth Circuit has noted that “liberal intervention is desirable” to resolve controversies efficiently while involving all concerned parties with interests at stake. *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986).

**A. Movants have a significantly protectable interest in this litigation.**

Under Rule 24(a)(2), a prospective intervenor must show a “significantly protectable interest” in the litigation. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). In the Fourth Circuit, intervenors have a significantly protectable interest where they “stand to gain or lose by the direct legal operation of the district court’s judgment” *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991).

As discussed above, Movants have an interest in defending EPA’s existing air pollution regulations, including for coal-fired power plants, and preventing the use of Section 321(a) to block new regulation.

Here Movants and their members stand to lose the health protections afforded by EPA’s air pollution regulations should this Court grant the injunctive relief Plaintiffs seek. The disposition of this case directly affects Movants’ interest in preventing the use of Section 321(a) to obstruct the implementation of other Clean Air Act provisions. See Declaration of Paul Corbit Brown (describing injuries that would result from delayed or reduced Clean Air Act regulation).

**B. Movants’ interests will be impaired without intervention.**

Movants' interests in defending and receiving protection from critical Clean Air Act regulations will be impaired if they are not allowed to intervene. Prospective intervenors must only show that "disposition of a case would, as a practical matter, impair the applicant's ability to protect his interest in the transaction." *Spring Const. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980). Granting the injunctive relief that Plaintiffs seek could block, delay or interfere with the application or enforcement of existing or future Clean Air Act regulations that protect Movants' members, impairing Movants' interests in health and enjoyment of the environment. In addition, an injunction could undermine Movants' procedural interest as intervenor-respondents in the D.C. Circuit litigation in which Plaintiffs and others are challenging the Clean Power Plan and related regulations. See Declaration of Paul Corbit Brown ¶15.<sup>3</sup>

**C. Movants' interests are not adequately represented by the EPA.**

Intervention as of right is appropriate at this time because there is a substantial possibility that Movants' significant interest in the outcome of the case will not be "adequately represented" by the EPA once the new Administration takes office in late January 2017.

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<sup>3</sup> Assuming that Movants are obligated to show standing to intervene as defendants, but see *Jones v. Chapman*, No. CV ELH-14-2627, 2016 WL 6600511, at \*4 n.9 (D. Md. Nov. 8, 2016), the interests described above in continued protection by Clean Air Act regulations, and the likelihood that successful defense in this case would protect those interests, are easily sufficient to support Movants' standing.

Until this time, Movants' interests in this litigation were sufficiently similar to those of the EPA that Movants did not need to intervene. See *Stuart v. Huff*, 706 F.3d 345, 353-53(4th Cir. 2013) (inadequacy of representation not shown where government defendant was defending statute). However, statements from the President-Elect, his campaign, and his transition team, as well as news reports, have highlighted that the incoming Administration will effect an abrupt reversal of position on environmental regulation, including potential changes of position in pending Clean Air Act challenges to regulations addressing pollution from fossil fuel-fired power plants.<sup>4</sup> The new Administration's nominee to serve as EPA Administrator has, as Attorney General of Oklahoma, brought or joined numerous

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<sup>4</sup> See, e.g., Donald J. Trump Transition Website, "Regulatory Reform" (available at <http://www.greatagain.gov/policy/regulatory-reform.html>); Sammy Roth, Trump's EPA Pick Rejects Climate Science, Fights for Fossil Fuels, U.S.A. TODAY (Dec. 9, 2016) (available at <http://www.usatoday.com/story/news/nation-now/2016/12/09/trumps-epa-pick-rejects-climate-science-fights-fossil-fuels/95231986/>); see also Murray Reply 21-22 (suggesting that there will be a shift of regulatory policy when "the new Administration takes over"); Chelsea Harvey, Trump Has Vowed to Kill the Clean Power Plan. Here's How He Might – and Might Not – Succeed, Washington Post (Nov. 9, 2016) (available at [http://www.washingtonpost.com/news/energy-environment/wp/2016/11/11/trump-has-vowed-to-kill-the-clean-power-plan-heres-how-he-might-and-might-not-succeed/?utm\\_term=.5a3a3ea17571](http://www.washingtonpost.com/news/energy-environment/wp/2016/11/11/trump-has-vowed-to-kill-the-clean-power-plan-heres-how-he-might-and-might-not-succeed/?utm_term=.5a3a3ea17571)); Big Coal's 6-Point Plan for Donald Trump, FOX BUSINESS (Nov. 30, 2016) (available at <http://www.foxbusiness.com/politics/2016/11/30/big-coals-6-point-plan-for-donald-trump.html>).

lawsuits seeking to overturn Clean Air Act regulations and has advocated for broad rollbacks in federal environmental regulation.<sup>5</sup>

Movants therefore seek to intervene now in anticipation of that policy shift, due to the likelihood that EPA may no longer adequately represent Movants' interests in defending the air pollution standards that are the subject of this litigation.

**D. Movants' Motion to Intervene is timely.**

In assessing the timeliness of an intervention motion, courts consider “how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for the tardiness in moving to intervene.” *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989). Movants' Motion to Intervene is timely because, due to recent events, Movants can no longer expect EPA to adequately represent their interests.

Although summary judgment has been granted in favor of Plaintiffs, this suit is still ongoing with regard to the appropriate remedy. Intervention now will not prejudice other parties or delay the proceedings. Unless this Court requests further briefing, Movants do not intend to file any substantive briefing beyond what EPA

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<sup>5</sup> Chris Mooney, *et al.*, *Trump Names Scott Pruitt, Oklahoma Attorney General Suing EPA on Climate Change, to Head the EPA*, WASHINGTON POST (Dec. 8, 2016) (available at [https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/?utm\\_term=.5aed871cf259](https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/?utm_term=.5aed871cf259)).

has already submitted. The timing of Movants' motion results only from their prior reliance on EPA to adequately represent their interests.

Timeliness is considered "relative to the point at which it became clear that [prospective intervenors'] interests were not being adequately represented by the existing defendants." *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989) (discussing *Fleming v. Citizens for Albemarle*, 577 F.2d 236 (4th Cir.1978)). Only now that EPA's policy position is expected to shift such that Movants' interests will no longer be represented is intervention necessary. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977) (finding a post-judgment intervention motion timely where the prospective intervenor "promptly moved to intervene" to protect her interest "as soon as it became clear" that her interest was no longer represented).

As the Supreme Court counseled in *NAACP v. New York*, Movants are therefore taking "immediate affirmative steps to protect their interests" by moving to intervene now in anticipation that EPA may change its position under the incoming Administration. 413 U.S. 345, 367 (1973).

## **CONCLUSION**

For the foregoing reasons, Movants respectfully request that the Court enter an order granting their Motion to Intervene.

Respectfully submitted,

**MON VALLEY CLEAN AIR COALITION  
OHIO VALLEY ENVIRONMENTAL COALITION  
KEEPER OF THE MOUNTAINS FOUNDATION**

By Counsel

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