ORAL ARGUMENT NOT YET HEARD

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

STATE OF WEST VIRGINIA, STATE OF TEXAS, et al. Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and REGINA A. MCCARTHY, Administrator, Respondents.	)	Case No. 15-1363 (consolidated with Nos. 15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 1501383, 15-1386, 15-1393, 15-1398, 15-1409, 15-1410, 15-1413, 15-1418, 15-1422, 15-1432)

UNOPPOSED MOTION BY FORMER EPA ADMINISTRATORS WILLIAM D. RUCKELSHAUS AND WILLIAM K. REILLY FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*

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Pursuant to Fed. R. App. Pro. 29(b) and D.C. Cir. Rule 29(b), former EPA Administrators William D. Ruckelshaus and William K. Reilly respectfully move for leave to participate as *amici curiae* in support of the Respondents Environmental Protection Agency ("EPA") and Regina A. McCarthy, EPA Administrator.

Counsel for the federal respondents in these consolidated cases have provided the consent of their clients to *amici* participation by former EPA Administrators Ruckelshaus and Reilly. Counsel for several movant intervenors in support of federal respondents, including State and Municipal Intervenors, Calpine Corporation, City of Austin d/b/a Austin Energy, City of Seattle by and through its City Light Department, National Grid Generation, L.L.C., Pacific Gas & Electric Company, Advanced Energy Economy, American Wind Energy Association, and Environmental Non-Governmental Organizations, also all expressed their consent to *amici* participation. Counsel for the petitioners in Case Nos. 15-1363, 15-1364, 15-1370, 15-1372, 15-1373, 15-1374, 15-1376, 15-1380, 15-1393, 15-1398, 15-1409, have stated that they take no position on the question whether this motion for leave to participate as *amici curiae* should be granted. No other counsel for any of the additional petitioners in this consolidated case or for any movant intervenors in support of petitioners responded to notice sent to liaison counsel asking whether they consented, objected, or took no position on *amici's* proposed participation.

That notice, which was sent to liaison counsel on Thursday November 19, 2015, provided that if no response was received by Monday, November, 23, 2015, counsel for proposed *amici* Ruckelshaus and Reilly would notify this Court that those parties took no position on this motion.

In support of this motion, the two former EPA Administrators state as follows:

1. William D. Ruckelshaus and William K. Reilly each previously served as Administrator of the U.S. Environmental Protection Agency. Ruckelshaus served as both the first and fifth EPA Administrator. Appointed by President Richard Nixon, Ruckelshaus began his first tenure as Administrator on December 4, 1970, only two days after the President created EPA by executive order. *See* Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970). Ruckelshaus served as Administrator until April 1973, and returned a decade later in May 1983 to serve as Administrator a second time at the request of President Ronald Reagan. President George H.W. Bush appointed William K. Reilly EPA's seventh Administrator in February 1989. Reilly served in that position through the entire Bush Presidency, until January 20, 1993.

2. Former EPA Administrators Ruckelshaus and Reilly each played major roles in administering the Clean Air Act, including the statutory provisions at issue in this case.

a. Administrator Ruckelshaus was responsible for the immediate implementation of the Clean Air Act, which the President signed into law on December 31, 1970. *See* Pub. L. No. 91-604, 84 Stat. 1676 (1970). He promulgated the nation's first air pollution control rules, including those establishing nationally uniform ambient air quality control standards and guidelines for States to develop plans for the implementation of those national standards. Ruckelshaus also issued the Clean Air Act's first emissions limitations applicable to both motor vehicles and stationary sources. And in 1971, Administrator Ruckelshaus listed power plants as a category of stationary source warranting regulation under Section 111 because they emit pollutants that endanger public health and welfare. *See* List of Categories of Stationary Sources, 36 Fed. Reg. 5,931 (Mar. 31, 1971).

b. Administrator Reilly championed the enactment of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, which added hundreds of pages of new statutory provisions, including statutory language directly at issue in this case. In particular, the 1990 Amendments included language governing the regulation of existing stationary sources under Section 111(d) as well as major reforms to Section 112 of the Act, authorizing regulation of emissions of hazardous air pollutants from power plants. The relationship between Sections 111(d) and 112 is disputed by the parties in this litigation.

3. As EPA Administrators responsible for implementing federal environmental protection laws, both Ruckelshaus and Reilly repeatedly confronted the real-world challenges presented by statutory language enacted by a Congress that did not always fully anticipate either pollution's adverse environmental consequences or the economic costs of its control. They each responded to those challenges by adopting reasonable interpretations of statutory language that supported the exercise of agency authority in a manner that provided for cost-effective, flexible, and pragmatic approaches to pollution reduction that were also properly respectful of State sovereignty. Their actions as EPA Administrators also made clear each understood the limits of their statutory authority as defined by a statute's language and its reasonable interpretation and, in the absence of sufficient existing statutory authority, the propriety of seeking necessary congressional amendments.

a. In 1970, when Ruckelshaus became EPA's first Administrator, the nation was suffering from the uncontrolled discharges of literally thousands of tons of toxic and dangerous pollutants in the nation's waterways. Congress, however, had yet to enact comprehensive water pollution control legislation directly aimed at the enormous environmental problem the nation then faced, which had developed over many decades. Rather than wait for Congress to enact new legislation to address these ongoing, serious harms to public health, safety, and welfare, Ruckelshaus

immediately brought enforcement actions based on the capacious language of the federal Rivers and Harbors Act of 1899, 33 U.S.C. § 404, against industrial and municipal dischargers of pollutants into navigable water bodies. Buttressed by the Supreme Court's broad construction of the federal Act's language to reach water pollution (*see, e.g.*, United States v. Republic Steel Corp. 362 U.S. 482, 491–92 (1960)), Ruckelshaus referred 106 civil actions and 169 criminal enforcement actions to the Department of Justice based on massive, nationwide violations of the Rivers and Harbors Act. ENVTL. PROT. AGENCY, THE FIRST TWO YEARS: A REVIEW OF EPA'S ENFORCEMENT PROGRAM 8 (1973); *see* JOEL A. MINTZ, ENFORCEMENT AT THE EPA 22 (2012). The resulting enforcement actions both succeeded in securing judicial orders sharply curtailing water pollution by major industries and cities and laid the groundwork for congressional enactment of the Clean Water Act in 1972. *See* Pub. L. No. 92-500, 86 Stat. 816. It was common ground that Congress had drafted the language of the Rivers and Harbors Act in 1899 without anticipating that water pollution would pose an endangerment to public health and welfare many decades later. Yet the language Congress enacted was sufficiently capacious to authorize EPA's reasonable application of the existing Act to the problem of water pollution.

b. As Administrators, Ruckelshaus and Reilly also had to respond to economic consequences that Congress did not fully anticipate when enacting

environmental legislation. For example, during the mid-1980s, Ruckelshaus exercised his discretion to decline to implement fully Section 112 of the Clean Air Act, which regulates hazardous air pollutants from industrial facilities. He acted based on his concerns that the then-existing statutory language failed adequately to account for the economic consequences of such controls, including their potentially devastating economic consequences to certain industries and locations. *See* William D. Ruckelshaus, Administrator, Envtl. Prot. Agency, Speech, *Environmental Protection: Politics and Reality* (Oct. 26, 1984); William D. Ruckelshaus, Administrator, Envtl. Prot. Agency, Speech, *Risk in a Free Society*, (Feb. 18, 1984).

c. As a result of these experiences, both Administrators Ruckelshaus and Reilly similarly emphasized the need for environmental pollution controls that reflected sound risk assessment, were cost-effective, and addressed the most serious environmental problems first. Administrator Ruckelshaus stressed that "[s]afety is not, as is sometimes thought, the absolute removal of risk. Rather it is a social construct, an agreement, a way of directing social resources and attention toward reasonable levels of protection." *See* William D. Ruckelshaus, Administrator, Envtl. Prot. Agency, Speech, *Environmental Protection: Politics and Reality* (Oct. 26, 1984). To that same end, Administrator Reilly released a widely celebrated report in September 1990, "Reducing Risk: Setting Priorities and Strategies for

Environmental Protection," which promoted more flexible pollution control programs in the effort to target the nation's most pressing environmental problems. *See* ENVTL. PROT. AGENCY, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION (Sept. 1990). Reilly explained that it was time for EPA to "find[] the most efficient and effective ways to reduce risk." *See* William K. Reilly, *Aiming Before we Shoot*, Speech (Sept. 26, 1990), http://www2.epa.gov/aboutepa/aiming-we-shoot-quiet-revolution-environmental-policy. That "requires a more mature accommodation of reality," including not "deploy[ing] a disproportionate amount of your resources on what is a much smaller problem." *See* Oral History Interview with William K. Reilly (July 26, 1993), *available at* http://www2.epa.gov/aboutepa/william-k-reilly-oral-history-interview.

4. During their respective tenures as EPA Administrator, Ruckelshaus and Reilly also routinely considered the energy implications of pollution controls. They have long understood that environmental and energy policies are inextricably linked, given the myriad ways that energy resource extraction, transportation, and combustion may cause pollution of air, water, and land, and because environmental protection standards obviously can impact economic choices in the electricity sector. As a result, Ruckelshaus and Reilly, like all EPA administrators, naturally accounted for the nation's energy requirements in determining the requisite level of

environmental protection standards. Consideration of the environmental benefits achievable by inducing shifts from higher- to lower-polluting fuels is a constant of the environmental standard-setting process, as are potential gains to be had from energy conservation, which can simultaneously ameliorate environmental harms, reduce costs to electricity consumers, and advance energy independence. Title IV of the 1990 Clean Air Act Amendments, in which Reilly played a central role, explicitly allows renewable energy and energy efficiency to be used as credits in the market-based system Congress established to control power plant emissions of pollutants that cause acid rain, acknowledging the substitutability of fuels on the interconnected electricity grid. *See, e.g.*, 42 U.S.C. §§ 7651(b), 7651a(12), 7651c(f), 7651c(f)(1)(A), 7651c(f)(1)(B).

As early as the Federal Water Pollution Control Act Amendments of 1972, first implemented by Administrator Ruckelshaus, the Clean Water Act expressly required that "energy requirements" be a major factor in determining the degree of effluent reduction required of categories of both new and existing industrial point sources of water pollution. *See* 33 U.S.C. §§ 1304(b)(1)(B), 1304(b)(2)(B), 1304(b)(4)(B). The Clean Air Act Amendments of 1977, subsequently administered by both Ruckelshaus and Reilly, included many provisions specifically requiring the Agency to consider energy-related impacts as a routine component of environmental standard setting for stationary sources, but nowhere

suggesting that they should be a bar to action, or nullify EPA's responsibility for pollution control. *See, e.g.*, 42 U.S.C. §§ 7411(a)(1), 7412(d)(2). Many of the 1977 amendments also directly responded to the heightened need for energy independence in the immediate aftermath of the OPEC oil embargo of 1973. *See, e.g.*, 42 U.S.C. § 7411(j)(1)(A)(ii). And the Agency's varied pollution control regulations directly applicable to power plant operations regularly have considered, typically at the request of industry, the potential adverse impact on the availability of adequate, affordable, and reliable electricity, extending to the operation of the nation's electricity grid. *See, e.g.*, Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,255, 48,265, 48,271, 48,303, 48,319 (Aug. 8, 2011); National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,576, 41,599, 41,604–05, 41,608, 41,651 (July 9, 2004); *see also* Regulatory Impact Analysis for the Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States, Environmental Protection Agency 243–77 (June 2011), http://www3.epa.gov/airtransport/pdfs/FinalRIA.pdf.

In executing their responsibilities, both Ruckelshaus and Reilly worked with their counterparts at other federal agencies with relevant authority and expertise,

including the members of the Federal Energy Regulatory Commission, and the Secretary of Energy, to ensure the compatibility of their respective mandates.

5. Former EPA Administrators Ruckelshaus and Reilly seek to participate as *amici curiae* to support their shared view of the Clean Power Plan's validity in light of their respective experiences at the Agency implementing the nation's pollution control laws. They are uniquely positioned to offer this important, historical perspective on statutory interpretation and administration, which is distinct from the kinds of legal arguments expected from the parties.

As would be elaborated upon in their filing as *amici*, the Clean Power Plan represents the very kind of pollution control program they endorsed while at EPA. It provides for simultaneously pragmatic, flexible, and cost-effective pollution control programs, and it properly respects State sovereignty by providing States with substantial authority and flexibility in deciding whether and how best to administer the Clean Power Plan. The Clean Power Plan also falls well within the bounds of an Administrator's authority to embrace reasonable interpretations of existing statutory language to address unforeseen problems without the need to resort to congressional amendment of current law. Finally, the Clean Power Plan's consideration of the advantages of fuel shifting and the operation of the nation's electricity grid is the very kind of innovative, cost-effective, and energy-sensitive approach to pollution control that reflects the Agency's best traditions.

6. D.C. Cir. Rule 29 permits the filing of a motion for leave to participate as *amicus curiae* up to seven days after the filing of the principal brief of the party being supported, but encourages the filing of a notice of intent as soon as practicable. *Amici* former EPA Administrators William D. Ruckelshaus and William K. Reilly are filing this motion as soon as practicable and before the parties have filed briefs addressing the merits of the case. If permitted to file an *amicus* brief, *amici* would file a document within the briefing schedule established by this Court for all briefs, including those filed by *amicus curiae* and within any proscribed word limitations.

WHEREFORE, the proposed *amici* William D. Ruckelshaus and William K. Reilly respectfully request leave to file a brief of *amici curiae* pursuant to the schedule and any other direction, including word limitations, established by the Court.

Respectfully submitted this 3rd day of December, 2015.

s/ Richard J. Lazarus

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CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rules of Appellate Procedure 27 (d)(1)&(2) and 29(b) and D.C. Circuit Rule 29(c) because it meets the prescribed format requirements, does not exceed 20 pages, and is being filed as promptly as practicable after the case was docketed in this Court. This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(5)&(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

s/ Richard J. Lazarus

Dated: December 3, 2015

CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Pursuant to D.C. Circuit Rule 28(a)(1)(A), counsel certifies as follows: Except for William D. Ruckelshaus and William K. Reilly, all parties, intervenors, and amici appearing in this court are, to the best of my knowledge, listed in the Unopposed Motion by Peabody Energy Corp. for Leave to Intervene in Support of Petitioners.

s/__Richard J. Lazarus_____

Dated: December 3, 2015

CERTIFICATE OF SERVICE

I certify that the foregoing MOTION OF FORMER EPA ADMINISTRATORS WILLIAM D. RUCKELSHAUS and WILLIAM K. REILLY FOR LEAVE TO PARTICIPATE AS AMICI CURIAE, CERTIFICATE OF COMPLIANCE, AND CERTIFICATE OF PARTIES AND AMICI CURIAE were served today on all registered counsel in these consolidated cases via the Court's CM/ECF system.

s/ Richard J. Lazarus

Dated: December 3, 2015