ORAL ARGUMENT NOT YET SCHEDULED

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

State of North Dakota, Petitioner, **v.** **United States Environmental Protection Agency, et al.,** Respondents.	Case No. 17-1014 (consolidated with Case Nos. 17-1015, 17-1018, 17-1019, 17-1020, 17-1022, & 17-1023)

On Petition for Review of Final Action of the
United States Environmental Protection Agency

UNOPPOSED MOTION FOR LEAVE TO INTERVENE AS RESPONDENTS

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the States of New York, California (by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Xavier Becerra), Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota (by and through the Minnesota Pollution Control Agency), New Mexico, Oregon, Rhode Island, Vermont, Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami, and Broward County, Florida (collectively, "State and Municipal Proposed Intervenors") hereby move for leave to

intervene in support of respondents Environmental Protection Agency, et al. ("EPA") in these consolidated cases. Petitioner North Dakota does not oppose this motion. Petitioners Murray Energy, Inc. (case no. 17-1015), Utility Air Regulatory Group, et al. (case no. 17-1018), LG&E and KU Energy, LLC (case no. 17-1019), National Rural Electric Coop. Assoc. (case no. 17-1020), West Virginia, et al. (case no. 17-1022), and National Association of Home Builders (case no. 17-1023) take no position on this motion. Respondents EPA, et al. also take no position on this motion.

In support of their motion, State and Municipal Proposed Intervenors state as follows:

1. These consolidated cases are petitions for review of a final action of the EPA, published at 82 Fed. Reg. 4,864 (Jan. 17, 2017), and titled "Denial of Reconsideration and Administrative Stay of the Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units" (Reconsideration Denial).

Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), requires a party that objects to a rule on grounds that were impracticable to raise within the public comment period or that arose after the public comment period (but within the period for judicial review) to petition the agency for reconsideration. If EPA determines that the objection satisfies

this procedural standard and is "of central relevance to the outcome of the rule," the agency is required to commence a reconsideration proceeding. *Id.*

2. The Reconsideration Denial concerns 38 petitions for reconsideration filed on EPA's final rule, "Carbon Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," published at 80 Fed. Reg. 64,661 (Oct. 23, 2015) (Clean Power Plan or Rule).[1] EPA denied all of the petitions on procedural and/or substantive grounds with the exception of those petitions that concerned (i) the design details of the Rule's Clean Energy Incentive Program, which the agency granted, and (ii) biomass and waste-to-energy issues, regarding which the agency deferred action. 82 Fed. Reg. at 4,864.

3. In brief, the agency found the petitions procedurally deficient because "many of the same objections were already raised in . . . comments on the proposed [rule]." *See* Basis for Denial of Petitions to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units (Jan. 11, 2017), at 4, available at: https://www.epa.gov/sites/production/files/2017-

[1] The underlying challenges to the Rule, consolidated under the lead case of *West Virginia v. EPA*, Case No. 15-1363, have been fully briefed and were argued before an en banc panel on September 27, 2016.

01/documents/basis_for_denial_of_petitions_to_reconsider_and_petitions_to_stay_the_final_cpp.pdf. In addition, petitioners' arguments regarding lack of adequate notice failed because the changes in the final rule from the proposal were in response to public comments and represented a "logical outgrowth" of the proposed rule. *See id.* at 4. EPA also found the petitions substantively lacking, finding that petitioners had not raised any issues that were of "central relevance" to the outcome of the Rule. *Id.* In sum, EPA determined that "[p]etitioners failed to provide the agency with the technical data or analysis to support their claims that the EPA's analysis was deficient or that a different outcome was warranted." *Id.* EPA also denied requests for an administrative stay of the Clean Power Plan, citing the current stay of the Rule imposed by the Supreme Court in February 2016. *Id.* at 6.

4. Federal Rule of Appellate Procedure 15(d) requires that a party moving to intervene set forth its interest and the grounds for intervention. Intervention under Rule 15(d) is granted where the moving party's interests in the outcome of the action are direct and substantial. *See, e.g., Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (intervention allowed under Rule 15(d) because petitioners were "directly affected by" agency action); *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with "substantial interest in the outcome"). The decision to allow intervention is guided by practical

considerations and the "need for a liberal application in favor of permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 700, 702 (D.C. Cir. 1967).

5. State and Municipal Proposed Intervenors satisfy the standard for intervention under Rule 15(b). This Court essentially recognized as much when it granted intervention to the same parties in the underlying challenges to the Clean Power Plan. *See* Doc. #1592885 in *West Virginia, et al. v. EPA* (D.C. Cir. No. 15-1363, Jan. 16, 2016). State and Municipal Proposed Intervenors participated in the briefing and oral argument of the case. The petitions for review here implicate the same interests as the underlying challenges because they also seek to invalidate, delay, or otherwise interfere with the Clean Power Plan.

6. State and Municipal Proposed Intervenors have a compelling interest in the timely implementation of the Clean Power Plan to prevent and mitigate climate change harms to our residents and natural resources. The Clean Power Plan establishes emission guidelines to reduce carbon dioxide emissions from fossil-fueled power plants, the country's largest source of such pollution. These emission reductions will help prevent and mitigate harms that climate change poses to human health and the environment, including increased heat-related deaths, damaged coastal areas, disrupted ecosystems, more severe weather events, and longer and more frequent droughts. *See Massachusetts v. EPA*, 549 U.S. 497, 521 (2007); 74 Fed. Reg.

66,496, 66,523-66,536 (Dec. 15, 2009) (finding that greenhouse gas emissions endanger public health and welfare); 80 Fed. Reg. at 64,683-88 (summarizing additional scientific evidence on climate change harms since the endangerment finding, including those—such as extreme precipitation events and flooding caused by sea level rise—that have already begun).

7. State Proposed Intervenors have taken significant steps to reduce greenhouse gas emissions, including emissions from existing fossil-fueled power plants. *See, e.g.*, Cal. Code Regs. tit. 17, §§ 95801-96022; Conn. Gen. Stat. § 22a-200c & Conn. Agencies Regs. § 22a-174-31; Del. Code Ann. tit. 7, § 6043 & Del. Admin. Code tit. 7, ch. 1147; Me. Rev. Stat. Ann. tit. 38, ch. 3-B; Md. Code Ann., Envir., § 2–1002(g); Mass. Gen. Laws ch. 21A, § 22 & 310 Mass. Code Regs. 7.70; N.Y. Comp. Codes R. & Regs. tit. 6, Part 251; Or. Rev. Stat. § 469.503(2); R.I. Gen. Laws. § 23-82-4; Vt. Stat. Ann. tit. 30, § 255; Wash. Rev. Code § 80.80.040(b).

8. Municipal Proposed Intervenors have similarly adopted measures to reduce their greenhouse gas emissions from the power sector. *See, e.g.*, Chicago, "Chicago Climate Action Plan" (2008), at 25-28 (committing to greenhouse gas reduction goal of 80 percent by 2050 and outlining reductions needed from the power sector to meet this goal), available at: www.chicagoclimateaction.org/filebin/pdf/finalreport/CCAPREPORTFINALv2.pdf; New York, "One New York: The Plan for a Strong and Just City"

(2015), 166-71 (same), available at: http://www.nyc.gov/html/onenyc/downloads/pdf/publications/OneNYC.pdf. The Clean Power Plan would further these goals by ensuring that fossil-fueled power plants in all states implement feasible and cost-effective measures to limit their carbon dioxide emissions. State and Municipal Proposed Intervenors therefore have a strong interest in defending EPA's Reconsideration Denial, which if overturned could potentially result in the weakening and/or delay in the Clean Power Plan's implementation.

9. State and Municipal Proposed Intervenors also have an interest in intervention here because many of them have participated extensively in the regulatory and judicial proceedings leading up to EPA's adoption of the Clean Power Plan. For example, several State and Municipal Proposed Intervenors brought the petition that led to *Massachusetts v. EPA*, and EPA's subsequent finding that greenhouse gases may reasonably be anticipated to endanger public health and welfare. *See* 74 Fed. Reg. 66,496. Several State and Municipal Proposed Intervenors also sued EPA to promptly establish carbon dioxide emission standards for power plants under section 111 of the Clean Air Act, 42 U.S.C. § 7411. *New York v. EPA* (D.C. Cir. No. 06-1322). Several states and New York City also brought public-nuisance claims against the largest owners of fossil-fueled power plants seeking to limit carbon dioxide emissions from those sources. *Am. Elec. Power v.*

Connecticut, 131 S. Ct. 2527, 2537 (2011) (finding plaintiffs' federal common law nuisance claims displaced by section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d)).

10. State and Municipal Proposed Intervenors' interests may not be adequately represented by the other parties to these consolidated cases. State and Municipal Proposed Intervenors have unique sovereign interests in limiting climate change pollution in order to prevent and mitigate loss and damage to publicly-owned coastal property, to protect public infrastructure, and to limit emergency response costs borne by the public. *See Massachusetts v. EPA*, 549 U.S. at 521-23. These interests do not always align with those of EPA, as shown by the historical efforts of many State and Municipal Proposed Intervenors to compel EPA to address climate change.

11. This motion is timely under Rule 15(d), because it is being filed within 30 days of the petitions for review in these consolidated cases. Pursuant to Circuit Rule 15(b), this motion also constitutes a motion to intervene in all petitions for review of the challenged administrative action.

12. The proposed intervention will also not unduly delay or prejudice the rights of any other party. This litigation is in its very early stages, and intervention will not interfere with any schedule set by the Court.

For the foregoing reasons, State and Municipal Proposed Intervenors respectfully request that this Court grant their motion to intervene.

Dated: January 27, 2017

Respectfully Submitted,

FOR THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

/s/ Michael J. Myers[2]

Barbara D. Underwood
Solicitor General
Steven C. Wu
Deputy Solicitor General
Bethany A. Davis Noll
Assistant Solicitor General
Michael J. Myers
Morgan A. Costello
Brian M. Lusignan
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2400

[2] Counsel for the State of New York represents that the other parties listed in the signature blocks below consent to the filing of this motion.

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
ATTORNEY GENERAL
Robert W. Byrne
Sally Magnani
Senior Assistant Attorneys General
Gavin G. McCabe
David A. Zonana
Supervising Deputy Attorneys General
Jonathan Wiener
M. Elaine Meckenstock
Deputy Attorneys General
1515 Clay Street
Oakland, CA 94612
(510) 622-2100

Attorneys for the State of California, by and through Governor Edmund G. Brown, Jr., the California Air Resources Board, and Attorney General Xavier Becerra

FOR THE STATE OF CONNECTICUT

GEORGE JEPSEN
ATTORNEY GENERAL
Matthew I. Levine
Kirsten S. P. Rigney
Scott N. Koschwitz
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

FOR THE STATE OF DELAWARE

MATTHEW P. DENN
ATTORNEY GENERAL
Valerie S. Edge
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3d Floor
Dover, DE 19904
(302) 739-4636

FOR THE STATE OF HAWAII

DOUGLAS S. CHIN
ATTORNEY GENERAL
William F. Cooper
Deputy Attorney General
465 S. King Street, Room 200
Honolulu, HI 96813
(808) 586-4070

FOR THE STATE OF ILLINOIS

LISA MADIGAN
ATTORNEY GENERAL
Matthew J. Dunn
Gerald T. Karr
James P. Gignac
Assistant Attorneys General
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660

FOR THE STATE OF IOWA

THOMAS J. MILLER
ATTORNEY GENERAL
Jacob Larson
Assistant Attorney General
Office of Iowa Attorney General
Hoover State Office Building
1305 E. Walnut Street, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5341

FOR THE STATE OF MAINE

JANET T. MILLS
ATTORNEY GENERAL
Gerald D. Reid
Natural Resources Division Chief
6 State House Station
Augusta, ME 04333
(207) 626-8800

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
ATTORNEY GENERAL
Steven M. Sullivan
Solicitor General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6427

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL
Melissa A. Hoffer
Christophe Courchesne
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2423

FOR THE STATE OF MINNESOTA

LORI SWANSON
ATTORNEY GENERAL
Karen D. Olson
Deputy Attorney General
Max Kieley
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1244

Attorneys for Proposed Intervenor State of Minnesota, by and through the Minnesota Pollution Control Agency

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
ATTORNEY GENERAL
Joseph Yar
Assistant Attorney General
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 490-4060

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
ATTORNEY GENERAL
Paul Garrahan
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE COMMONWEALTH OF VIRGINIA

MARK HERRING
ATTORNEY GENERAL
John W. Daniel, II
Deputy Attorney General
Donald D. Anderson
Sr. Asst. Attorney General and Chief
Matthew L. Gooch
Assistant Attorney General
Environmental Section
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 225-3193

FOR THE STATE OF RHODE ISLAND

PETER F. KILMARTIN
ATTORNEY GENERAL
Gregory S. Schultz
Special Assistant Attorney General
Rhode Island Department of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL
Nicholas F. Persampieri
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-2359

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
ATTORNEY GENERAL
James C. McKay, Jr.
Senior Assistant Attorney General
Office of the Attorney General
441 Fourth Street, NW
Suite 630 South
Washington, DC 20001
(202) 724-5690

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
ATTORNEY GENERAL
Katharine G. Shirey
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6769

FOR THE CITY OF NEW YORK

ZACHARY W. CARTER
CORPORATION COUNSEL
Carrie Noteboom
Senior Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2319

FOR THE CITY OF PHILADELPHIA

SOZI PEDRO TULANTE
CITY SOLICITOR
Scott J. Schwarz
Patrick K. O'Neill
Divisional Deputy City Solicitors
The City of Philadelphia
Law Department
One Parkway Building
1515 Arch Street, 16th Floor
Philadelphia, PA 19102-1595
(215) 685-6135

FOR THE CITY OF BOULDER

TOM CARR
CITY ATTORNEY
Debra S. Kalish
City Attorney's Office
1777 Broadway, Second Floor
Boulder, CO 80302
(303) 441-3020

FOR THE CITY OF CHICAGO

STEPHEN R. PATTON
Corporation Counsel
BENNA RUTH SOLOMON
Deputy Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, IL 60602
(312) 744-7764

FOR BROWARD COUNTY, FLORIDA

JONI ARMSTRONG COFFEY
COUNTY ATTORNEY
Mark A. Journey
Assistant County Attorney
Broward County Attorney's Office
155 S. Andrews Avenue, Room 423
Fort Lauderdale, FL 33301
(954) 357-7600

FOR THE CITY OF SOUTH MIAMI

THOMAS F. PEPE
CITY ATTORNEY
City of South Miami
1450 Madruga Avenue, Ste 202
Coral Gables, Florida 33146
(305) 667-2564

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Unopposed Motion to Intervene as Respondents was filed on January 27, 2017 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Michael J. Myers
MICHAEL J. MYERS