Case Nos. 16-2432 (L), 17-1093, 17-1170

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MURRAY ENERGY CORPORATION; MURRAY AMERICAN ENERGY, INC.; THE AMERICAN COAL COMPANY; AMERICAN ENERGY CORPORATION; THE HARRISON COUNTY COAL COMPANY; KENAMERICAN RESOURCES, INC.; THE MARION COUNTY COAL COMPANY; THE MARSHALL COUNTY COAL COMPANY; THE MONONGALIA COUNTY COAL COMPANY; OHIOAMERICAN ENERGY, INC.; THE OHIO COUNTY COAL COMPANY; UTAHAMERICAN ENERGY, INC.

Plaintiffs – Appellees

v.

ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY

Defendant – Appellant

and

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

Intervenors/Defendants

BRIEF OF INTERVENORS/DEFENDANTS

Appeal from January 17, 2017 decision of the
United States District Court for the Northern District of West Virginia
Case No. 5:14-cv-39-JPB

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RULE 26.1 CORPORATE DISCLOSURE

Intervenors/Defendants Mon Valley Clean Air Coalition, Ohio Valley Environmental Coalition and Keeper of the Mountains Foundation certify that there are no parent corporations of Intervenors/Defendants, and that no publicly held corporation owns 10% or more of the stock of any Intervenor/Defendant.

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A. Jurisdiction of the United States District Court

The jurisdiction of the United States District Court for the Northern District of West Virginia was based upon 28 U.S.C. § 1331, and federal questions regarding: (a) whether § 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2) created a cause of action for citizen suits against the EPA Administrator where the citizen alleged that the Administrator failed to perform an act or duty under the Clean Air Act which was not discretionary, and (b) the appropriate relief, if any, for the alleged failure.

B. Jurisdiction of the United States Court of Appeals

This Court's jurisdiction is based upon 28 U.S.C. § 1291, which provides that the courts of shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

On October 17, 2016, the United States District Court entered a "Memorandum Opinion and Order Denying the United States' New Motion for Summary Judgment and Granting Summary Judgment in Favor of the Plaintiffs,' from which Defendant-Appellant, the Administrator of the United States Environmental Protection Agency (hereafter "Appellant-EPA") filed a notice of appeal on December 16, 2016. (App. at p. 140).

On January 11, 2017, the United States District Court entered a "Final Order" (App. at p. 260) directing Appellant-EPA to engage in a series of actions over a defined schedule to comply with § 321(a) of the Clean Air Act. The January 11, 2017 "Final Order" denied the request of Murray Energy Corporation and other Plaintiff-Appellees (hereafter Appellee-Coal Companies") for a nationwide injunction barring adoption of then proposed regulations, or implementation of already final regulations, until Appellant-EPA complied with the requirements of § 321(a) of the Clean Air Act. On January 17, 2017, the United States District Court entered an "Order Denying Motion to Intervene and Administratively Closing Case." (App. at p. 288).

Mon Valley Clear Air Coalition, Ohio Valley Environmental Coalition and the Keeper of the Mountains Foundation, Intervenor-Appellants, all West Virginia-based Non-Governmental Organizations (hereafter "Appellant-WV NGOs"), filed a notice of appeal from the January 17, 2017 order on January 20, 2017 (App. at p. 290), and the Appellant-EPA on February 3, 2017 filed a notice of appeal from the January 11, 2017 and January 17, 2017 orders. (App. at p. 300).

III. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in its holding of January 17, 2017 (App. at p. App. 289) that the District Court's January 11, 2017 "Final Order" (App. at p. 286) -- adopting Appellant-WV NGOs' position regarding the limits on its

injunction authority in § 321(d) of the Clean Air Act -- mooted Appellant-WV NGOs motion to intervene, where: (a) Appellee-Coal Companies may still file an appeal from the January 11, 2017 ruling, and (b) Appellant-EPA may withdraw its defense of the January 11, 2017 ruling, which denied Appellee-Coal Companies a nationwide injunction on adoption or implementation of regulations affecting the coal mining industry.

IV. STATEMENT OF THE CASE

A. Statement Of Facts

This appeal represents the latest chapter in Appellee-Coal Companies' attack on a regulatory design which they have characterized as Appellant-EPA's "War on Coal," and which Appellant-WV NGOs have defended as a reasoned and lawful effort to protect the health and safety of citizens of the United States.

Appellee-Coal Companies alleged that Appellant-EPA's regulatory actions have caused a reduced demand for coal and, consequently, significant unemployment of persons dependent on coal for a livelihood. (App. at p. 76). This unemployment could have been avoided, Appellee-Coal Companies argued, if Appellant-EPA had conducted the employment impact analysis that Appellee-Coal Companies argue is mandated by § 321(a) of the Clean Air Act. (App. at p. 76).

In response, Appellant-EPA challenged the Appellee-Coal Companies' standing to prosecute this action, which they characterized as involving a discretionary duty, and that the injuries alleged by Appellee-Coal Companies were not fairly attributable to Appellant-EPA's regulations. (App. 76-77).

In an October 17, 2016 memorandum order granting Appellee-Coal Companies summary judgment, the United States District Court found that the Appellee-Coal Companies had alleged a sufficiently concrete and particularized injury in fact to withstand scrutiny under the standing doctrine. (App. at p. 178). The District Court further found that Appellant-EPA had not complied with a mandatory duty recited in § 321(a) of the Clean Air Act, and directed Appellant-EPA to file a proposed schedule for compliance with that provision of the Clean Air Act. (App. at p. 200).

On January 11, 2017, the District Court ruled that the Appellant-EPA's proposed schedule was inadequate and ordered a specific schedule for compliance. The January 11, 2017 order denied Appellee-Coal Companies request for a nationwide injunction against Appellant-EPA barring it from promulgation and/or implementation of further regulation of the coal industry. (App. at p. 260).

B. Procedural History

In a May 23, 2104 Amended Complaint (App. at pp. 34-53), Appellee-Coal Companies -- Murray Energy Corporation and eleven other coal mining companies

-- alleged that the Appellant- EPA had failed to perform a mandatory duty under § 321(a) of the Clean Air Act to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the Clean Air Act] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement."

On June 30, 2014 Appellant-EPA filed motion to dismiss and to stay discovery, arguing that its duty under § 321(a) of the Clean Air Act was not non-discretionary because the Clean Air Act failed to establish a date-certain deadline, and that the § 321(a) duty, if any, was too vague to constitute a clear-cut or purely ministerial duty. (App. at p. 73).

On September 16, 2014, the United States District Court entered an order finding that Appellant-EPA's § 321(a) duty was non-discretionary, and denied the motions to dismiss and stay discovery. (App. at 73).

On December 23, 2104, Appellant-EPA filed a motion to dismiss arguing that Appellee-Coal Companies lacked Article III standing. On March 27, 2105, the United States District Court entered a Memorandum Order denying Appellant-EPA's motions to dismiss on grounds of lack of standing. (App. at 73).

On April 10, 2015, Appellant-EPA filed a motion for summary judgment (App. at p. 114). which the Appellee-Coal Companies requested the Court to hold

in abeyance pending discovery, for which Appellee-Coal Companies filed a motion to compel, and which the District Court granted on May 29, 2015. (App. at p. 115).

On June 12, 2015, Appellant-EPA filed a petition for a writ of mandamus with the United States Court of Appeals for the Fourth Circuit, in Case No. 15-1639, requesting this Court to vacate the District Court's May 29, 2015 order compelling discovery. On July 9, 2015, this Court denied the Defendant-Appellant petition. (App. at p. 119).

On August 24, 2016, the District Court granted the Chamber of Commerce of the United States and the National Mining Association leave to file amicus curiae brief in support of Appellee-Coal Companies. (App. at p. 145). The State of West Virginia and twelve other states were granted leave to file an amicus curiae brief in support of Appellee-Coal Companies on September 7, 2016. (App. at p. 145).

On October 17, 2016, the United States District Court entered a "Memorandum Opinion and Order Denying the United States' New Motion for Summary Judgment and Granting Summary Judgment in Favor of the [Appellee-Coal Companies]," and directing Appellant-EPA to file a proposed schedule for completion of a § 321(a) Clean Air Act analysis, which Appellant-EPA filed on October 31, 2016. (App. at p. 140).

On November 14, 2016, Appellee-Coal Companies filed objections to Appellant-EPA's proposed schedule for compliance with § 321(a), and requested that the District Court enter a nationwide injunction enjoinng the Appellant-EPA from imposing further regulatory burdens on the use of coal until Appellant-EPA complied with § 321(a). Appellee-Coal Companies noted in their November 14, 2106 objections that: "There is also a strong motivation for continued delay, as [Appellant-]EPA seeks to implement and entrench its anti-coal policies before the next Administration takes over." (App. at pp. 3616-3617).

On December 14, 2016, Appellant-WV NGOs filed a motion to intervene, supporting memoranda and a declaration in support, stating that they represented individuals and organizations whose health and safety depended on the enforcement of Appellant-EPA regulations pertaining to the burning of coal to generate electricity. Appellant-WV NGOs argued that the change in administration resulting from the November, 2106 election – noted by Appellee-Coal Companies in their November 14, 2016 objections to Appellant-EPA's proposed schedule for compliance with § 321(a) of the Clean Air Act – was likely to affect the decision of a new EPA Administrator to adopt and/or implement health and safety regulations intended to protect Appellant-WV NGOs. (App. at p. 3380).

Appellant-WV NGOs further pointed out that, whether or not § 321(a)

created a mandatory, non-discretionary duty, the issuance of an injunction barring adoption of proposed regulations, based upon violation of § 321(a)'s duty of analysis, was explicitly prohibited by § 321(d) of the Clean Air Act which provided 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).

On January 11, 2017, the United States District Court entered a "Final Order" compelling Appellant-EPA to engage in a series of actions over a defined schedule to comply with § 321(a) of the Clean Air Act. (App. at p. 260). Citing § 321(d) of the Clean Air Act, the January 11, 2017 "Final Order" denied Appellee-Coal Companies' request for a nationwide injunction barring adoption of then proposed regulations, and implementation of already final regulations, until Appellant-EPA complied with the requirements of § 321(a) of the Clean Air Act. (App. at p. 286).

On January 17, 2017, the United States District Court entered an "Order Denying Motion to Intervene and Administratively Closing Case." The District Court ruled that because it had denied the nationwide injunction, on the basis of § 321(d) of the Clean Air Act, as Appellant-WV NGOs had requested, that the motion for intervention was, as a consequence, moot. (App. at p. 289).

On December 16, 2016 Appellant-EPA filed a notice of appeal (App. at p. 220) from the October 17, 2016 order denying it summary judgment, and granting Plaintiffs – Appellees summary judgment (Case No. 16-2432). Intervenor-Appellants filed a notice of appeal (App. at p. 290) from the January 17, 2017 order denying their motion to intervene on January 20, 2017 (Case No. 17-1093), and the Administrator of the EPA filed a notice of appeal (App. at p. 300) from the January 11, 2017 and January 17, 2017 orders on February 3, 2017 (Case No. 17-1170).

On February 2, 2107, the District Court denied, without prejudice to resubmission after the conclusion of these appeals, Appellee-Coal Companies' motion for attorneys' fees and expenses in the approximate amount of Three Million Nine Hundred Thousand ($3,900,000). (App. at p. 297).

On February 3, 2017, this Court entered an order consolidating Case Nos. 17-1093 and 17-1110 with Case No. 16-2432.

C. Ruling Presented For Review

Whether the District Court's January 11, 2017 Final Order adoption of Intervenors/Defendants position regarding the limits on its injunction authority in § 321(d) of the Clean Air Act mooted Appellant-WV NGOs motion to intervene?

V. SUMMARY OF ARGUMENT

The primary motivating factor for Appellant-WV NGOs' motion to intervene was preservation of health and safety regulations upon which their members depend – and the very real risk that the change in administration of the Appellant-EPA resulting the November 2016 election would jeopardize those regulations. The district court incorrectly ruled that Appellant-WV NGOs' motion to intervene was mooted by the District Court's entry of an order -- consistent with the position advocated by Appellant-WV NGOs -- denying Plaintiffs–Appellees' request for a nationwide injunction against adoption and implementation of EPA regulations.

At the time of Appellant-WV NGOs' motion, it remained possible that Appellee-Coal Companies could seek their requested nationwide injunction by means of a request for further relief from the District Court, or by means of an appeal to this Court. Furthermore, in light of recent changes in litigation positions adopted by the new administration in other Circuit Court litigation, it is clear that admission of Appellant-WV NGOs' as parties to the proceeding below was warranted to insure the ongoing defense of Appellant-EPA health and safety regulations proposed and/or not yet implemented.

Moreover, admission of Appellant-WV NGOs' as a party would have insured that "employment shifts" to the natural gas and renewable energy

industries were included in an any assessment of adverse employment impacts in the coal industry attributable to EPA regulations.

VI. ARGUMENT

A. Appellant-WV NGOs' Motion To Intervene Was Not Mooted By The District Court's Agreement with Appellant-WV NGOs Argument That 321(d) Barred Issuance of an Injunction.

1. Appellee-Coal Companies May File a Notice of Appeal from the Denial of a Nationwide Injunction Until March 12, 2017.

The primary ground for intervention below was WV NGOs; opposition to Appellee-Plaintiffs' request for a nationwide injunction of Appellant-EPA from promulgation and/or implementation of additional regulation on the coal industry. This ground – predicated on Appellant-WV NGOs interest in the health and safety protections afforded by Appellant-EPA regulations – does not evaporate merely because the District Court in its January 11, 2017 order declined to grant Appellee-Plaintiffs the requested injunction. Federal Rule of Appellate Procedure grants Appellee-Plaintiffs 60 days after the issuance of the January 11, 2017 order in which to appeal, i.e.,, until March 12, 2017. Until that time passes, without a Notice of Appeal from Appellee-Plaintiffs, Appellant-WV NGOs motion to intervene clearly is not moot.

2. Appellant-EPA May Abandon Its Opposition to a Nationwide Injunction, in Response to the Change in Administration.

Additionally, as a consequence of the change in administration following the November 2016 election, Appellant-WV NGOs' reasonably anticipate that Appellant-EPA will abandon its opposition to Appellant-Coal Companies' request for a nationwide injunction. To be sure, this argument, dismissed below as speculative by both Appellant-EPA and Appellee Coal Companies, has already manifested itself in other Circuit Court litigation.

Specifically, on August 21, 2016, in State of Texas v. United States, Civil Action No. 7:16-cv-54-O, the United States District Court for the Northern District of Texas, entered a nationwide injunction against enforcement of US Department of Education guidelines pertaining to transgender bathrooms. The Obama administration appealed the injunction and requested that it apply only to states involved in the lawsuit and not nationwide. Oral arguments in that case were scheduled to begin on Tuesday, February 14, 2017. However, on Friday, the Justice Department withdrew the previous administration's challenge.[1]

It is, manifestly, not speculative to argue that the Administration that altered its stance in litigation in the State of Texas litigation before the Fifth Circuit, will not similarly alter its position on the overriding issue of the propriety of a

[1] https://www.nytimes.com/2017/02/11/us/politics/trump-transgender-students-injunction.html

nationwide injunction in the present litigation, which involves issues every bit as intensely debated in the recent election as the issues involved in the Texas litigation. At that point, Appellant-WV NGOs will be the sole litigant before this Court defending the position of the US District Court for the Northern District of West Virginia to the effect that 321(d) of the Clean Air Act bars – explicitly – the issuance of any injunction, nationwide or otherwise, to enforce the provisions of 321(a) of the Clean Air Act.

B. Appellant-WV NGOs Were Entitled To Mandatory Intervention

Appellant-WV NGOs met 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 Appellant-WV NGOs' 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).

1. Appellant-WV NGOs Stated A Substantial Interest In The Litigation.

Appellant-WV 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. Appellant-WV NGOs have noted, and Appellee-Coal Companies do not contest, that 96% of the electricity in West Virginia is generated from coal-fired electric plants. In short, there is no place in the state of West Virginia to which Appellant-WV NGOs may retreat to avoid the adverse health consequences of toxic emissions from coal-fired electric generation plants.

Appellant-WV NGOs 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), 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) 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.

Appellant-WVNGOs 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. As environmental, not-for-profit organizations, Appellant-WV NGOs 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 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.[2]

The peer-reviewed study, *Atmospheric particulate matter size distribution and concentration in West Virginia coal mining and non-mining areas*, Journal of Exposure Science and Environmental Epidemiology (2014) 24, 405–411,

[2] 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).

submitted with the Declaration of Paul Corbit Brown, cited numerous health research studies concluding that:

> Residents of coal mining areas have significantly higher mortality from chronic heart, respiratory, and kidney diseases, and elevated morbidity from chronic cardiopulmonary, cardiovascular, and kidney diseases.14–16 Age-adjusted total mortality rates in MTM areas are significantly greater compared with non-mining areas in central Appalachian states.17 Residents of MTM areas have an increased prevalence of congenital anomaly births compared with residents of other Appalachian coal mining areas.18 In addition, age-adjusted chronic cardiovascular rates were greater in MTM Appalachian counties compared with non-mining Appalachian counties.19

App. at p. 3391.

Appellant-WV NGOs do not regard regulations that seek to abate harm to public health and safety as evidence of a "war on coal," as Appellee-Coal Companies have described them. To the contrary, Appellant-WV NGOs regard those regulations as necessary and appropriate protection for citizens at risk as a result of activities, which pose demonstrable hazards to the public health and welfare. Appellee-Coal Companies are rightly subject to reasonable regulation designed to reduce the harms that their activities pose to third parties and the public at large. Controlling harmful air pollution that causes serious harms to thousands of unwilling victims is a proper and fair cost of doing business.

Appellant-WV NGOs support the use of careful economic analysis to examine the effects of pollution and controls thereof, including identifiable impacts (positive or negative) on employment. Appellant-WV NGOs believe it is vital,

however, that any and all such analysis be based on rigorous and sound methods, and that Appellant-WV NGOs' be given a full and fair opportunity, commensurate with that afforded Appellee-Coal Companies, to participate in and to review any information and methods upon which such analysis are bases. 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).

However, Appellant-WV NGOs have serious concerns about potential misuse of Section 321(a), motivated by a desire for economic gain, may 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, Appellant-WV NGOs submit that Appellee-Coal Companies request that the District Court issue a nationwide injunction barring Appellant-EPA from issuing new regulations,, violates Section 321(d) of the Clear Air Act which provides 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).

The plain language of § 321(d) of the Clean Air Act makes it abundantly clear that even Appellant-EPA, the administering agency, may not modify or withdraw requirements imposed under the Act based upon the requirements of

Section 321(a)-(c). It is equally clear 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.

The language of § 321(d) is a far cry from Congressional silence which, in other contexts, has been said to support judicial intervention. See Boudemeine v Bush, 553 US 723, 788 (2008). Manifestly, Appellant-WV NGOs have a strong interest in preventing impediments to the protection of public health, and Congress has clearly stated its intent that no Court interfere with that overriding objective.

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, Appellant-WV NGOs have a substantial 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 Appellant-WV NGOs 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

Appellant-WV NGOs' 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 serious injuries that would result from delayed or reduced Clean Air Act regulation (App. at p. 3390).

2. Appellant-WV NGOs Interests Will Be Impaired Without Intervention.

Appellant-WV NGOs' interests in defending and receiving protection from critical Clean Air Act regulations are impaired by the District Court's January 17, 2017 order denying their motion to intervene. Appellant-WV NGOs was only required to 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 Appellant-Coal Companies sought (and can still seek on appeal) could block, delay or interfere with the application or enforcement of existing or future Clean Air Act regulations that protect Appellant-WV NGOs' interests in health and enjoyment of the environment. In addition, an injunction could undermine Appellant-WV NGOs' procedural interest as intervenor-respondents in the D.C. Circuit litigation in which Appellee-Coal Companies and others are challenging the Clean Power

Plan and related regulations. See Declaration of Paul Corbit Brown ¶15) App. at p. 3383).[3]

3. Appellant-WV NGOs Interests Are Not Adequately Represented By Appellant-EPA.

Intervention as of right below was appropriate because, as is now clear, there is a substantial possibility that Appellant-WV NGOs' significant interest in the outcome of the case will not be "adequately represented" by the EPA now that the new Administration has taken office. Until the November 2016 election, Appellant-WV NGOs' interests in this litigation were sufficiently similar to those of the Appellant-EPA that Appellant-WV NGOs did not need to intervene. See Stuart v. Huff, 706 F.3d 345, 353 (4th Cir. 2013) (inadequacy of representation not shown where government defendant was defending statute).

However, statements from the President, his campaign, and his transition team, as well as news reports, have highlighted that the new Administration will effect an abrupt reversal of position on environmental regulation, including potential changes of position in pending Clean Air Act challenges to regulations

[3] Assuming that Appellant-WV NGOs 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 Appellant-WV NGOs' standing.

addressing pollution from fossil fuel-fired power plants.[4] The new Administration's nominee to serve as EPA Administrator has, as Attorney General of Oklahoma, brought or joined numerous lawsuits seeking to overturn Clean Air Act regulations and has advocated for broad rollbacks in federal environmental regulation.[5]

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

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[4] 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; 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.).

[5] 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).

4. Appellant-WV NGOs Motion to Intervene Was 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). Appellant-WV NGOs' December, 2016 Motion to Intervene was timely because, due to the November 2016 election, Appellant-WV NGOs could no longer expect Appellant-EPA to adequately represent their interests.

Although summary judgment has been granted in favor of Appellee-Coal Companies, this suit is still ongoing before the District Court with regard to the appropriate remedy. Reversal of the District Court's January 17, 2017 Order denying intervention, to permit Appellant-WV NGOs intervention now, will not prejudice other parties or delay the proceedings. Unless the Court requests further briefing, Appellant-WV NGOs do not intend to file any substantive briefing below on the Clean Air Act's § 321(a) duty beyond what Appellant-EPA has already submitted. The timing of Appellant-WV NGOs' motion results only from their prior reliance on Appellant-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 Appellant-EPA's policy position is expected to shift, such that Appellant-WV NGOs' 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, 413 U.S. 345, 367 (1973), Appellant-WV NGOs are therefore taking "immediate affirmative steps to protect their interests" by moving to intervene now in anticipation that Appellant-EPA may change its position under the new Administration, as it has already done in the Texas litigation noted above.

5. Appellant-WV NGOs Satisfied All Formalities for Intervention.

Initially, Appellee-Coal Companies argued below that Appellant-WV NGOs failed to comply with the requirements of Rule 24 (c), Fed. R. Civ. Procedure "because it fail[ed] to attach 'a pleading that sets out the claim or defense for which intervention is sought.'" On December 14, 2016, the WV NGOs filed a Motion to Intervene under Rule 24, Fed. R. Civ. Proc. Filed simultaneously with that motion was Appellant-WV NGOs' separate Memorandum of Points and Authorities in Support of Motion for Leave to Intervene."

Appellant-WV NGOs' separate Memorandum filed in response to the explicit requirements of LR Civ. P 7.02 (a), included in Part II – titled "Rule 24 (c) Statement of Interest" – the precise statement that Plaintiffs purport to demand, i.e., an unambiguous statement of the WV NGOs interest in preserving the protections to their health afforded by existing and proposed regulations which minimize toxic emissions from the uncontrolled and/or poorly controlled mining of coal and burning of coal by electric utilities.

A more tangible interest, directly related to the issues remaining to be resolved in this litigation, cannot be stated. Appellant-WV NGOs' allegation that their health and welfare would be impacted by Plaintiffs' request for an extraordinary nationwide injunction against EPA rulemaking provides all of the showing of impact required by Rule 24 (a) for mandatory intervention.

Here Appellant-WV NGOs' "Rule 24 (c) Statement of Interest" fully satisfies the practical purpose of the rule. "The purpose of Rule 24(c) requiring a motion for intervention to state the grounds therefor and to be accompanied by a pleading setting forth the claims or defense upon which intervention is sought is to enable the court to determine whether the applicant has the right to intervene and, if not, whether permissive intervention should be granted." Miami County Nat. Bank of Paola, Kansas v. Bancroft, 121 F.2d 921 (10th Cir. 1941). See also Wright & Miller, et al., 7C Federal Practice & Procedure, Rule 24. Intervention

D. Procedure and Jurisdiction, § 1914 Motion and Pleading (3d ed. 2016 rev.). Moreover, Appellant-WV NGOs' explained that they were moving to intervene at that stage of the case owing to the possibility that the EPA may change positions after January 20, 2017 – a concern now clearly not mere speculation.

To the extent that a proposed Answer, in addition to a separate statement of interest, is deemed to be required, Appellant-WV NGOs' submitted with their Reply to Appellant-Coal Companies' opposition to intervention, a separate "Answer of Defendant-Intervenors." See Spring Const. Co. v. Harris, 614 F.2d 374, 376–77 (4th Cir. 1980).

C. Appellant-WV NGOs Should Have Been Granted Permissive Intervention Under Rule 24 (b)

Even if Appellant-WV NGOs 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 Appellant-WV NGOs 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, Appellant-WV NGOs had defenses in common with Appellant-EPA, including the defense that § 321(d) of the Clean Air Act precludes any relief that would restrain or delay existing or future Clean Air Act regulations.

Intervention is especially appropriate in the present case because Appellee-Coal Companies have proposed a narrow and highly biased methodology for conducting the employment impacts analysis under section § 321(a) which conflicts with the manifest purpose of 321(a) of the clean air act. The District Court has retained jurisdiction and required EPA to demonstrate compliance, indicating that it intends to supervise how EPA performs the analysis – an approach which may mean that the scope of the 321(a) study will be misguided. Together, the text of § 321(a) focus on employment "losses," and the legislative history's reference to employment "shifts," compel the conclusion that "losses" mean net losses, i.e., gross losses in one industry, as reduced by offsetting increases in another.

In its October 17, 2107 order granting Plaintiffs – Appellees summary judgment, the District Court noted the Congressional intent to assess not only employment decreases, but employment shifts, attributable to EPA regulations. Specifically, the District Court cited the following language of the legislative history of § 321(a) as instructive:

> The following year, Congress added the provision to the Clean Air Act in Section 321. Pub. L. No. 95-95, § 311, 91 Stat. 685, 782 (1977). The House committee report summarized that, "[u]nder this provision, the Administrator is mandated to undertake an ongoing evaluation of job losses and employment shifts due to requirements of the Act." H.R. REP. NO. 95-294, at 317 (1977) [Doc. 258-2, Ex. 8]. This evaluation was "to include the firms, workers, and communities which may be affected." [Id.].

App. at p. 157 (emphasis added).

Moreover, the District Court also acknowledged in its October 17, 2018 order that the intent of the employment analysis specified in § 321(a) was to inform government agencies of triggering possible government assistance programs for areas adversely affected by a particular regulatory mandate.

> This was specifically "intended to bring into play any government programs available to provide financial assistance which would prevent plant closings or production curtailments or to assist workers and communities impacted by closings and curtailments." [Doc. 258-3, SBA Assistance for Agric. Concerns & to Meet Pollution Standards: Hearings Before the Subcomm. on SBA & SBIC Legislation of the H. Comm. on Small Bus., 94th Cong. 163 (1975) (Ex.19)].

App. at p. 185 (emphasis added).

Again at the December 15, 2016 status conference, the District Court observed that the § 321(a) employment impact analysis which he envisioned encompassed the entire economy, not just coal:

> THE COURT: One of the things I want to be clear on, while it's the coal industry that brought this case, I have put in my order some specific things with regard to the coal industry, even when we're talking about the electric generating rules, it is the effect on the entire economy that needs to be evaluated, not just the coal industry. I mean, there are many other industries or businesses that make their living off of the electric generating industry. And it should include all of those, not just coal. I understand your interest is coal, my interest is compliance with 321.

App. at p. 249.

In response, Appellant-WV NGOs observed that adverse employment impacts in the coal industry were frequently occasioned by positive employment

impacts in the renewable energy industry, including wind and solar power generation:

> [T]he Court's identification of the entire electric generation industry, not merely the coal element of it, is, in our judgment, appropriate. Because if one's assessing job impacts, those things which tend to decrease or depress employment in the coal industry very frequently have the opposite effect of increasing employment in solar or wind or other alternative energy employment areas. And we would concur with the observation that those kinds of job impacts should be part of any EPA assessment under 321(a).

App. at p. 251).

To the extent there are further proceedings regarding the scope of Appellant-EPA's 321(a) employment and job shifting analysis, Appellant-WV NGOs should be permitted to intervene to ensure that the analysis is consistent with the clear language and intent of the Clean Air Act, and not a mere one-sided survey of Appellant-Coal Companies and their fellow coal mining companies to the exclusion of demonstrable employment increases in the natural gas and renewable energy industries.[6]

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[6] Such increases are clearly not matters of mere speculation. See discussion of solar employment increases which exceed job growth in oil, gas and coal industries combined. http://www.computerworld.com/article/3161188/sustainable-it/us-solar-industry-passes-oil-coal-and-gas-for-job-creation.html. See also discussion of exponential growth in 2016 in solar industry generally, https://www.greentechmedia.com/articles/read/us-solar-market-grows-95-in-2016-smashes-records?utm_source=breakingnews&utm_medium=email&utm_campaign=SMI2016YIR And See discussion of equally dramatic increase in deployment of solar related electricity storage capacity.

VII. CONCLUSION

This Court should reverse the District Court's denial of Appellant-WV NGOs' motion to intervene.

Respectfully submitted,

MON VALLEY CLEAN AIR COALITION,
OHIO VALLEY ENVIRONMENTAL COALITION, and
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https://www.greentechmedia.com/articles/read/fercs-lafleur-wholesale-market-changes-unique-abilities-energy-storage

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 16-2642-L **Caption:** Murray Energy Corporation, et al v. EPA and WV NGOs

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Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

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Party Name Intervenors/Defendants-WV NGOs

Dated: February 21, 2017

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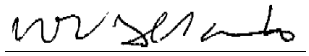
IX. CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellant-WV NGOs' Brief was filed with the Clerk of the Court via the CM/ECF filing system this 21st day of February, 2017, and thereby served on counsel for all parties of record.



William V. DePaulo