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

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MURRAY ENERGY CORPORATION, et al.,

Plaintiffs – Appellees

v.

ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY

Defendant – Appellant,

and

MON VALLEY CLEAN AIR COALITION, et al.,

Applicants-in-Intervention-Appellants.

REPLY BRIEF OF APPLICANTS-IN-INTERVENTION-APPELLANTS

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April 14, 2017

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A. Applicants-In-Intervention-Appellants' Interest In The Health And Safety Benefits Afforded Them By Appellant-Defendant EPA's Clean Air Act Regulations Was Not Mooted By The Entry Of An Order Denying Nation-Wide Injunction Currently.

Because Appellee-Defendants are still active participants in the litigation below, and may yet appeal the denial of a nationwide injunction following a later-filed District Court order, Applicants-in-Intervention-Appellants' motion to intervene was not mooted by the District Court's January 11 or 17, 2017 orders.

The January 11, 2107 order imposes specific duties on EPA which that agency is compelled to go forward with presently, and sets dates on which the Appellant-Defendant must report back to the Court. However, Appellee-Plaintiffs will have the same robust right to criticize whatever work product Appellant-Defendant EPA files – and to seek additional judicial relief from the District Court – when that §321(a) work-product is filed, as they had following Appellant-Defendant EPA's submissions in response to the District Court's October 14, 2016 order granting Appellee-Plaintiffs summary judgment.

The denial of a nation-wide injunction will be appealable to litigants below, including Appellee-Plaintiffs, whenever Appellant-Defendant EPA completes its study under §321(a) at a future date that is presently unknown. The fact that Appellee-Plaintiffs have not felt compelled to file an appeal within the 60-day

deadline provided by this Court's rules of procedure, in now way alters their ability, ultimately, to seek such an order.

This reality is underscored by the District Court's January 17, 2017 order -- styled "ORDER DENYING MOTION TO INTERVENE AND ADMINISTRATIVELY CLOSING CASE" – which expressly holds that:

> This Court shall retain jurisdiction over the parties hereto only for the purpose of supervising the implementation and enforcement of this Court's January 11, 2017, Final Order.

App.289 (emphasis added).

In short, the District Court will retain jurisdiction to review the adequacy of any work product submitted by Appellant-Defendant EPA, and to consider any criticism proffered by Appellee-Plaintiff, and thereafter to enter relief as the Court deems appropriate -- just as it reviewed and rejected Appellant-Defendant EPA's report filed with the Court following the Court's October 17, 2016 entry of summary judgment.

Additionally, Appellee-Plaintiffs may -- at the time the District Court concludes its review of Appellant-Defendant EPA's next §321(a) study – request that court to revisit its January 11, 2017 interlocutory order, and issue the nation-wide injunction, again just as occurred following summary judgment.

Clearly, where the Appellant-Defendant EPA has not concluded the §321(a) compelled by the January 11, 2017 order, where Appellee-Plaintiffs have not

critiqued that yet-to-be-produced study, and where the District Court retains the same right to determine that the study does, or does not, satisfy the January 11, 2017 order, the mere passage of sixty days from the entry of the orders now under review in no way moots the requested intervention.

Until such time as an order of Appellee-Plaintiffs' claims is entered, after the Appellant-Defendant EPA's §321(a) study is completed and reviewed below, Applicants-in-Intervention-Appellants' interest in this litigation is not moot.

B. Applicants-In-Intervention-Appellants' Interest In This Litigation – Clearly Asserted At The District Court's December 15, 2017 Status Conference -- Includes The Scope And Content Of The §321(A) Study Ordered By The District Court, And That Interest Warrants Intervention Independent Of Orders Denying Injunctive Relief.

Unquestionably, the immediate impetus for Applicants-in-Intervention-Appellants' motion to intervene below was opposition to Appellee-Plaintiffs' then pending request for a nationwide order enjoining Appellant-Defendant EPA from promulgation and/or implementation of additional regulation on the coal industry. This spur to intervention – motivated by Applicants-in-Intervention-Appellants' interest in the health and safety protections afforded by Appellant-EPA regulations – did not define the range of procedural postures of the case in which that health and safety interest might be affected.

As noted above, the fact that the District Court in its January 11, 2017 order declined to grant Appellee-Plaintiffs the requested injunction, and Appellee-Plaintiffs have elected not to appeal that denial currently, does not exhaust the opportunities for adverse impacts by this litigation on Applicants-in-Intervention-Appellants' interests.

Specifically, Appellee-Plaintiffs have proposed a scope for conducting the employment impacts analysis under section § 321(a) which may conflict with the the interest asserted by Applicants-In-Intervention-Appellants.

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).

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).

As noted, at the December 15, 2016 status conference, the District Court commented 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 (emphasis added).

In response, Applicants-in-Intervention-Appellants' observed that adverse employment impacts in the coal industry were frequently offset 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 (emphasis added).

To the extent there are further proceedings regarding the scope of Appellant-EPA's 321(a) employment and job shifting analysis, Applicants-in-Intervention-Appellants' interests in preservation of the health and safety benefits of existing and future regulation of air pollutants warrant intervention.

Applicants-in-Intervention-Appellants qualified for mandatory intervention to protect its health and safeth interest, in the yet to be conducted 321(a) study. Protection of Applicants-in-Intervention-Appellants' interests requires their presence to insure that the study is not improperly biased by the exclusion of demonstrable employment increases in the natural gas and renewable energy industries which would, under current political realities, weigh heavily against additional or continuing health and safety regulations applicable to the coal sector of the energy generation industry.

Applicants-in-Intervention-Appellants' ability to insure the integrity of the §321(a) study yet to be concluded, is necessary to avoid their health and safety being compromised by a study focused exclusively on the coal sector, and not reflecting in employment shifting – in the form of significant job increases in the

natural gas and renewable sectors of the energy generation industries.

Abundant available information strongly suggests that the net employment effect of Appellant-Defendant EPA regulations is a substantial net increase, not decrease, in employment for the energy generation industry as a whole, as a consequence of the dramatic increases in other energy generation sectors.

Specifically, EcoWatch, a publication of the World Resources Institute reported in April 2017 that solar employment increased much faster than the economy generally and resulted in the following jobs in various energy generation sectors:

> The solar, wind and energy efficiency industries already employ millions of people in the U.S. and they're poised to grow. According to the U.S. Department of Energy, there are 374,000 American jobs in solar energy, 102,000 in wind energy and more than 2.2 million related to energy efficiency. For comparison, 160,000 Americans work in coal, 360,000 in natural gas and 515,000 in oil. Solar and wind are among the most dynamic industries in the nation. In 2016, solar employment expanded 17 times faster than the overall economy. Wind turbine technicians are expected to be the fastest-growing occupation over the next 10 years.

http://www.ecowatch.com/states-renewable-energy-jobs-2348095715.html?utm_source=CR-TW&utm_medium=Social&utm_campaign=ClimateReality (last visited April 14, 2017).

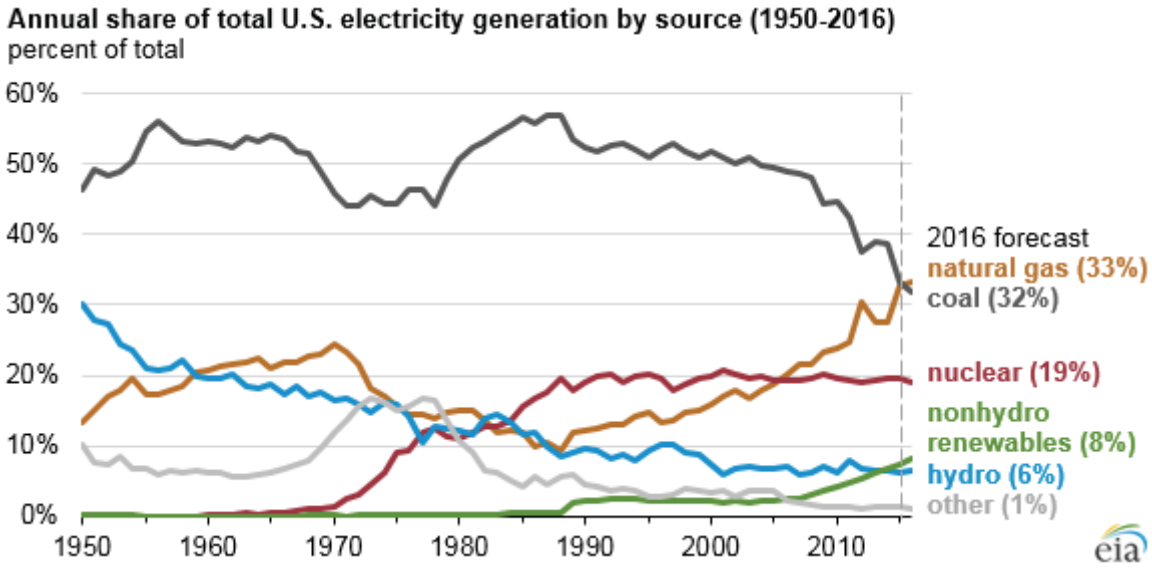
This is not an isolated study. Slate.com reports that the solar business now employs more Americans than coal mining:

> [T]he most interesting finding, from a mining perspective, is how the number of solar jobs compares to other forms of electricity generation. Despite representing just 1.3% of US energy production, "Solar employs

> slightly more workers than natural gas, over twice as many as coal, over three times that of wind energy, and almost five times the number employed in nuclear energy. Only oil/petroleum has more employment…

http://www.slate.com/blogs/moneybox/2015/02/23/solar_jobs_growth_the_industry_now_employs_more_workers_than_coal.html (last visited April 14, 2017).

Moreover, in assessing the "contribution" of Appellant-Defendant EPA regulations to coal industry unemployment, it is necessary that any §321(a) study consider the overriding impact on the coal share of electric generation caused by the dramatic increase in supply of, and resulting low price for, natural gas. The following chart demonstrates that impact:



http://www.cnbc.com/2016/12/20/coals-us-stronghold-is-losing-steam-even-as-trump-aims-for-a-revival.html (last visited April 14, 2017).

III. CONCLUSION

Applicants-in-Intervention-Appellants' participation in this litigation is necessary to protect its interest in preservation of health and safety regulations in place and yet to be adopted by Appellant-Defendant EPA. Those interests are not mooted by the entry of one order at one particular procedural stage of the litigation in December, 2016. Those health and safety interests will continue through the administrative process ultimately resulting in a §321(a) product which Appellee-Plaintiffs can reasonably be expected to use in support of efforts to eliminate Applicants-in-Intervention-Appellants' existing health and safety protections, or curtail the extension of those interests in needed and appropriate additional regulations.

This Court should reverse the January 17, 2017 denial of Applicants-in-Intervention-Appellants' motion to intervene.

Respectfully submitted,

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

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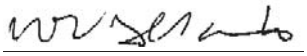
IV. CERTIFICATE OF SERVICE

I hereby certify that a copy of Applicants-in-Intervention-Appellants' Reply Brief was filed with the Clerk of the Court via the CM/ECF filing system this 14th day of April, 2017, and thereby served on counsel for all parties of record.



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