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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MURRAY ENERGY CORPORATION et al.,
Plaintiffs-Appellees,

-v.-

ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant/Cross-Appellee,

MON VALLEY CLEAN AIR COALITION et al.,
Applicants-in-Intervention-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Case No. 5:14-cv-00039 (Hon. John Preston Bailey)

RESPONSE BRIEF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AS APPELLEE IN CASE NO. 17-1093

OF COUNSEL:

GAUTAM SRINIVASAN
MATTHEW C. MARKS
Air and Radiation Law Office
Office of General Counsel
United States Environmental Protection Agency

JEFFREY H. WOOD
Acting Assistant Attorney General

JENNIFER SCHELLER NEUMANN
PATRICK R. JACOBI
RICHARD GLADSTEIN
LAURA J.S. BROWN
SONYA SHEA
MATTHEW LITTLETON
Attorneys
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
(202) 514-4010
matthew.littleton@usdoj.gov

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STATEMENT OF JURISDICTION

Plaintiffs Murray Energy Corporation and related companies (collectively, "Murray") sued the Administrator of the United States Environmental Protection Agency ("EPA"), and invoked the district court's jurisdiction under Section 304(a) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7604(a). For reasons explained in EPA's opening brief as appellant in Case Nos. 16-2432 and 17-1170 ("U.S. Br."), the district court did not have jurisdiction to entertain Murray's suit.

On January 17, 2017, the court issued an order that administratively closed the case and also denied a motion to intervene filed by Mon Valley Clean Air Coalition, Keeper of the Mountains Foundation, and Ohio Valley Environmental Coalition (collectively, "Mon Valley"). Appendix ("App.") 288–89. Mon Valley had sought to intervene as of right under Federal Rule of Civil Procedure ("Rule") 24(a)(2), App. 3376–81. In a footnote, Mon Valley requested permissive intervention under Rule 24(b) in the alternative. App. 3373 n.1. On January 20, 2017, Mon Valley filed a notice of appeal from the order denying intervention, App. 290, which appeal this Court docketed as Case No. 17-1093. On February 6, 2017, this Court *sua sponte* consolidated Mon Valley's appeal with EPA's two appeals from the same action.

This Court has jurisdiction under 28 U.S.C. § 1291 to consider Mon Valley's appeal from the district court's order preventing Mon Valley from becoming a party to this suit in any respect. *See Alt v. EPA*, 758 F.3d 588, 590 (4th Cir. 2014).

STATEMENT OF ISSUES

Earlier this year, the district court entered an injunction that requires EPA to undertake certain evaluations of the CAA's employment effects and to establish a system for future evaluations in order to remedy what the court deemed a failure of the agency to act under Section 321(a) of the CAA, 42 U.S.C. § 7621(a). EPA has appealed from that order and believes it to be unlawful.

For purposes of Mon Valley's separate appeal from the denial of its motion to intervene, however, the most salient part of the district court's injunction is what it *omits*: an order that would "stay the effective date of any pending regulations under the [CAA] for the coal industry and coal-fired utilities * * * and enjoin EPA from proposing or finalizing new regulations * * * impacting the coal industry or coal-fired electric generating units until EPA complies with the [c]ourt's orders." App. 286. Because Mon Valley sought to participate in this case solely "to resist" that relief, the court denied Mon Valley's motion to intervene as moot. App. 288–89.

The issues presented in Mon Valley's appeal are:

1. Did the district court abuse its discretion by denying Mon Valley's intervention motion after declining to award the only relief Mon Valley sought to resist?

2. Does the judgment of the district court, which compels EPA to conduct certain evaluations under the auspices of Section 321(a) of the Act, impair or impede Mon Valley's ability to protect any interest cognizable under Rule 24(a)(2)?

3. Does EPA adequately represent any interest of Mon Valley implicated by this suit, such that intervention as of right under Rule 24(a)(2) is unwarranted?

4. Did the district court clearly abuse its discretion by not granting Mon Valley permissive intervention under Rule 24(b)(1)?

STATEMENT OF THE CASE

EPA's opening brief on appeal sets forth the legal and procedural background of this litigation. U.S. Br. 3–10. As relevant here, on October 17, 2016, the district court held the agency liable for not acting under Section 321(a) of the CAA, which instructs the agency to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the [Act] and applicable implementation plans." 42 U.S.C. § 7621(a). The court ordered EPA to submit "a plan and schedule for compliance with § 321(a)" and permitted Murray to file "comments or criticisms" of the agency's proposal. App. 203. After receiving the parties' remedy submissions, the court scheduled a status hearing for December 15, 2016. App. 31. One day before the hearing, Mon Valley moved to intervene as a defendant in support of EPA.

Mon Valley moved to intervene as of right under Rule 24(a)(2), App. 3376, which permits a litigant to intervene as a defendant if it can establish, *inter alia*, an interest that would be injured by a judicial ruling in favor of the plaintiff:

> On timely motion, the court must permit anyone to intervene who * * * claims an interest relating to the property or transaction that is the

> subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Mon Valley observed that Murray had sought injunctive relief that would stay the effective date of final CAA regulations and stop EPA from proposing or finalizing new regulations pending compliance with Section 321(a). App. 3370; *see also* App. 3612. Mon Valley asserted "an interest in defending EPA's existing air pollution regulations * * * and preventing the use of Section 321(a) to block new regulation," and that this interest would be harmed "should this Court grant the injunctive relief Plaintiffs seek." App. 3377. Mon Valley alleged that, although EPA had adequately represented Mon Valley's interest to date, there was "a substantial possibility" that the agency would not do so after President Donald Trump assumed office in January 2017. App. 3378. Mon Valley cited the recent presidential election as a justification for the court to permit intervention at this late stage of the litigation. App. 3380–81.

In a footnote, Mon Valley argued in the alternative that it should be granted permissive intervention under Rule 24(b)(1). App. 3373 n.1. That rule affords the court discretion to permit intervention by a litigant whose "timely motion" asserts "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Mon Valley contended that it "ha[d] defenses in common with defendants, including that the statute precludes any relief that would restrain or delay existing or future [CAA] regulations." App. 3373 n.1.

Both Murray and EPA opposed Mon Valley's motion to intervene as of right. App. 289. Murray also opposed Mon Valley's request for permissive intervention, while EPA took no position on that issue. *See ibid*. At the status hearing on remedy, Mon Valley reiterated an interest in "the relief that might be incorporated into any injunction," rather than "the broader issue of [Section] 321(a) and the duty that the [c]ourt ha[d] found unfulfilled in its summary judgment order." App. 244–45.

On January 11, 2017, the district court issued a "final order" directing EPA to take steps to remedy the CAA violation that the court had found. App. 285–86. The court ordered the agency to produce "a § 321(a) evaluation of the coal industry and other entities affected by [CAA] rules and regulations" and to "adopt[ ] measures to continuously evaluate the loss and shifts in employment which may result from its administration and enforcement of the [CAA]." *Ibid.* Notably, however, the court did not "stay the effective date of any pending [CAA] regulations" or "enjoin EPA from proposing or finalizing new [CAA] regulations" pending compliance with the court's injunction. App. 286. The court held that such relief was barred by a "plain reading" of Section 321(d) of the Act, *ibid.*, which states that "[n]othing in [Section 321] shall be construed to require or authorize [EPA] * * * to modify or withdraw any [CAA] requirement imposed or proposed to be imposed." 42 U.S.C. § 7621(d).

On January 17, 2017, the court issued an order denying Mon Valley's motion to intervene and declaring this case closed except "for the purpose of supervising

the implementation and enforcement" of the injunction entered against EPA. App. 289. The court denied Mon Valley's motion as moot because the court already had "expressly declined to grant" the relief with which Mon Valley was concerned. *Ibid.*

EPA appealed from the judgment, App. 300, and Mon Valley appealed from the order denying intervention, App. 290. Murray did not file a cross-appeal.

SUMMARY OF ARGUMENT

EPA has argued that the district court lacked jurisdiction over this lawsuit and that it erred in holding the agency liable for a failure to act under Section 321(a). If this Court agrees with EPA on either of those points, it should dismiss Mon Valley's appeal as moot because the disposition of this suit—dismissal or judgment in favor of EPA—could not possibly impair or impede any interest asserted by Mon Valley. On the other hand, if this Court disagrees with EPA and holds that the district court properly found the agency liable, this Court should affirm the district court's ruling that Mon Valley's motion to intervene was moot at the time it was resolved.

1. By the time that the district court ruled on the motion to intervene, the court had already decided not to award Murray the only relief in which Mon Valley stated an interest: an injunction that would directly impact CAA regulations. Because the court was not going to grant that relief, there was no reason to allow Mon Valley to intervene solely to defend against a counterfactual outcome of the suit. Even if Mon

Valley's motion was not moot then, it is moot now that Murray has decided not to appeal from the district court's denial of prohibitory injunctive relief against EPA.

2. The relief that the district court actually awarded—an injunction directing EPA to perform evaluations under the auspices of Section 321(a) of the CAA and develop measures for performing future evaluations—does not impair or impede Mon Valley's ability to protect any interest cognizable under Rule 24(a)(2). Given that EPA cannot modify or withdraw any CAA requirement due to a Section 321(a) evaluation, the only way that the evaluations required by the injunction could harm Mon Valley is if Congress decided to act in response to them. But the possibility of future legislative action is far too speculative to merit intervention as of right.

3. In any event, Mon Valley cannot intervene as of right because its interest in the disposition of this case is adequately represented by EPA. Mon Valley concedes that EPA adequately represented its interest from the time this suit was filed through final judgment. Mon Valley claims, however, that the government could change its approach to this suit under the Trump Administration. EPA's continued prosecution of its appeals in this case belies that claim, but Mon Valley would not be entitled to intervene even if the agency changed course. Mere difference in litigation tactics is not enough to show inadequate representation, especially when the party on whose behalf the litigant seeks to intervene is a federal agency charged with representing the public's interest in proper administration of the law. Moreover, now that Murray

has forfeited its right to file a cross-appeal, the worst-case scenario for Mon Valley in this suit is preservation of the existing judgment, which does not impact the CAA regulations that Mon Valley is keen to preserve. In other words, there is no scenario under which intervention as of right would be appropriate here.

4. Mon Valley forfeited any argument for permissive intervention under Rule 24(b)(1) by relegating that argument to a footnote below. Regardless, this is not the extraordinary case that would merit reversal of a denial of permissive intervention.

STANDARD OF REVIEW

This Court reviews the denial of a motion to intervene as of right under Rule 24(a)(2) for abuse of discretion. *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013). If Mon Valley preserved an argument for permissive intervention, the district court's denial of a motion to intervene permissively under Rule 24(b)(1) is reviewed for a "clear abuse" of discretion. *McHenry v. C.I.R.*, 677 F.3d 214, 219 (4th Cir. 2012).

ARGUMENT

In its principal brief in these consolidated appeals, EPA argues that the district court lacked jurisdiction over this suit. U.S. Br. 14–41. If that is true, Mon Valley's appeal is moot because "intervention presupposes pendency of an action in a court of competent jurisdiction." *Black v. Cent. Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974). EPA further argues that, if the district court had jurisdiction over the suit, it should have entered judgment for the agency. U.S. Br. 41–44. If this Court agrees

with that argument, then Mon Valley's request to intervene on EPA's behalf is moot because the court cannot award relief against the agency, and neither EPA nor Mon Valley sought relief against Murray. Intervention is an empty exercise if there is no possibility that a suit will alter the status quo.

EPA supports affirmance of the district court's denial of Mon Valley's motion to intervene in the event this Court holds that (i) Section 321(a) of the CAA imposes a nondiscretionary duty, (ii) Murray has standing to claim that EPA did not perform the duty, *and* (iii) the agency failed to perform the duty. In that event, this Court should uphold the district court's order denying intervention. Mon Valley's motion was moot then, it is certainly moot now, and, in any case, the motion lacks merit.

I. The district court did not abuse its discretion by denying Mon Valley's motion to intervene as moot.

Before the district court, Mon Valley claimed only one interest in this suit: "an interest in defending EPA's existing air pollution regulations, including for coal-fired power plants, and preventing the use of Section 321(a) to block new regulation." App. 3377. When the court ruled on the motion to intervene, however, it was clear that this suit was not going to "impair or impede" that interest. Fed. R. Civ. P. 24(a)(2). By that point in time, the court already had entered a final order that "expressly declined" to disturb existing CAA regulations or "enjoin EPA from issuing new regulations." App. 289 (citing App. 286). It would have been pointless to permit Mon Valley to intervene solely to resist relief that would not be awarded.

The court's decision to deny intervention under these circumstances fell well within the bounds of its case-management discretion. *See Stuart*, 706 F.3d at 350.

Mon Valley contends that its motion to intervene is not moot for two reasons. First, it argues (Br. 15) that Murray might still file a cross-appeal from the district court's order of January 11, 2017, denying prohibitory injunctive relief against EPA. As of this writing, however, that argument is moot because Murray did not file that cross-appeal and the time to do so has now expired. *See* Fed. R. App. P. 4(a)(1)(B). Second, Mon Valley speculates (Br. 16) that EPA could "abandon its opposition" to prohibitory injunctive relief. But, in the absence of a cross-appeal, this Court will not expand the judgment in Murray's favor. *See Am. Roll-On Roll-Off Carrier, LLC v. P & O Ports Baltimore, Inc.*, 479 F.3d 288, 295–96 (4th Cir. 2007). And, even if EPA were to withdraw its appeals, the judgment would simply stand as is, without the relief that worries Mon Valley. At this point, there is no chance that the district court will grant that relief, so Mon Valley's attempt to intervene is clearly moot.

II. The district court's judgment does not impair or impede Mon Valley's ability to protect any interest cognizable under Rule 24(a)(2).

Before the district court, Mon Valley did not claim any interest in defending against the relief actually imposed by the judgment: an injunction directing EPA to perform evaluations under the auspices of Section 321(a) of the CAA and develop measures for performing future evaluations. On appeal, Mon Valley largely stays the course, but, for the first time, it also claims an interest in the methodology and

content of evaluations performed by EPA pursuant to the district court's injunction. Mon Valley Br. 21–22. That claim comes too late for this Court's review. *See Labor v. Harvey*, 438 F.3d 404, 429 (4th Cir. 2006) (en banc). But even if Mon Valley had preserved a claim of interest in Section 321(a) evaluations themselves, that claim is not sufficient to merit intervention as of right.

An abstract concern with EPA's manner of performance under Section 321(a) is not a direct and "significantly protectable" interest that could justify Mon Valley's intervention as of right under Rule 24(a)(2). *Donaldson v. United States*, 400 U.S. 517, 542 (1971). Because EPA cannot modify or withdraw any CAA requirement based on a Section 321(a) evaluation, *see* 42 U.S.C. § 7621(d), any injury to Mon Valley from the evaluations prescribed by the district court's injunction could only come indirectly through legislative action. But, just as the mere possibility of such action is insufficient to confer standing on Murray to sue, *see* U.S. Br. 34–37, it is not enough to give Mon Valley the "practical" stake in this suit that is necessary to intervene as of right.[1] Fed. R. Civ. P. 24(a)(2).

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[1] This Court has yet to decide whether a litigant seeking to intervene as of right on behalf of a defendant must establish Article III standing to assert a defense. The Supreme Court is presently considering whether Rule 24(a)(2) requires a plaintiff-intervenor as of right to demonstrate standing, and the disposition of that case may bear on the question whether Mon Valley must show standing. *See Town of Chester v. Laroe Estates, Inc.*, S. Ct. No. 16-605 (oral argument set for Apr. 17, 2017). But this Court need not decide that question here because any interest of Mon Valley in EPA evaluations cannot give it a right to intervene under Rule 24(a)(2) in any event.

Mon Valley incorrectly states (Br. 22) that the district court's injunction gives Murray a chance "to participate in and to review any information and methods upon which such analys[e]s are base[d]." EPA is required to submit certain information to the court, which will then assess the agency's compliance with the injunction. But the court did not assign *Murray* a role in EPA's compliance with the injunction, and Murray has no greater right than Mon Valley or anyone else to review the agency's submissions to the court. Moreover, to the extent that Mon Valley is "concern[ed] about potential misuse of Section 321(a) * * * [to] impede, weaken or delay the implementation and enforcement" of the CAA, Br. 22, nothing in the judgment will prevent Mon Valley from "assert[ing] that interest or that claim in due course at its proper place" in any later proceeding alleging such misuse. *Donaldson*, 400 U.S. at 531. The relevant point is that Mon Valley need not participate in *this* proceeding in order to protect its interest in the proper administration of the CAA.

III. EPA is an adequate representative of Mon Valley's interest in this suit.

Even if Mon Valley had claimed a valid interest in averting misuse of Section 321(a) evaluations, and even if that interest could theoretically be sufficient to merit intervention as of right, Mon Valley still could not intervene as of right because EPA "adequately represent[s] that interest." Fed. R. Civ. P. 24(a)(2). Indeed, Mon Valley concedes (Br. 25) that EPA adequately represented its interest until after the district court entered judgment and closed the case on January 17, 2017. Mon Valley posits

(Br. 25–26) that EPA might cease to defend itself in this litigation now that a new Administration is in place, but that is not the "very strong showing" of inadequate representation necessary to justify intervention as of right. *Stuart*, 706 F.3d at 351.

First, Rule 24(a)(2) speaks in the present tense—"adequately represent"—and Mon Valley cites no precedent in which a litigant was allowed to intervene at a time when its interest was concededly being adequately represented by existing parties. It certainly was not an *abuse of discretion* for the district court to deny intervention at a time when inadequate representation could not be shown. Mere speculation about future representation cannot suffice; it had to be "*clear* that [the movants'] interests were not being adequately represented by the existing defendants." *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989) (emphasis added). Second, the government has not shifted its position in this case—it is pursuing this appeal on the same legal grounds it articulated in the district court. Third, even if EPA were to abruptly shift course and withdraw its appeals, Mon Valley's claimed "interest in defending * * * air pollution standards" (Br. 26) would not be impaired or impeded. Those CAA standards are not at stake in this suit, *see supra* page 11, and Mon Valley offers no evidence to suggest that, *in this case*, EPA is shirking its "basic duty of representing the people in matters of public litigation." *Stuart*, 706 F.3d at 352. Intervention as of right is therefore unwarranted.

III. The district court did not clearly abuse its discretion by denying Mon Valley permissive intervention under Rule 24(b)(1).[2]

Mon Valley forfeited its claim for permissive intervention under Rule 24(b)(1) by relegating that claim to a footnote in one of its pleadings in district court. App. 3373 n.1; *see Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015) (deeming footnoted argument forfeited). But even if Mon Valley had preserved that claim, a "[r]eversal of a decision denying permissive intervention is extremely rare, bordering on nonexistent," *South Dakota v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003), and Mon Valley does not make the showing necessary to overcome this Court's "particularly deferential" standard of review. *McHenry*, 677 F.3d at 219.

For reasons already explained, the district court did not abuse its discretion in holding that Mon Valley's motion to intervene was moot at the time it was decided. App. 289. Mon Valley now argues (Br. 33), for the first time, that it should be able to intervene in post-judgment proceedings to ensure that the retrospective analysis of CAA employment effects required by the district court's injunction will address "employment increases in the natural gas and renewable energy industries" as well as effects on the coal industry. But that would require Mon Valley to intervene as a plaintiff seeking further relief against EPA, rather than as a defendant in support of

[2] Given the broad discretion that Rule 24(b) affords the district court, EPA took no position on permissive intervention below. The issue on appeal, however, is not whether Mon Valley could or should have been allowed to intervene permissively but rather whether the court clearly abused its discretion in denying intervention.

the agency. Having only asserted defenses in the district court, *see* App. 231, Mon Valley cannot now be permitted to intervene to monitor EPA's compliance with the district court's injunction or request that the agency take further action not required by that injunction. Even if Mon Valley has not waived its Rule 24(b)(1) arguments, therefore, this Court still should affirm the denial of permissive intervention.

CONCLUSION

For the foregoing reasons, this Court should dismiss Mon Valley's appeal as moot or, in the alternative, affirm the district court's decision to deny intervention.

Respectfully submitted,

/s/ Matthew Littleton
MATTHEW LITTLETON
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
Tel: (202) 514-4010
Fax: (202) 353-1873
matthew.littleton@usdoj.gov

March 31, 2017
DJ # 90-5-2-4-20081

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations imposed by this Court's order of March 13, 2017, because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), this brief contains 3,850 words. This brief complies with the typeface and type style requirements because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word 2013.

/s/ Matthew Littleton
MATTHEW LITTLETON
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
Tel: (202) 514-4010
Fax: (202) 353-1873
matthew.littleton@usdoj.gov

CERTIFICATE OF SERVICE

On March 31, 2017, I served a copy of the foregoing brief on the United States Court of Appeals for the Fourth Circuit using the Appellate CM/ECF System. All parties to these consolidated cases are represented by registered users who will be served by the CM/ECF System.

/s/ Matthew Littleton
MATTHEW LITTLETON
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
Tel: (202) 514-4010
Fax: (202) 353-1873
matthew.littleton@usdoj.gov