ORAL ARGUMENT NOT YET SCHEDULED

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

MURRAY ENERGY CORPORATION, INC. Petitioners v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 14-1112 (consolidated with No. 14-1151)

MOTION OF ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENT AND LEAVE TO FILE A BRIEF AS RESPONDENTS-INTERVENORS

Environmental Defense Fund, Natural Resources Defense Council, and the Sierra Club ("Movants") respectfully move for leave to intervene in support of respondent Environmental Protection Agency ("EPA") in the above-captioned proceeding, and for permission to file an 8750-word intervenor brief by the date EPA's brief is due, namely, February 12, 2015.

Counsel for petitioner Murray Energy Corporation has stated that petitioner will oppose this motion. Respondent EPA does not oppose it. Petitioner-intervenor

National Federation of Independent Business (NFIB) takes no position on this motion. Proposed petitioner-intervenor Utility Air Regulatory Group takes no position on it. Proposed petitioner-intervenors West Virginia, *et al*., oppose it insofar as it asks for the opportunity to file a response brief.

BACKGROUND

Procedural History. Petitioner Murray Energy ("Murray") filed the instant petition on June 18, 2014, under the All Writs Act, 28 U.S.C. § 1651(a), requesting that this Court prohibit the EPA from completing its pending rulemaking under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), concerning carbon dioxide emissions from existing power plants. *See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34, 380 (June 18, 2014) ("*Proposed Guidelines*"). Petitioner claims that EPA lacks authority under the Act to proceed with the rulemaking, and asks this Court to put a halt to the ongoing rulemaking, which seeks to reduce emissions from the nation's largest sources of greenhouse gases.

This Court called for EPA's response to Murray's petition on September 18, 2014, and EPA filed its response on November 3, 2014. Also on November 3, the National Federation of Independent Businesses filed a motion for leave to intervene in support of petitioner, which the Court granted on November 7, 2014.

On November 10, 2014, Movants submitted a brief as amici curiae in support of EPA's response to Murray's petition for a writ of prohibition. Doc. 1521668.

On November 13, this Court entered an order consolidating the instant case with another petition (No. 14-1151) by which Murray seeks to stop the same ongoing EPA rulemaking; deferring consideration of EPA's motion to dismiss in that case to the merits panel; and establishing a merits briefing schedule. Per Curiam Order (Doc. 1522086). In the same order, this Court, *sua sponte*, ordered that the consolidated *Murray Energy* cases should be set for oral argument on the same day and before the same panel as *West Virginia, et al. v. EPA*, No. 14-1146, in which certain states challenge EPA's ongoing Section 111(d) rulemaking based on statutory arguments closely similar to those raised by Murray Energy here. Movants have been granted leave to intervene in the closely related *West Virginia* case.[1]

On November 19, 2014, the Utility Air Regulatory Group filed a motion for leave to intervene in support of petitioners in No. 14-1112, *et al.* And on November 26, 2014, West Virginia and 11 other states filed a motion to intervene.

[11] As noted below, by operation of D.C. Circuit Rule 15(b), Movants' intervenor status in No. 14-1146 arguably has the effect of making them intervenors in Nos. 14-1112 and 14-1151 as well. But even if that is so, the present motion is required to ensure that Movants have the chance to file a responsive brief in the two latter petitions, which are being briefed separately.

The Movants. The proposed intervenors are nonprofit environmental organizations whose core purposes include supporting the development of effective public policies to control greenhouse gas pollution that contributes to destabilization of the global climate. Movants have been granted leave to intervene in *West Virginia v. EPA*, No. 14-1146.

The Environmental Defense Fund ("EDF") is a national nonprofit nonpartisan environmental organization representing more than 300,000 members nationwide. Since 1967 EDF has linked science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental problems. Protecting public health and the environment from harmful airborne pollutants, including greenhouse gases, is a core organizational mission, and EDF participates in regulatory and judicial proceedings on air pollution policy at the federal and state level to protect human health and the environment.[2]

The Natural Resources Defense Council ("NRDC") is a national nonprofit environmental organization with over 300,000 members nationwide. NRDC uses law, science, and the support of its members to ensure a safe and healthy environment for all living things. One of NRDC's top priorities is to reduce emissions of the air pollutants that are causing global warming.[3]

[2] *See* Ex. 1, Declaration of John Stith, ¶¶ 3-7.
[3] *See* Ex. 2, Declaration of Gina Trujillo, ¶¶ 3-7.

Sierra Club is a national nonprofit environmental organization with approximately 600,000 members nationwide. One of Sierra Club's major programs is its national Climate Recovery Partnership, a coordinated effort to promote a clean energy economy and protect communities and natural environments threatened by global warming. Among other goals, the Sierra Club advocates strongly for the replacement of fossil fuel-fired electricity generation with renewable energy and energy efficiency.[4]

Relief Requested in this Motion. While Movants believe that petitioner Murray's claims are fundamentally flawed—not least because there is no final agency action before the Court—the Court's decision to entertain merits briefing prompts us (as it has prompted various parties supporting petitioner) to move to intervene. Movants also request leave to file a brief supporting EPA of no more than 8750 words. In order to avoid any change in the briefing schedule already established by this Court pursuant to its order of November 13, 2014, Movants propose to file their brief on the current due date for respondent EPA's brief, namely, February 12, 2015.

[4] *See* Ex. 3, Declaration of Mary Anne Hitt, ¶¶ 2-12.

STATEMENT OF INTEREST AND GROUNDS FOR INTERVENTION

Petitioner seeks to challenge, and block, a critically important rulemaking that, if allowed to proceed to final emissions guidelines, would likely be the single most significant step the country has yet taken to reduce its greenhouse gas emissions and thereby reduce grave risks to public health and welfare.

A. Intervention is Appropriate in the Circumstances.

As other intervenors have noted, there is no deadline for intervention in an All Writs Act proceeding. *See*, *e.g.*, Motion of National Federation of Independent Business to Intervene in Support of Petitioner at 3-4 (Doc. 1520421). While considerable time has elapsed since the filing of the petition in June, this Court did not call for a response from EPA to Murray's petition until September 18, 2014, and did not set the case for merits briefing until November 13, 2014. In the circumstances, this motion is timely.

Movants are moving to intervene now that the Court has decided that case will be heard for full briefing and oral argument, and in light of the Court's granting of intervention, combined with the right to file a standard 8750-word intervenor brief, to at least one entity supporting petitioners. Given the enormous importance of the ultimate statutory issues at issue, and the fact that the Court has allowed intervention from industry groups seeking to stop this rulemaking, it is appropriate that the Court give equivalent treatment to supporters of EPA's rulemaking.

Movants did submit a brief as amici curiae in support of EPA at the response-to-petition stage, and this Court's November 13, 2014, order confirms that the merits panel will consider that submission (as well as those submitted by other amici on both sides). Movants' amicus submission at the preliminary phase, however, is not an adequate substitute for a merits brief, or for the important rights of participation that go with party status. Most significantly, the previously filed amicus brief provides no opportunity to respond to the arguments that will be made in Murray's opening brief on the merits, or in the intervenor brief or briefs that will be filed in support of Murray.

Movants' participation as intervenor will not delay proceedings at all, or prejudice any existing party. By this motion, Movants seek leave to file a normal-length (8750-word) brief, and file their brief on or before the scheduled date for EPA's brief (February 12, 2015).[5]

Because each of the Movants is an intervenor in No. 14-1146, it appears they may be entitled to intervention by operation of D.C. Cir. Rule 15(b). Rule 15(b) states in relevant part that "[a] motion to intervene in a case before this court concerning direct review of an agency action will be deemed a motion to intervene in all cases before this court involving the same agency action or order, including

[5] If any other party were granted leave to intervene in support of EPA and sought to file a brief, Movants would share the standard 8750-word allocation with aligned intervenors.

later filed cases, unless the moving party specifically states otherwise, and an order granting such motion has the effect of granting intervention in all such cases." Murray's instant petition plainly "involv[es] the same agency action" as No. 14-1146, namely, EPA's ongoing power plant rulemaking under section 111(d), and Movants' motion in No. 14-1146 did not restrict their intervention to only that particular petition. On the other hand, it is not entirely clear that Rule 15(b) applies here because the differing and unusual legal theories the petitioners have invoked to attack EPA's still-pending rulemaking arguably distinguish this from the common scenario in which multiple petitions for review challenge a single final agency action. Moreover, this Court has established separate briefing schedules and formats for the No. 14-1146, Movants' opportunity to file a brief in No. 14-1146 will not afford them an opportunity to respond to the arguments of petitioner Murray here. Accordingly, Movants seek request leave to file a brief as respondents-intervenors.

B. Movants and Their Members Will Be Harmed if the Court Sustains the Challenges to EPA's Proposed Section 111(d) Rule

Movants have a strong interest in protecting their members from the dangers posed by emissions of carbon dioxide and other pollutants from power plants. EPA's proposal, if finalized, would significantly reduce carbon dioxide emission from power plants and have the co-benefit of reducing other harmful air pollutants as well. Environmental movants have participated extensively in the administrative and

judicial proceedings leading up to EPA's proposed regulation under section 111(d) of the Clean Air Act, which is the target of Murray's All Writs Act petition. Movants' interests, as well as those of their members, would be harmed if the Court issued a ruling that nullified the proposed section 111(d) rule.

Furthermore, movants' extensive participation in greenhouse gas regulatory proceedings, which spans more than a decade leading up to EPA's issuance of the proposed section 111(d) rule, underscores their substantial interest in defending this rulemaking. In 2001, two of the movants—NRDC and Sierra Club—filed comments in support of a petition to EPA calling for greenhouse gas regulations under section 202 of the Clean Air Act, 42 U.S.C. § 7521. *See* Comments of NRDC, EPA Docket No. A-2000-04 (filed May 23, 2001). All three movants (along with others) then challenged EPA's denial of that petition in 2003 by initiating litigation that led to the Supreme Court's holding in *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007), that greenhouse gases are air pollutants subject to control under the Clean Air Act. After that decision, Movants advocated for EPA's issuance of the Endangerment Finding and motor vehicle emission standards, as well as the regulation of greenhouse gas emissions from stationary sources. Movants intervened in defense of EPA and filed briefs as intervenors in the related proceedings in this Court challenging various EPA actions relating to greenhouse gases (Nos. 09-1322, *et al.*; Nos. 10-1167, *et al.*; Nos. 10-1092, *et al.*; Nos. 10-1073, *et al.*) that were at issue in

Coalition for Responsible Regulation v. EPA, 684 F.3d 102 (D.C. Cir. 2012), *cert. granted in part and denied in part, and aff'd in part and rev'd in part sub nom. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) ("UARG").

Movants have participated extensively in litigation and rulemaking proceedings to advocate that EPA carry out its responsibilities to establish standards of performance for carbon dioxide emissions from power plants. In a 2005 rulemaking to review the NSPS for fossil fuel-fired power plants, Movants filed comments arguing that EPA must address carbon dioxide emissions in its updated performance standards. *See* EPA Document No. EPA-HQ-OAR-2005-0031-0108 (Joint Comments of EDF, NRDC, and Sierra Club). Movants then challenged EPA's final decision in 2006 not to regulate carbon dioxide emissions in the updated NSPS and the agency's legal position that it lacked authority to do so under the Clean Air Act. *State of New York, et al. v. EPA*, No. 06-1322 (D.C. Cir.). After the Supreme Court rejected the agency's position in *Massachusetts*, this Court remanded the NSPS rule to EPA for action consistent with the Supreme Court's decision. *State of New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 24, 2007) (order remanding to EPA).

Movants have long advocated that EPA carry out its responsibilities under the Clean Air Act to issue national emission standards for power plants under section 111. Movants have testified at the public hearings and filed extensive comments on both the 2012 and 2014 section 111(b) proposals, *e.g.*, EPA Docket ID No. EPA-

HQ-OAR-2013-0495-9514 (Sierra Club, EDF, NRDC, *et al.*); No. EPA-HQ-OAR-2011-0660-10798 (Sierra Club, EDF, NRDC, *et al.*), and, on December 1, 2014, filed comprehensive comments on the section 111(d) proposal. Many thousands of Movants' members also submitted individual comments on these proposals.

Movants' significant participation in the proceedings related to EPA's regulation of carbon dioxide emissions from power plants strongly favors their motion for leave to intervene. This Court has regularly allowed intervention by Movants[6] and other environmental and industry organizations[7] when those parties seek to support EPA against challenges brought under the Clean Air Act. This Court's practice of granting intervention to private organizations—including environmental groups, trade organizations, private companies, and others—

[6] *See, e.g.*, *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (EDF, NRDC, and Sierra Club intervened in support of EPA), *rev'd in part on other grounds*, *UARG*, 134 S.Ct. at 2427; *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014); *Las Brisas Energy Center, LLC v. EPA, et al.*, No. 12-1248 and consolidated cases (Nov. 5, 2012) (ordering granting interventor status to EDF, NRDC, Sierra Club, and others in support of EPA); *North Carolina v. EPA*, 531 F.3d 896, *modified on rehearing*, 550 F.3d 1176 (D.C. Cir. 2008) (EDF intervened in support of EPA); *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002) (EDF and other environmental organizations intervened in support of EPA); *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (NRDC intervened in support of EPA).

[7] *See, e.g.*, *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009) (National Petrochemical and Refiners Association and other industry groups intervened in support of EPA); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) (industry groups intervened in support of EPA); *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir 2008) (chemical industry groups intervened in support of EPA).

supporting agency actions in which they have an interest recognizes that such private entities have distinctive perspectives that contribute to the process of judicial review. As noted, each of the Movants has been granted intervenor status in the related challenge brought by West Virginia and other states, No. 14-1146.

Movants have a strong interest in regulations to curb carbon emissions from the existing fleet of power plants, which is the largest contributor of greenhouse gas pollution in the United States. As EPA has determined, the accumulation of heat-trapping greenhouse gases in the atmosphere causes dangerous and harmful changes in the Earth's climate. *See* Endangerment Finding, 74 Fed. Reg. at 66,496. *Coalition for Responsible Regulation*, 684 F.3d at 121 (upholding EPA's endangerment finding based on "substantial record evidence" that "extreme weather events, changes in air quality, increases in food- and water-borne pathogens, and increases in temperatures are likely to have adverse health effects."[8] Because of the long atmospheric residence lifetime of carbon dioxide, 74 Fed. Reg. at 66,518-19, any action to prevent EPA from regulating greenhouse gas emissions from existing power plants threatens to exacerbate the impacts of climate change. Fossil fuel-fired power plants emit nearly 40% of domestic carbon dioxide emissions.[9] The dangers

[8] The Supreme Court denied certiorari on all matters relating to the Endangerment Finding.

[9] *See* EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2012*, EPA 430-R-14-003 (Apr. 2015), at Table 2-1, *available at* http://www.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2014-Main-Text.pdf.

posed by harmful climate impacts now and in the future require prompt and effective action by EPA to limit carbon pollution from existing power plants under section 111(d) of the Clean Air Act. The proposed rule, if finalized, would reduce carbon dioxide pollution by 26% from 2005 levels by 2020 and 30% by 2030. 79 Fed. Reg. at 34,931.

In addition to securing reductions in carbon pollution, the proposed 111(d) rule, if finalized, will have additional substantial public health benefits by reducing smog- and soot-forming pollutants such as sulfur dioxide, nitrogen oxides, and fine particulate matter. Cutting emissions of these co-pollutants emitted by power plants will lower the rates of asthma attack, respiratory disease, heart attack, and premature death that occur each year as a result of smog and soot in the ambient air. EPA predicts that the section 111(d) rule, if finalized in its proposed form, would reduce nationwide emissions of sulfur dioxide and nitrogen oxides by hundreds of thousands of tons and fine particulate emissions by up to 60,000 tons.

Movants' members will benefit directly from limits on greenhouse gas emissions achieved through EPA's section 111(d) rule as well as from associated reductions of other harmful pollutants.[10] If petitioners succeed in thwarting EPA's efforts to regulate existing power plants under section 111(d), Movants' members

[10] *See*, *e.g.*, Ex. 4, Decl. of Arthur P. Cooley ¶¶ 2-7; Ex. 5, Decl. of Joanne Pannone ¶¶ 5-20; Ex. 6, Decl. of Elizabeth Coplon, ¶¶ 3-6.

will be injured by both the local and the global harms caused by carbon dioxide and other pollutants emitted by those sources.[11]

C. Movants Need Not Prove Standing, But if They Do Need To, It Is Adequately Demonstrated

Movants seeking to intervene on behalf of a respondent need not demonstrate Article III standing; the Supreme Court has concluded that Article III standing requirements apply to those "who seek[] to initiate or continue proceedings in federal court," not to those who *defend* against such proceedings. *Bond v. United States*, 131 S. Ct. 2355, 2361-62 (2011); *see also Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 110 (D.C. Cir. 2012) (noting that standing was required for defendant-intervenor that sought to appeal where principal defendant had not appealed).[12] Here it is petitioner and petitioner-intervenors, not Movants, who seek to invoke Article III jurisdiction. Even if defendant-side standing were required here, EPA has such standing, and the Court need not address Movants' standing. *See McConnell v. FEC*, 540 U.S. 93, 233 (2003), *overruled on other grounds*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Comcast Corp. v. FCC*, 579 F.3d 1, 5-6 (D.C. Cir. 2009).

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[11] *See, e.g.*, Cooley Decl. ¶¶ 6-7; Pannone Decl. ¶¶ 17-20; Coplon Decl., ¶ 6.

[12] Even before *Bond*, precedent requiring intervenors to demonstrate standing in some circumstances, *see, e.g.*, *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533 (D.C. Cir. 1999), had been questioned by this Court. *See, e.g., Jones v. Prince George's County*, 348 F.3d 1014, 1018 (D.C. Cir. 2003).

In any event, Movants' interests satisfy both constitutional and prudential requirements for standing. The health, environmental, and procedural concerns described above also establish their standing to sue under Article III of the Constitution. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). For the same reasons, Movants fall squarely within the "zone of interests" protected or regulated by the relevant provisions of the Clean Air Act. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998).

Movants' members use, own, and enjoy property and natural resources which are harmed by or are at risk of harm from global warming. *See supra*, notes 10, 11. Harms to Movants' use and enjoyment of their property, as well as their interests in use and enjoyment of natural resources, are sufficient to establish injury. *See, e.g.*, *Massachusetts*, 549 U.S. at 522; *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 51 (D.C. Cir. 1999).

Moreover, Movants' members are at risk of harm from the deleterious smog and soot pollution that will result if Murray's legal claims were sustained. Some of these members live in close proximity to power plants, and are particularly at risk from the negative health and environmental impacts that result from power plant emissions. [13] This Court has repeatedly held that environmental organizations have standing to sue in order to protect their members from air pollution. *See, e.g., NRDC*

[13] *See, e.g.*, Pannone Decl., ¶¶5-6.

v. EPA, 755 F.3d 1010 (D.C. Cir. 2014); *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 672-73 (D.C. Cir. 2013); *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir., 2012). Accordingly, even if Movants were required to establish standing—which they are not—they would readily satisfy Article III's requirements.

CONCLUSION

Movants should be granted leave to intervene in support of respondent and leave to file a brief of no more than 8750 words by February 12, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION OF ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS was today served electronically through the Court's CM/ECF system on all registered counsel.

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