

ORAL ARGUMENT NOT YET SCHEDULED
**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ROBINSON ENTERPRISES, INC. et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

No. 19-1175

WESTMORELAND MINING HOLDINGS, LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

No. 19-1176

THE NORTH AMERICAN COAL CORP.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

No. 19-1179

**MOTION FOR LEAVE TO INTERVENE IN SUPPORT OF
RESPONDENTS**

Pursuant to Federal Rule of Appellate Procedure (“FRAP”) 15(d) and Circuit Rule 15(b), the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey,

New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, the Commonwealths of Massachusetts, Pennsylvania and Virginia, the District of Columbia, the Cities of Boulder, Chicago, Los Angeles, New York, Philadelphia and South Miami, and the City and County of Denver (collectively, “State and Municipal Intervenors”) hereby move for leave to intervene in cases 19-1175, 19-1176, and 19-1179 in support of respondents Environmental Protection Agency and Administrator Andrew Wheeler (“EPA”) for the limited purpose of defending EPA’s legal authority to regulate greenhouse gas emissions from existing power plants under section 111 of the Clean Air Act (the “Act”).¹ State and Municipal Intervenors have a compelling interest in preventing the adverse effects of global climate change on human health and the environment. Moreover, recent actions taken by EPA call into question its commitment to robustly defend its statutory authority to regulate power plant greenhouse gas emissions. The cases in which movants seek to intervene and several other cases have been consolidated by the

¹ State and Municipal Intervenors, except for the State of Nevada, are petitioners in cases 19-1165 and 19-1177. The State of Nevada was originally a petitioner in case 19-1189, but voluntarily withdrew its petition and instead moved to intervene in support of Petitioners in the consolidated cases. Unopposed Motion to for Leave to Intervene, ECF#1809530 (Oct. 4, 2019); Notice of Voluntary Withdrawal of Petition in Case No. 19-1189, ECF#1809529 (Oct. 4, 2019).

Court with *American Lung Association, et al. v. United States Environmental Protection Agency*, Case No. 19-1140.²

Counsel for State and Municipal Intervenors sought the position of the parties in cases 19-1175, 19-1176, and 19-1179 by electronic mail communication to counsel of record sent October 1, 2019. Counsel for petitioners in cases 19-1176 and 19-1179 and for EPA take no position on the motion. Counsel for petitioners in case 19-1175 oppose the motion. No other party has stated that they oppose the motion.

BACKGROUND

1. These consolidated cases involve review of EPA's final action titled Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) ("Rule"). The Rule consists of three interrelated final agency actions: (1) a repeal of the Clean Power Plan, which was published at 80 Fed. Reg. 64,662 (Oct. 23, 2015); (2) emission guidelines replacing the Clean Power Plan's emission

² Pursuant to Circuit Rule 15(b), State and Municipal Intervenors *do not* seek to intervene in 19-1140 or the other consolidated cases: 19-1165, 19-1166, 19-1173, 19-1177, 19-1185, 19-1186, 19-1187, 19-1188, or 19-1189.

guidelines; and (3) revisions to EPA's regulations governing state plans under section 111(d) of the Act. *See* 84 Fed. Reg. at 32,520.

2. The Rule establishes emissions guidelines for existing coal-fired power plants based on a “menu” of minor efficiency improvements that EPA now considers to be the best system of emissions reduction for greenhouse gases from these plants. 84 Fed. Reg. at 32,536. EPA promulgated these emission guidelines pursuant to its authority in section 111(d) of the Act. 42 U.S.C. § 7411(d); *see Am. Elec. Power v. Connecticut*, 564 U.S. 410, 424 (2011) (section 111 “speaks directly” to carbon dioxide emissions from fossil-fueled power plants).

3. State and Municipal Intervenor object to many aspects of the Rule and have filed petitions for review seeking to vacate that rule. But State and Municipal Intervenor support EPA's position in the Rule that the agency has authority to regulate greenhouse gas emissions from power plants under section 111 and seek to intervene in support of EPA to defend against all challenges to that authority. As discussed in more detail below, many State and Municipal Intervenor have long sought to compel the use of, and to vindicate, EPA's legal authority in this regard, including as intervenor-respondents in the now-dismissed challenges to the Clean Power Plan, *West Virginia v. EPA* (D.C. Cir. 15-1363, and consolidated cases).

4. Industry petitioners in the cases in which movants seek to intervene have raised or will likely raise at least three specific challenges to EPA's authority:

(1) the alleged prohibition on section 111 regulation of sources already regulated under section 112;³ (2) the alleged need for EPA to make a new determination under section 111(b) that greenhouse gas emissions from fossil-fueled power plants cause or significantly contribute to air pollution that could endanger public health or welfare; and (3) the alleged requirement for EPA to proceed under sections 108 through 110 of the Clean Air Act, rather than section 111, to regulate greenhouse gas emissions from power plants.

5. Robinson Enterprises, Inc. and the other petitioners in case number 19-1175 have told this Court that they are “challenging EPA’s authority to regulate carbon dioxide emissions” based on all three of the arguments described above. Memorandum in Opposition to Motions for Abeyance, ECF#1808711, at 3-4 (Sept.

³ The argument that existing power plants cannot be regulated under section 111(d) because they are already regulated under section 112 was raised but not resolved in two prior challenges to the Clean Power Plan in this Court. *See In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015); Opening Brief of Petitioners on Core Legal Issues, *West Virginia v. EPA*, Case No. 15-1363, ECF#1599889, at 61-73 (Feb. 19, 2016).

30, 2019). This is consistent with comments these petitioners filed,⁴ which EPA rejected.⁵

6. Westmoreland Mining Holdings, LLC, petitioner in case number 19-1176, in a lengthy filing opposing motions for an abeyance of the case, made clear that it is “challenging EPA’s authority” under section 111(d) to regulate greenhouse gas emissions from existing fossil-fueled power plants, based on the theory that EPA is separately regulating mercury and other toxic emissions from those same sources under section 112 of the Act, 42 U.S.C. § 7412. Petitioner Westmoreland Mining Holding LLC’s Opposition to Motion for Abeyance, ECF#1808726, at 2-11 (Sept. 30, 2019).

7. The North American Coal Corporation, petitioner in case number 19-1179, has told the Court that it intends to raise at least the second anticipated attack on EPA’s authority: that the agency allegedly failed to make a proper determination of contribution and endangerment for greenhouse gas emissions

⁴ See Comment Letter of Texas Public Policy Foundation, 4-6 (Oct. 30, 2018) (Docket ID EPA-HQ-OAR-2017-0355-23639); Comment Letter of Competitive Enterprise Institute, 1-7 (Oct. 31, 2018) (Docket ID EPA-HQ-OAR-2017-0355-24261).

⁵ EPA, Responses to Comments on EPA’s Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, Chapter 1: Legal Authority, at 10-20 (June 2019) (Docket ID EPA-HQ-OAR-2017-0355-26741).

from fossil-fueled power plants. *See* Response of Petitioner the North American Coal Corporation to EPA's Motion to Expedite, ECF#1805626, at 2 (Sept. 9, 2019); Response of Petitioner the North American Coal Corporation to Motions for Abeyance, ECF#1808554, at 2-3, 5-6 (Sept. 30, 2019). This same petitioner raised this issue during the comment period,⁶ and EPA rejected it.⁷

8. Petitioners in these cases may raise other arguments challenging EPA's legal authority under the Act to regulate greenhouse gas emissions from existing fossil-fueled power plants.

9. Although State and Municipal Intervenors vigorously dispute the lawfulness and reasonableness of many aspects of the Rule, they support EPA's conclusion that it has authority to regulate greenhouse gas emissions from existing fossil-fueled power plants under section 111 of the Act. State and Municipal

⁶ *See* Comments of North American Coal Corp., at 2-5 (Oct. 31, 2018) (Docket ID EPA-HQ-OAR-2017-0355-25897).

⁷ Instead, EPA has adhered to its earlier position—set forth in a separate rule establishing standards of performance for new, modified, and reconstructed fossil-fueled power plants under Clean Air Act section 111(b), 80 Fed. Reg. 64,510 (Oct. 23, 2015)—that it could regulate those emissions without making a new endangerment finding, because EPA had already made the only endangerment finding required when it first regulated power plants under section 111. 84 Fed. Reg. at 32,533. Moreover, EPA adhered to its position that, even if a pollutant-specific endangerment finding was required, the findings it made in the 111(b) rulemaking constituted such a determination. *Id.*

Intervenors thus seek to intervene on behalf of respondents for the narrow purpose of defending that authority.

LEGAL STANDARD

10. FRAP 15(d) provides that a party may move for leave to intervene in a case seeking review of an administrative determination of an agency “within 30 days after the petition for review is filed.” A motion to intervene must “contain a concise statement of the interest of the moving party and the grounds for intervention.” FRAP 15(d).

11. In determining whether to allow intervention under FRAP 15(d), this Court can draw on the policies underlying Federal Rule of Civil Procedure 24 (“FRCP 24”). *Cf. Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (applying FRCP 24 to intervention for the purposes of appeal). Under FRCP 24, a party is entitled to intervene in an appeal as of right if it has a legally protected interest in the action; the outcome of the action threatens to impair that interest; no existing party adequately represents that interest; and its motion is timely. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015). The Court can grant intervention to support the government where the movant would be harmed by a successful challenge to a regulatory action and that harm could be avoided by a ruling denying the relief sought by the

petitioner. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732-33 (D.C. Cir. 2003).

12. Under Circuit Rule 15(b), a motion to intervene in a case seeking review of an administrative action or order “will be deemed a motion to intervene in all cases” before the Court “involving the same agency action or order . . . unless the moving party specifically states otherwise.” In this case, because State and Municipal Intervenors are also petitioners in case numbers 19-1165 and 19-1177, in which they are seeking review of the Rule, and because their interests are generally aligned with other petitioners in several of the other consolidated cases, State and Municipal Intervenors seek to intervene in support of EPA *only* in cases 19-1175, 19-1176, and 19-1179.

TIMELINESS

13. This motion is timely under Rule 15(d), because it is filed within 30 days of the petitions for review in cases 19-1175, 19-1176 and 19-1179. *See* Petition for Review, *Robinson Enterprises, Inc. v. EPA*, Case No. 19-1175 ECF#1805328 (Sept. 5, 2019); Petition for Review, *Westmoreland Mining Holdings LLC v. EPA*, Case No. 19-1176, ECF#1805335 (Sept. 5, 2019); Petition

for Review, *N. Am. Coal Corp. v. EPA*, Case No. 19-1179, ECF#1805313 (Sept. 5, 2019).⁸

14. The proposed intervention will also not unduly delay or prejudice the rights of any other party. This litigation is in its very early stages, and no schedule has yet been set by the Court.

INTEREST AND GROUNDS FOR INTERVENTION

15. State and Municipal Intervenors have standing to intervene because they will be injured if petitioners succeed in obtaining a ruling from this Court that EPA lacks the legal authority to regulate greenhouse gas emissions from existing power plants under section 111 of the Act.

16. State and Municipal Intervenors are injured by the adverse effects of global climate change on human health and the environment, including increased heat-related deaths, damaged or lost coastal areas, disrupted ecosystems, more severe weather events, and longer and more frequent droughts. *See Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007); 80 Fed. Reg. at 64,683-88; 74 Fed. Reg. 66,496, 66,523-66,536 (Dec. 15, 2009). The administrative record is replete with evidence of these injuries. *See Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C.

⁸ Thirty days after September 5 was October 5, a Saturday. Therefore, the deadline to file intervention motions was Monday, October 7. *See* FRAP 26(a)(1)(C).

Cir. 2002) (in “many if not most” cases seeking review of administrative determinations, standing is “self-evident” and “no evidence outside the administrative record is necessary for the court to be sure of it.”). For example, when EPA proposed to repeal the Clean Power Plan without a replacement, many State and Municipal Intervenors objected, providing a summary of climate-related injuries they were currently or expecting to experience. Comments of New York, et al., on EPA’s Proposed Repeal of the Clean Power Plan, at 6-9 (April 26, 2018) (Docket ID EPA-HQ-OAR-2017-0355-24007). Many State and Municipal Intervenors then provided detailed descriptions of the climate change related harms they are experiencing in their comments on the Rule. *See* Comments of New York, et al., on EPA’s Proposed Emission Guidelines, at 2-10, 87-93 & Appendix A (Oct. 31, 2018) (Docket ID EPA-HQ-OAR-2017-0355-24817); Comments of New Jersey on the Affordable Clean Energy Rule Proposal, at 3-7 (Oct. 31, 2018) (Docket ID EPA-HQ-OAR-2017-0355-23668). Additional climate change harms to State and Municipal Intervenors were confirmed in the *Fourth National Climate Assessment*, a 2018 report issued by EPA and other government agencies. *See* U.S. Global Change Research Program, *Fourth National Climate Assessment*, Vol. II, Chapters 18-27 (2018) (Docket ID EPA-HQ-OAR-2017-0355-26762), *available at* <https://nca2018.globalchange.gov/> (detailing, on a region-by-region basis, the harmful impacts of climate change on the United States).

17. Greenhouse gas emissions from existing fossil-fueled power plants, which are “by far” the country’s largest stationary source category of such emissions, 84 Fed. Reg. at 32,522 n.4, “contribute” to the harmful effects of climate change. *See Massachusetts v. EPA*, 549 U.S. at 523-25 (concluding that greenhouse gas emissions from automobiles “contribute” to climate change sufficiently to satisfy the causation requirement of standing, notwithstanding the multitude of other sources of greenhouse gas emissions). Indeed, EPA recognized in the Rule that greenhouse gas emissions from fossil-fueled power plants “would easily meet” the requirement in section 111(b)(1)(A) of the Act that regulated source categories “contribute[] significantly” to harmful air pollution. *Id.* at 32,533.

18. A Court order rejecting EPA’s authority to regulate greenhouse gas emissions from existing fossil-fueled power plants would prevent EPA from using section 111 to redress the harms of climate change on State and Municipal Intervenor, by denying federal authority to use this statutory tool to regulate the largest set of stationary sources of greenhouse gas emissions. *See Massachusetts v. EPA*, 549 U.S. at 525-26. In contrast, this harm to State and Municipal Intervenor can be prevented if the Court rejects industry petitioners’ challenges to EPA’s legal authority to regulate greenhouse gas emissions from these sources.

19. State and Municipal Intervenor have a compelling interest in defending EPA's authority to regulate greenhouse gas emissions from existing fossil-fueled power plants under section 111 of the Act. As described above, reducing emissions from these sources will help prevent and mitigate harms that climate change poses to human health and the environment, whereas preventing EPA from regulating these sources under section 111 will hamper state and federal efforts to control greenhouse gas emissions that contribute to those harms. Moreover, EPA's statements and actions in this and other rulemakings give State and Municipal Intervenor reason to doubt EPA's willingness to vigorously defend its authority to regulate greenhouse gas emissions from power plants.

20. State and Municipal Intervenor have long pursued the goal of preventing and mitigating climate change harms in their states and municipalities. State and Municipal Intervenor have taken significant steps to reduce greenhouse gas emissions, including emissions from existing fossil-fueled power plants, in a variety of ways. Many states have enacted their own greenhouse gas emission limitations or goals. *See, e.g.*, Cal. Code Regs. tit. 17, §§ 95801-96022; Colo. Rev. Stat. § 25-7-102(2), § 25-7-105 (1)(e)(I); Conn. Gen. Stat. § 22a-200c & Conn. Agencies Regs. § 22a-174-31 (implementing nine-state Regional Greenhouse Gas

Initiative)⁹; Mass. Gen. Laws ch. 21N, §§ 3(b), 3(d) & 4(a); 310 Code Mass. Regs. §§ 7.74 & 7.75; New Jersey Global Warming Response Act, N.J. Stat. Ann. § 26:2C-37; New York State Climate Leadership and Community Protection Act, 2019 Session Laws, ch. 106; N.Y. Comp. Codes R. & Regs. tit. 6, Part 251; North Carolina Clean Energy Plan (Oct. 2019)¹⁰; Or. Rev. Stat. § 469.503(2); Wash. Rev. Code § 80.80.040 & 19.405.040. Many cities have similarly adopted measures to reduce their greenhouse gas emissions from the power sector. *See, e.g.*, City of Chicago, “Chicago Climate Action Plan,” at 25-28 (2008) (committing to greenhouse gas reduction goal of 80 percent by 2050 and outlining reductions needed from the power sector to meet this goal); City of New York, “One New York: The Plan for a Strong and Just City,” at 166-71 (2015) (same); Office of the Mayor of Los Angeles, “L.A.’s Green New Deal: Sustainable City Plan,” at 11 (2019) (committing to goal of 100% renewable energy by 2045). Because federal regulation of existing fossil-fueled power plants would further the State and Municipal Intervenor’s goals and efforts, and would do so on a nationwide basis,

⁹ *See also* Del. Code Ann. tit. 7, § 6043 & Del. Admin. Code tit. 7, ch. 1147; Me. Rev. Stat. Ann. tit. 38, ch. 3-B; Md. Code Ann., Envir., § 2-1002(g); Mass. Gen. Laws ch. 21A, § 22 & 310 Mass. Code Regs. 7.70; N.J. Admin. Code §§ 7:27C-1.1 to -11.14; R.I. Gen. Laws. § 23-82-4; Vt. Stat. Ann. tit. 30, § 255.

¹⁰ Available at https://files.nc.gov/ncdeq/climate-change/clean-energy-plan/NC_Clean_Energy_Plan_OCT_2019_.pdf.

State and Municipal Intervenor have a strong interest in defending EPA's authority to enact such regulations.

21. State and Municipal Intervenor also have an interest in these three cases because movants have long sought federal regulation of greenhouse gas emissions, and industry petitioners will ask the Court to prevent EPA from doing just that. For example, several State and Municipal Intervenor brought the petition that led to *Massachusetts v. EPA*, and EPA's subsequent finding that greenhouse gases may reasonably be anticipated to endanger public health and welfare. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009). Several State and Municipal Intervenor also sued EPA to promptly establish carbon dioxide emission standards for power plants under section 111 of the Act. *New York v. EPA* (D.C. Cir. No. 06-1322). In order to settle that case, EPA agreed to proceed with a rulemaking to regulate greenhouse gas emissions from power plants, which culminated in the Clean Power Plan. Several states and New York City also brought public-nuisance claims against the largest owners of fossil-fueled power plants. *Am. Elec. Power*, 564 U.S. at 423-24 (finding plaintiffs' federal common law nuisance claims displaced by section 111(d) of the Act).

22. Many State and Municipal Intervenor also submitted comments to EPA in advance of—and, later, in response to—the agency's Clean Power Plan. And when the Clean Power Plan was challenged in the D.C. Circuit, many State and

Municipal Intervenor intervened in support of the agency's authority to regulate such greenhouse gas emissions under section 111 of the Act and spent years in litigation defending that authority. *See, e.g., West Virginia v. EPA* (D.C. Cir. 15-1363, and consolidated cases); *In re: Murray Energy Corp.* (D.C. Cir. No. 14-1112, and consolidated cases). Many State and Municipal Intervenor again participated in the administrative process by submitting comments before, and in response to, EPA's proposals to repeal and replace the Clean Power Plan.

23. State and Municipal Intervenor's interests are not adequately represented by the other parties to these consolidated cases, including EPA. As representatives of the interests of their citizens, State and Municipal Intervenor's interests in these consolidated cases differ from those of other parties. In addition, State and Municipal Intervenor have unique sovereign and quasi-sovereign interests in limiting climate change pollution in order to prevent and mitigate loss and damage to publicly-owned coastal property, to protect public infrastructure, and to limit emergency response costs borne by the public. *See Massachusetts v. EPA*, 549 U.S. at 521-23. These interests have not always aligned with those of EPA, as shown by the historical efforts of many State and Municipal Intervenor to compel EPA to address climate change, and by EPA's repeal and replacement of the Clean Power Plan over the objections of many State and Municipal Intervenor.

24. Moreover, EPA has taken steps recently that have caused State and Municipal Intervenors concern about the agency's defense of its legal authority to regulate greenhouse gas emissions from existing fossil-fueled power plants under section 111 of the Act. For example, EPA is reviewing its regulation of new fossil-fueled power plants under section 111(b) of the Act, which EPA has described as the trigger for its regulation of existing fossil-fueled power plants. 84 Fed. Reg. at 32,533. In that rulemaking, EPA maintained its current position that a pollutant-specific endangerment finding for fossil-fueled power plants is not required, but nonetheless solicited comment on whether its position was wrong and offered for discussion arguments some industry petitioners previously made in their comments on the Rule. *See Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units*, 83 Fed. Reg. 65,424, 65,432 n.25 (Dec. 20, 2018).

25. Similarly, in a separate rulemaking proposing to eliminate regulation of greenhouse gas emissions from sources in the oil and gas industry, EPA is ostensibly retaining its interpretation that it is not required to make a new finding of significant contribution to regulate a new pollutant from a source already regulated under section 111 of the Act. *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review*, 84 Fed. Reg. 50,244, 50,261-67 (Sept. 24, 2019). However, the agency simultaneously is

soliciting comments as to whether that position is correct, and it has provided detailed prompts for commenters to answer that question in the negative. *Id.* at 50,262-63 (“[W]e solicit comment on whether the interpretation of CAA section 111(b)(1)(A) that the EPA set forth . . . is correct, or instead whether that provision should be interpreted to require that the EPA make a [significant contribution finding] on a pollutant-specific basis for a source category as a prerequisite for regulating emissions of that pollutant from the source category.”).

26. Because EPA has chosen in these other rulemakings to question its own current legal position—that a new contribution and endangerment finding is not required for the emission of greenhouse gases from sources already regulated under section 111 of the Act—and has solicited comments as to why its position is wrong, State and Municipal Intervenors reasonably fear that EPA will reverse course and not adequately defend that position from challenges by industry petitioners in this litigation.

For the foregoing reasons, State and Municipal Intervenors respectfully request that this Court grant their motion to intervene in cases 19-1175, 19-1176, and 19-1179.

Dated: October 7, 2019

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Michael J. Myers, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2). According to the word processing system used in this office, this document, exclusive the caption, signature block, and any certificates of counsel, contains 3,756 words.

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/s/ Michael J. Myers
MICHAEL J. MYERS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to Intervene in Support of Respondents was filed on October 7, 2019 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Michael J. Myers

MICHAEL J. MYERS