ORAL ARGUMENT NOT YET SCHEDULED

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

American Lung Association, *et al.*,	)	
Petitioners,	)	
v.	)	No. 19-1140
United States Environmental Protection Agency, Andrew Wheeler, Administrator,	)	
Respondents.	)	

UNOPPOSED MOTION OF NATIONAL MINING ASSOCIATION TO INTERVENE IN SUPPORT OF RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the National Mining Association ("NMA") respectfully moves to intervene in support of the United States Environmental Protection Agency ("EPA") and its Administrator, Andrew Wheeler (collectively, "Respondents") in the above-captioned petition for review of EPA's final rule entitled "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations" (the "Final Rule"). *See* 84 Fed. Reg. 32,520 (July 8, 2019), Docket No. EPA-HQ-OAR-2017-0355. Under D.C. Circuit Rule 15(b), this motion constitutes a request to intervene in all petitions for review of the Final

Rule. Petitioners take no position on this motion and Respondents do not oppose this motion.

BACKGROUND

NMA is the national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering, transportation, financial, and other businesses that serve the mining industry. NMA's members produce and use electricity, as well as supply the products that are essential for finding, producing, and delivering all kinds of energy. As set forth below, NMA has longstanding and vital interests in the EPA rulemaking that is the subject of the *American Lung Association* Complaint.

This case deals with Respondents' efforts to implement Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), which requires States to submit plans to EPA that establish "standards of performance" for certain existing sources. Under the Clean Power Plan ("CPP"), "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units," 80 Fed. Reg. 64,510 (Oct. 23, 2015), which was the predecessor to the Final Rule, EPA required States to base their state plans in large part on shifting away from coal-fired generation. The Final Rule repealed the CPP

and instead requires States to submit state plans based upon measures that require coal-fired electric generating units to run more efficiently, thereby reducing emissions. 84 Fed. Reg. at 32,521. NMA was an active participant in the rulemaking process for the Section 111(d) rulemakings, including the Final Rule and the CPP. NMA submitted public comments on the proposed version of the Final Rule[1] and participated extensively in the rulemaking process for the CPP, which EPA repealed and replaced by publishing the Final Rule. NMA submitted comments on both the CPP proposed rule[2] and the proposed rule to repeal the CPP.[3] NMA was also a petitioner in the CPP litigation[4] and participated as *amicus*

[1] Letter from Hal Quinn, President and CEO of NMA, to EPA (October 31, 2018), EPA-HQ-OAR-2017-0355 (commenting on "Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program," 83 Fed. Reg. 44,746 (Aug. 31, 2018)).

[2] Letter from Hal Quinn, President and CEO of NMA, to EPA (Dec. 1, 2014), EPA-HQ-OAR-2013-0602 (commenting on "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 79 Fed. Reg. 34,830 (June 18, 2014)).

[3] Letter from Hal Quinn, President and CEO of NMA, to EPA (Apr. 26, 2018), EPA-HQ-OAR-2017-0355 (commenting on "Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 82 Fed. Reg. 48,035 (Oct. 16, 2017)).

[4] *National Mining Company v. EPA*, No. 15-1367 (D.C. Cir. 2015), consolidated with *State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir. 2015).

curiae in support of petitioners in litigation brought to prevent EPA from finalizing the CPP.[5]

NMA has a substantial interest in defending the Final Rule, which repeals the CPP and replaces it with a rule that is both lawful and more beneficial to NMA's members. The CPP would have forced States and their utilities to shift away from coal-fired electric generation, with drastic economic effects on NMA's members, including forcing the closure of coal mines and layoffs of miners. Indeed, the central purpose and design of the CPP was to shift generation away from coal-fired electric generation, thereby reducing demand for the product that NMA's members produce, sell, and otherwise service. *See* 84 Fed. Reg. at 32,522.

The Final Rule benefits NMA's members by repealing the CPP and by replacing it with a rule that remains within the authority granted to EPA in Section 111(d) to regulate individual stationary sources of emissions. The Final Rule lawfully implements Section 111(d) by setting out a framework for States to develop and submit plans addressing emissions from individual coal-fired electric generating units through measures that require those units to run more efficiently, thereby reducing emissions. 84 Fed. Reg. at 32,521. NMA members, whose businesses are closely tied to coal-fired electricity generation, need both relief from

[5] Brief for National Mining Association as *Amicus Curiae*, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015).

the unlawful and harmful generation-shifting burdens that the CPP would have imposed, as well as finality and certainty regarding EPA's regulation of emissions from electric utility generating units. The Final Rule provides that certainty, thus allowing NMA members to make the most prudent decisions for their own businesses.

GROUNDS FOR INTERVENTION

Federal Rule of Appellate Procedure 15(d) provides that a motion to intervene in a proceeding for review of an agency order must be filed within 30 days after the petition for review is filed and contain a "concise statement of the interest of the moving party and the grounds for intervention." While Federal Rule of Civil Procedure 24(a)(2)'s requirements are not binding on this Court, those requirements help inform this Court's intervention analysis. *Int'l Union v. Scofield*, 382 U.S. 205, 216, n. 10 (1965). Federal Rule of Civil Procedure 24(a) requires courts to consider whether the applicant has an interest in the subject of the action, that disposition of the action may impede or impact the applicant's ability to protect its interests, that existing parties do not adequately represent the applicant's interests, and that the application is timely. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Federal Rule of Civil Procedure 24(b)(1)(B) provides for permissive intervention by any party that "has a claim or defense that shares with the main action a common question of law or fact."

NMA in this case seeks the same disposition as Respondents—denial of the Petition—so it need not demonstrate standing on its own behalf. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (stating that "an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests"). But if NMA is required to show standing to intervene, NMA has standing for the same reasons that it satisfies the requirements for intervention under Federal Rule of Civil Procedure 24(a)—especially the "interest" analysis. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). That is, NMA's members would have suffered serious economic harm from the CPP, and will obtain substantial benefits in terms of predictability from the Final Rule.

I. NMA Has an Interest in the Outcome of These Proceedings, Which Would Be Impaired by an Adverse Ruling Against Respondents, and Has Standing for the Same Reason

"The 'threatened loss' of [a] favorable action [by an agency] constitutes a 'concrete and imminent injury'" justifying intervention of right. Order, *New York v. EPA*, No. 17-1273 (D.C. Cir. Mar. 14, 2018) (ECF No. 1722115) (quoting *Fund for Animals*, 322 F.3d at 733). The same rationale establishes an intervenor's Article III standing. *See Fund for Animals*, 322 F.3d at 733. NMA's members have a core economic interest in the disposition of this Petition, which challenges a rule that is unquestionably favorable to the financial interests of NMA's members.

See Nat'l Mining Ass'n v. Kempthorne, 512 F.3d 702, 705-06 (D.C. Cir. 2008) (recognizing that NMA is "an industry trade association with standing to bring suit on behalf of its members").

The CPP would have imposed serious, unlawful harm upon NMA's members by forcing States and their utilities to shift away from coal-fired electric generation. Bridgeford Decl. ¶ 8. The Final Rule repeals the CPP, which was specifically designed to reduce demand for the products that NMA members produce, sell, and otherwise service.

With the Final Rule, EPA has addressed NMA's concerns about the harmful and unlawful CPP by repealing it and replacing it with a lawful rule, which does not impose such harms on NMA's members. Rather than requiring States to mandate a shift away from coal-fired electric generation, the Final Rule requires States to base reductions on measures that require coal-fired electric generating units to run more efficiently. The Final Rule thus provides NMA's membership both with relief from the harmful generation-shifting mandate of the CPP, as well as with certainty regarding the scope and timing of EPA's effort to regulate emissions from coal-fired electric generating units, so that NMA members can act to preserve their own closely-aligned business interests. Bridgeford Decl. ¶ 10.

Accordingly, NMA has a strong interest in the Final Rule, and disposition of this Petition may impair its ability to protect that interest. Bridgeford Decl. ¶11.

After all, if Petitioners are successful in their challenge to the Final Rule, it would eliminate the important benefits that NMA's members have obtained from the Final Rule.

II. NMA's Interests Are Not Adequately Represented by the Existing Parties

NMA's interests are unique and distinct from those of the Respondents. Although Respondents and NMA share the ultimate objective of upholding the Final Rule, this Court has recognized that EPA, as a government entity whose duty it is to represent the public interest, is not the appropriate party to advance the more narrow, specific interests of businesses impacted by EPA's regulations. *See Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015); *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). NMA's members would have suffered devastating economic impacts due to the CPP and its generation-shifting mandate, and thus have a strong business interest in this case that Respondents do not share or represent, as a matter of law.

III. NMA's Intervention is Timely

The Petition was filed on July 8, 2019. NMA's Motion to Intervene was timely filed within 30 days of that date.

CONCLUSION

NMA thus meets the requirements for intervention as of right, because the Petition threatens its interests, no party adequately represents NMA's interests in this case, and this Petition is timely. NMA similarly qualifies for permissive intervention, as it would defend the Final Rule without interfering with other parties' litigation, and has sought timely intervention. NMA thus respectfully requests that this Court grant this motion and designate NMA as an intervenor-respondent in the above-captioned proceedings and, pursuant to D.C. Circuit Rule 15(b), in any future petitions for review challenging the Final Rule.

This Court should grant NMA's motion to intervene.

Dated: August 7, 2019

Respectfully submitted,

/s/Misha Tseytlin

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Counsel for the National Mining Association

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the word limit in Fed. R. App. P. 27(d)(2)(A) because it contains 2,001 words, excluding those parts exempted by Fed. R. App. P. 32(f) and those accompanying documents excepted by Rule 27(a)(2)(B) and 27(d)(2).

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally-spaced 14-point Times New Roman type.

/s/ Carroll W. McGuffey III
Carroll W. McGuffey III

Dated: August 7, 2019

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American Lung Association, *et al.*,	)	
Petitioners,	)	
v.	)	No. 19-1140
United States Environmental Protection Agency, Andrew Wheeler, Administrator,	)	
Respondents.	)	

RULE 26.1 CERTIFICATE OF CORPORATE DISCLOSURE OF THE NATIONAL MINING ASSOCIATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the National Mining Association ("NMA") certifies that it is a non-profit, incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

Dated: August 7, 2019

Respectfully submitted,

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CERTIFICATE OF PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), Proposed Intervenor-Respondent submits the following Certificate of Parties.

The Petitioners in the above-captioned case are the American Lung Association and the American Public Health Association.

The Respondents in the above-captioned case are the United States Environmental Protection Agency and Andrew Wheeler, Administrator of the United States Environmental Protection Agency.

Movant Respondent-Intervenors are the National Rural Electric Cooperative Association and the Chamber of Commerce for the United States of America.

We are unaware that this Court has granted any interventions at this time. We also believe that no entity has been admitted as an *amicus* at this time.

Dated: August 7, 2019

Respectfully submitted,

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Counsel for the National Mining Association

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Carroll W. McGuffey III
Carroll W. McGuffey III

APPENDIX A

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DECLARATION OF TAWNY BRIDGEFORD

I, Tawny Bridgeford, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information and belief:

1. I am Deputy General Counsel and Vice President for Regulatory Affairs for the National Mining Association ("NMA").

2. NMA is the national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering, transportation, financial, and other businesses that serve the mining industry.

3. NMA's members produce and use electricity, as well as supply the products that are essential for finding, producing, and delivering all kinds of energy.

4. NMA supports EPA's effort to regulate greenhouse gas emissions from electric generating units through its rule entitled "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations" (the "Final Rule"), which is the subject of this litigation.

5. NMA participated in the rulemaking process for the Final Rule by submitting public comments endorsing the proposed version of the rule and recommending that EPA act expeditiously to finalize its proposal.

6. NMA also participated extensively in the rulemaking process leading up to the Final Rule. NMA submitted comments in opposition to the Clean Power Plan ("CPP'), the predecessor regulation that the Final Rule repealed and replaced. NMA also submitted comments in support of EPA's proposed rule to repeal the CPP.

7. NMA petitioned this Court for review of the CPP final rule and participated as *amicus curiae* in support of petitioners in litigation before this Court brought to prevent EPA from finalizing the CPP.

8. NMA's membership would have suffered devastating consequences to their business interests due to the CPP, which would have forced States and their

utilities to shift away from coal-fired electric generation. By design, this would have led utilities to purchase less coal that NMA members produce, sell, and otherwise service, thereby imposing serious economic harms to their business interests.

9. The Final Rule does not require States to shift away from coal-fired generation. Instead, the Final Rule focuses States on identifying measures that require coal-fired electric generating units to run more efficiently, thereby reducing emissions.

10. NMA's membership requires certainty regarding the scope and timing of EPA's effort to regulate emissions from coal-fired electric generating units in order to preserve NMA members' own business interests.

11. NMA therefore has a strong interest in the Final Rule, which lawfully regulates greenhouse gas emissions from coal-fired electric generating units with less harmful consequences to the coal-mining and production industry.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on August 6, 2019.

Tawny Bridgeford

Deputy General Counsel and Vice President, Regulatory Affairs