

ORAL ARGUMENTS JUNE 2, 2016

No. 15-1363 (Lead) and Consolidated Cases (Complex)

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

STATE OF WEST VIRGINIA, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND REGINA A.
MCCARTHY ADMINISTRATOR, UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Respondents.

On Petition for Review of a Final Agency Action of the United States
Environmental Protection Agency 80 Fed. Reg. 64,662 (Oct. 23, 2015)

**MOTION FOR LEAVE TO PARTICIPATE AS AMICI CURIAE AND TO
FILE AMICUS CURIAE BRIEF**

HARRY W. MACDOUGALD
CALDWELL, PROPST & DELOACH, LLP
TWO RAVINIA DRIVE, SUITE 1600
ATLANTA, GEORGIA 30346
404-843-1956
hmacdougald@cpdlawyers.com

ATTORNEY FOR AMICI CURIAE SCIENTISTS IN SUPPORT OF PETITIONERS

Pursuant to Fed. R. App. P. 29(b), and D.C. Circuit Rule 29(b), thirteen individual, well-qualified scientists and economists (the “Scientist Amici”) request leave to appear in this proceeding as amici curiae and to file an amicus curiae brief in support of petitioners that is filed contemporaneously herewith. *See* Scientists Amici Brief in Support of Petitioners at *i* (identifying amici curiae scientists). The scientists request leave to file their brief as Amici Curiae in Support of Petitioners as permitted by the Court’s briefing order of January 28, 2016, not to exceed the word limit for amicus briefs set forth in Fed. R. App. P. 29(d). *See* Dkt. No. 1595922, p. 2.

The Scientist Amici sought the consent of the parties to the filing of this motion and brief by sending an email notice on February 17, 2016, to all designated or liaison counsel for all parties and intervenors, asking them to respond by 6:00 p.m. on Saturday, February 20, 2016, whether they consented, objected to, or took no position on the Scientist Amici’s proposed participation, indicating that if no response was received by that time, counsel for the Scientist Amici would indicate to the Court that those parties took no position on this motion.

No party has objected.

Consent was obtained from the following:

The Environmental Protection Agency and the Department of Justice,
Competitive Enterprise Institute, et al.,
Western Farmers Electric Cooperative, National Association of
Homebuilders,

Basin Electric,

Environmental and Public Health Intervenors in Support of EPA,

Newmont,

The State of Missouri,

American Coalition for Clean Coal Electricity,

Kansas City Board of Public Utilities,

Murray Energy,

West Virginia Coal Association,

Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Los Angeles, by and through its Department of Water and Power, The City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas and Electric Company, Sacramento Municipal Utility District, and Southern California Edison Company,

Denbury, and

San Miguel Electric Coop, Gulf Coast Lignite Coalition.

No Objection was lodged by the following:

ALLETE d/b/a Minnesota Power and

North American Coal Corporation & Subsidiaries.

No Position was taken by the following:

West Virginia, et al., Petitioners in 15-1363 and 15-1409,

NRECA, et al, Petitioners in 15-1376, and

Mississippi Public Service Commission

No Response was received from any other party, and therefore, they are reported as

taking **No Position**.

I. THE SCIENTISTS' INTEREST IN APPEARING AS AMICI CURIAE

The facts and legal background of this case are described in the briefing by petitioners. To summarize, the regulation in question, the “Clean Power Plan,” 80 Fed. Reg. 64662 (“CPP”), seeks to prevent global warming by forcing reductions in emissions of Greenhouse Gases (“GHGs”) from electric power generation facilities.

Laying to one side the parties’ focus on whether §§ 111(d) or 112 of the Clean Air Act authorize or preclude the CPP, EPA’s regulatory authority over GHGs rests in the first instance on (1) the holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that GHGs are a “pollutant” for purposes of the Clean Air Act (“CAA”), and (2) EPA’s 2009 Endangerment Finding that concluded that GHGs cause global warming that endangers human health and welfare. 74 Fed. Reg. 66495.

EPA made the Endangerment Finding under § 202(a) of the CAA relating to mobile sources. From this foundation, EPA has asserted regulatory authority over vast swaths of the U.S. economy. The Clean Power Plan is the most radical such assertion to date. The nature and scope of the government’s regulatory authority over GHGs is critically important because CO₂ emissions are ubiquitous to industrial civilization and intrinsic to life itself – the assumption of such authority by executive agencies is the ultimate slippery slope because there is no place to stop.

The Clean Power Plan rests explicitly on the Endangerment Finding. *See* Clean Power Plan, 80 Fed .Reg. 64682-3, summarizing reliance on the Endangerment Finding. The calamities to be avoided by the Clean Power Plan include “threats to mental health,” “allergic rhinitis, ... conjunctivitis and dermatitis.” 80 Fed. Reg. 64683:2-3.

The Scientist Amici include respected professors from leading universities and distinguished researchers serving, or having served, in both government and private enterprise. Specifically, each individual scientist in the group has established himself as an authority in a field related directly to this rulemaking, such as climate research, weather modeling, physics, geology, statistical analysis, or engineering. *See* Scientists Amici Brief in Support of Petitioners at i. In light of their expertise, these physical scientists and economists seek to ensure that EPA’s climate-related findings and reliance on estimates of the “Social Cost of Carbon” accord with the scientific method and with professional standards of scientific research, data compilation, and statistical analysis. They seek to present to this Court highly relevant, and very easy to understand proofs that EPA’s Endangerment Finding and its Social Cost of Carbon estimates, both used to justify its Clean Power Plan, are each invalid.

II. THE SCIENTISTS’ BRIEF IS RELEVANT AND USEFUL TO THE COURT’S RESOLUTION OF THE CASE.

Fed. R. App. P. 29(a) provides that a movant may be permitted to file a brief as amicus curiae upon leave of the court. “Generally, a court may grant leave to appear as an amicus” if the information provided by the party is both “timely and useful.”

Ellsworth Assocs., Inc. v. United States, 917 F.Supp. 841, 846 (D.D.C. 1996). An amicus brief should “normally be allowed” when the movant possesses “unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cobell v. Norton*, 246 F.Supp.2d 59, 62 (D.D.C. 2003) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir.1997)).

The Scientist Amici, will offer unique information that is intrinsically relevant to the logical and legal foundation of the Clean Power Plan. The scientists’ brief synthesizes and analyzes empirical (i.e., temperature) data relevant to the three lines of evidence upon which EPA relies to attribute global warming to human-caused CO₂ emissions. The brief then shows how critical defects in climate modeling feed into and invalidate the Social Cost of Carbon estimates on which EPA also relies for the Clean Power Plan. The scientists’ perspective on these issues is unique, as each individual scientist possesses distinguished credentials and expertise in a scientific field associated with EPA’s Endangerment Finding and the modeling of the Social Cost of Carbon. Leave to file as amicus curiae is appropriately granted when movants “have a special interest in this litigation as well as a familiarity and knowledge of the issues raised therein that could aid in the resolution of th[e] case.” *Ellsworth Assocs.*, 917 F. Supp. at 846. Because the scientists have demonstrated a sufficient special interest, along with relevant expertise and familiarity with the scientific data underlying EPA’s Endangerment Finding and Social Cost of Carbon analysis, the Court should allow the scientists to file as amicus curiae.

Permitting the Scientist Amici to file as amicus curiae is also appropriate in this instance because their brief is timely and useful to the Court. The brief focuses on whether the Endangerment Finding is validated when tested by the scientific method, and on the validity of the models EPA used to develop its Social Cost of Carbon estimates. The brief provides an easy to understand proof that the Social Cost of Carbon estimates used by EPA are not only useless for public policy analysis purposes, but are also very dangerous. This information is in no way cumulative of any other briefs filed by parties or intervenors to this action. The Scientist Amici's motion for leave is also timely, as it has been filed within the time parameters for the filing of amicus materials. Further, the filing of the scientists' brief will not disturb the Court's briefing schedule.

CONCLUSION

For these reasons, the Scientist Amici respectfully request that the Court grant the scientists leave to file the attached amicus curiae brief in support of the Petitioners.

Respectfully submitted, this 22nd day of February, 2016.

/S HARRY W. MACDOUGALD
HARRY W. MACDOUGALD
CALDWELL, PROPST & DELOACH, LLP
TWO RAVINIA DRIVE, SUITE 1600
ATLANTA, GEORGIA 30346
404-843-1956
hmacdougald@cpdlawyers.com

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CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rules of Appellate Procedure 27(d)(1) & (2) and 29(b) and D.C. Circuit Rule 29(c) because it meets the prescribed format requirements, does not exceed 20 pages, and is being filed as promptly as practicable after the case was docketed by this Court. This motion also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.

This 22nd day of February, 2016.

/S HARRY W. MACDOUGALD
HARRY W. MACDOUGALD
CALDWELL, PROPST & DELOACH, LLP
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SUITE 1600
ATLANTA, GEORGIA 30346
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CERTIFICATE OF CONFERENCE

I hereby certify that, beginning on February 17, 2016, I conferred or attempted to confer via e-mail with all parties to this case regarding the relief requested in this motion. No party expressed any opposition to the motion. The responses received are summarized at pp. 1-2, above.

This 22nd day of February, 2016.

/s HARRY W. MACDOUGALD
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SUITE 1600
ATLANTA, GEORGIA 30346
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CERTIFICATE AS TO PARTIES AND *AMICI CURIAE*

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), counsel certifies as follows: Except for Southeastern Legal Foundation, all parties, intervenors, and *amici* appearing in this court are, to the best of my knowledge, listed in the Joint Certificate as to Parties, Rulings, and Related Cases (Dec. 18, 2015, Doc No. 1589420), the New York University School of Law's Certificate (Dec. 17, 2015, Doc. No. 1589260); the National League of Cities, *et al.*'s Certificate (Dec. 22, 2015, Doc No. 1589943), Pedernales Electric Cooperative, Inc.'s Certificate (Jan. 4, 2016, Doc No. 1591712), the Municipal Electric Authority of Georgia's Certificate (Jan. 11, 2016, Doc No. 1592854), the American Thoracic Society, *et al.*'s Certificate (Jan. 15, 2016, Doc No. 1594036), the Service Employees International Union's Certificate (Feb. 5, 2016, Doc No. 1597552), and Pacific Legal Foundation *et al.*'s Certificate (Feb. 5, 2016, Doc No. 1597462).

This 22nd day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2016, I electronically filed the foregoing Motion for Leave with the clerk of court for the U.S. Court of Appeals for the District of Columbia Circuit using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the attorneys of record who have consented to accept this Notice as service of this document by electronic means.

/s HARRY W. MACDOUGALD
HARRY W. MACDOUGALD
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