ORAL ARGUMENT REMOVED FROM CALENDAR

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

MURRAY ENERGY CORPORATION, Petitioner, **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** Respondent.	Case No. 15-1385 (consolidated with Nos. 15-1392, 15-1490, 15-1491 & 15-1494)

On Petition for Review of Final Agency Action of
the United States Environmental Protection

MOTION TO INTERVENE OF THE STATES OF CALIFORNIA, NEW YORK, RHODE ISLAND, VERMONT, AND WASHINGTON; THE COMMONWEALTH OF MASSACHUSETTS; THE DELAWARE DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL; AND THE DISTRICT OF COLUMBIA

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Due to Respondent U.S. Environmental Protection Agency's (EPA) recent official statements contradicting positions articulated in its merits brief supporting the national ambient air quality standards for ground-level ozone final rule (the "2015 Ozone NAAQS")[1], the amici States of California (by and through the California Air Resources Board and Attorney General Xavier Becerra), New York, Rhode Island, and Vermont; the Commonwealth of Massachusetts; the Delaware Department of Natural Resources & Environmental Control, and the District of Columbia, as well the State of Washington, which was not an amicus, (collectively, "State Movants") respectfully move to intervene as respondents to defend the rule. State Movants, who previously filed an amicus brief in this case, do not seek to file a new merits brief, but merely to change their party status.[2]

[1] National Ambient Air Quality Standards for Ozone; Final Rule, 80 Fed. Reg. 65,292 (Oct. 26, 2015).

[2] The State of Washington has not previously appeared in this case and did not join the amicus brief filed by the other State Movants. Like the State Movants who filed the amicus brief, Washington is not seeking leave to file a merits brief. For simplicity, this motion will use the term "State Movants" to refer to all parties seeking intervention in this motion, including Washington, with the caveat that Washington did not join the previously filed amicus brief.

Environmental and Public Health Petitioners/Intervenors do not oppose this motion. Respondent EPA reserves its position so that it may review the motion after it is filed. Both the State and Industry Petitioners and Intervenors state that they "do not consent, and each group reserves the right to file a brief in opposition."[3]

INTRODUCTION

The 2015 Ozone NAAQS reduces the upper limit on the concentration of ozone in the air to the level EPA has determined is necessary to protect public health with an adequate margin of safety. State Movants filed their amicus brief to voice their support for the rule, in light of their experience implementing NAAQS and their strong interest in protecting their residents from the negative health effects of ozone. Final Brief of State Amici in Support of Respondent, Sept. 26, 2016, (ECF No. 1637852).

In light of changed circumstances, State Movants now seek to intervene to enable them to fully participate as parties to this action. While a motion to intervene in a challenge to an agency action generally must be filed within 30 days after the petition for review is filed, Fed. R. App. P.

[3] The positions stated were given in response to a June 29, 2017, email sent by counsel for California seeking the positions of the parties to this case. (All parties, intervenors, and amici appearing in this Court are listed in the Final Brief for Respondent EPA.)

15(d), the Court can extend the time prescribed by the rules for good cause. Fed. R. App. P. 26(b). Because of recent, concrete indications from EPA in a June 6, 2017, letter and a June 28, 2017, Federal Register notice that it will no longer vigorously defend the 2015 Ozone NAAQS, good cause exists to extend the time to intervene to include this motion, and the motion should thus be considered timely. Prior to these recent developments, the positions EPA took before this Court were consistent with State Movants' interests, and intervention would not have been necessary. EPA's recent official statements, however, signal its agreement with arguments advanced by the Industry and State Petitioners who seek to weaken the rule, contradict EPA's own briefing to this Court, and are contrary to the positions State Movants took in their amicus brief. EPA's recent change in position on the 2015 Ozone NAAQS constitutes good cause for the Court to grant State Movants intervenor status at this time.

BACKGROUND

Ozone pollution is the primary component of urban smog. Exposure to elevated concentrations can cause a variety of negative health effects, especially for children, outdoor workers, and asthma sufferers. These effects grow worse at higher concentrations and with repeated exposure. Given these harmful consequences, and in order to ensure that Americans can

safely breathe the air in their communities, Congress directed EPA to set national ambient air quality standards for ozone to protect public health and welfare. *See* 42 U.S.C. § 7401 (2012).

EPA adopted a primary and secondary ozone NAAQS of 75 parts per billion (ppb) in 2008. National Ambient Air Quality Standards for Ozone; Final Rule, 73 Fed. Reg. 16,436 (Mar. 27, 2008). The level of the primary NAAQS was above the 60-70 ppb range recommended by EPA's Clean Air Science Advisory Committee as necessary to protect public health. In the next ozone NAAQS review, at issue here, EPA adopted a more protective standard of 70 ppb, based in part on the Committee's recommendation. 80 Fed. Reg. at 65,322, 65,292.

Industry and State Petitioners challenged this critical public health and safety standard. A reversal of the more protective standard restricting ozone pollution would result in more asthma attacks and increased lost school days, among other harms, and would cost up to $1.3 billion in lost net benefits just from controlling ozone in California alone.[4]

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[4] EPA, Regulatory Impact Analysis, ES-16, tbl. ES-6; ES-18, tbl. ES-9, *available at* https://www3.epa.gov/ttn/naaqs/standards/ozone/data/20151001ria.pdf.

From the time the first petitions were filed in October 2015 until recent days, State Movants relied on EPA to defend its 2015 Ozone NAAQS in this case. Industry and State Petitioners claimed that EPA exceeded its authority under the Clean Air Act by setting the ozone standards at a level more stringent than the statute allows. They argued that sources of ozone beyond the control of state regulators—such as emissions from wildfires and international pollution—purportedly will make it difficult or impossible for many states to meet the standards.[5] EPA responded by strongly defending the legal and scientific bases of the 2015 Ozone NAAQS, explaining to this Court that its rulemaking properly considered the role of background ozone in setting the standard.[6] State Movants supported that position in their amicus brief, arguing that the health-focused language of the NAAQS provisions does not allow EPA to set weaker standards nationally to account for elevated levels of background ozone in certain areas.[7]

[5] Final Joint Opening Brief of Industry Petitioners, Sept. 26, 2016, (ECF No. 1637757), at 22-31; State Petitioners' Opening Brief, Sept. 26, 2016, (ECF No. 1637804), at 19-44.

[6] Final Brief for Respondent EPA, Sept. 26, 2016, (ECF No. 1637734), at 98-119.

[7] Final Brief of State Amici in Support of Respondent, Sept. 26, 2016, (ECF No. 1637852), at 8-20.

Recent official statements by EPA indicate that EPA's defense of the 2015 Ozone NAAQS may no longer be zealous and forceful. Specifically, on June 6, 2017, EPA Administrator Pruitt sent a letter to the governors of all 50 states, informing them that he was delaying the implementation of the 2015 Ozone NAAQS for one year. The Administrator stated that EPA's review of the rule would consider "the role of background ozone levels, appropriately accounting for international transport, and timely consideration of exceptional events demonstrations."[8] Three weeks later, EPA published a notice in the Federal Register further undermining the position it has taken before this Court by stating that it needed to reevaluate "the role of background ozone levels" and how to account for "international transport,"[9] issues EPA previously told the Court were properly addressed in the final rule and fully supported by the administrative record.

This case was originally scheduled to be heard at oral argument in mid-February, which was delayed to mid-April by this Court. Days before

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[8] *See*, *e.g.*, E. Scott Pruitt, Letter to Governor Doug Ducey, June 6, 2017, *available at* https://www.epa.gov/sites/production/files/2017-06/documents/az_ducey_6-6-17.pdf.

[9] Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards, 82 Fed. Reg. 29,246, 29,246 (June 28, 2017).

the new oral argument date, EPA requested a continuance or abeyance in order to "review the 2015 Rule to determine whether it will be reconsidered." Respondent EPA's Motion to Continue Oral Argument, Apr. 7, 2017, (ECF No. 1670218), at 6. This Court ordered the case held in abeyance on April 11, 2017.

ARGUMENT

I. STATE MOVANTS ARE ENTITLED TO INTERVENE TO DEFEND THE 2015 OZONE NAAQS.

Federal Rule of Appellate Procedure 15(d) allows for intervention in reviews of agency orders. The movant must set forth a concise statement of interest in the case and the grounds for intervention. In determining whether to allow intervention under Rule 15(b), this Court can draw on the policies underlying Federal Rule of Civil Procedure 24 (hereafter "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).

A. State Movants' Legally Protected Interest Could Be Impaired by the Outcome of This Case.

This Court has held in analogous situations that a sufficient injury exists, for the purposes of intervention, "where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 317 (interpreting FRCP 24 and citing *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) and *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003)). That is the situation State Movants face here. The outcome of the Court's review of EPA's 2015 Ozone NAAQS will directly affect their independent interest in air quality.

State Movants have a vital interest in ensuring that the primary ozone standard is set at a level that adequately protects their residents from the harms of ozone pollution. If Industry and State Petitioners succeed in overturning EPA's 2015 Ozone NAAQS, State Movants will be deprived of important health protections and extensive economic benefits. *See* EPA, Regulatory Impact Analysis, ES-15, tbl. ES-5; ES-16, tbl. ES-6; ES-18, tbls. ES-9 & ES-10 (showing that achieving the 70 ppb standard leads to net health benefits of billions of dollars of avoided health care expenses, avoided premature deaths, and thousands of avoided lost work days and tens

of thousands of avoided lost school days), *available at*
https://www3.epa.gov/ttn/naaqs/standards/ozone/data/20151001ria.pdf

Nationally, federal ozone standards can spur greater and more cost-effective emission reductions—and consequently provide greater health protections—than otherwise equivalent standards set under state law, such as California's ambient air quality standards. State-only standards do not generally include the same consequences for areas that fail to comply. State-only standards may also vary, with some states setting less protective standards than others, risking a race to the bottom of air quality. Thus, if the federal ozone NAAQS are not uniformly set at a level that adequately protects public health, State Movants' efforts to protect public health by improving air quality could be frustrated by more lenient standards in neighboring states.

The NAAQS also provide policy support for federal emission standards that are, in part, relied upon by states to reach attainment. For instance, reducing emissions from locomotive and aircraft engines can contribute to attaining the NAAQS, but states are generally preempted from setting new

engine and other emission standards for these sources.[10] 42 U.S.C. §§ 7543(e)(1)(B), 7573. If the current federal standard is overturned, EPA and other federal actors may be less likely to move forward with protective action for sources within their control, and State Movants will face further challenges protecting public health and attaining previous ozone NAAQS.

B. State Movants Are Not Adequately Represented by EPA.

Although State Movants' interest in the outcome of this litigation (described above) would have been sufficient to justify intervention earlier, State Movants' need to obtain party status did not arise until EPA's recent change of position. EPA's statements signaling concerns about the 2015 Ozone NAAQS show that the agency no longer supports State Movants' interests in defending and implementing the strengthened ozone standard. The June 6 letter Administrator Pruitt sent to governors and the agency's June 28, 2017, Federal Register notice alleging the need for further study of background ozone levels and international ozone transportation directly conflict with the position EPA took in its brief to this Court. Instead, EPA's

[10] *See*, *e.g.*, San Joaquin Valley Air Pollution Control District, Petition Requesting That EPA Adopt New National Standards for On-Highway Heavy-Duty Trucks and Locomotives Under Federal Jurisdiction, June 22, 2016, p.1, *available at* https://www.epa.gov/sites/production/files/2016-11/documents/san_joaquin_valley_petition_for_hd_and_locomotive.pdf

vaguely alleged need for more information on this subject echoes Industry and State Petitioners' arguments in this challenge, namely that EPA should have factored into its standard setting sources of ozone beyond the control of state regulators, such as those from which ozone is transported internationally.[11] EPA's new uncertainty about its rule similarly conflicts with State Movants' position that these issues were already appropriately considered by EPA and can be addressed (if necessary) by other provisions of the Clean Air Act. Final Brief of State Amici in Support of Respondent, 8-20.

Because State Movants are not adequately represented in this case, intervention is justified. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) (finding movant intervenor not adequately represented by the government party); *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (explaining that the FRCP 24 burden of showing

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[11] The origins of EPA's newfound uncertainty about the justifications for the standards it finalized in October 2015 can be found in the papers current Administrator Pruitt filed in this very case while he was suing EPA as Oklahoma's Attorney General. *See*, *e.g.*, State Petitioners' Opening Brief, Sept. 26, 2016, (ECF No. 1637804), at 28 (arguing that EPA violated the Clean Air Act by failing to take account of background ozone levels in selecting the range of reasonable values). On February 17, 2017, Mr. Pruitt switched from Petitioner to Respondent in this case when he was sworn in as EPA Administrator and simultaneously resigned as Oklahoma's Attorney General.

inadequate representation by existing parties is "minimal"); *United States v. AT&T*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (stating that intervention "'ordinarily should be allowed … unless it is clear'" that an existing party provides adequate representation).

C. Good Cause Exists to Extend Rule 15's Thirty-Day Deadline to Allow Intervention Here.

Under the unusual circumstances here, State Movants' motion should be considered timely because good cause exists to extend Rule 15's deadline. Until recently, EPA robustly defended the strengthened ozone pollution standards. The agency's response brief directly countered Industry and State Petitioners' claims that background ozone would preclude attainment and argued, as the State Movants did in their amicus brief, that attainment concerns could be addressed by other measures after setting the NAAQS. Final Brief for Respondent EPA, Sept. 26, 2016, (ECF. No. 1637734), at 99, 105. Thus, EPA's argument that the petitions should have been denied matched the position of State Movants until recently.

Upon a showing of good cause, this Court may extend the 30-day deadline for filing a motion to intervene. *See* Fed. R. App. P. 26(b). There is good cause to allow a late motion to intervene when "in view of all the circumstances the intervenor acted promptly" after the change that gave rise

to the intervener's desire to participate in the litigation as a party. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977). This Court has applied this standard in agreeing that a motion to intervene was timely where the potential inadequacy of representation by the original parties became apparent only at a later stage in the litigation. *See Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986) (intervenors' interests had been "fully consonant" with those of the government until the government equivocated about whether it would appeal); *compare id. with Amador County, Cal. v. U.S. Dep't of the Interior*, 772 F.3d 901, 905 (D.C. Cir. 2014) (finding trial court did not abuse its discretion in denying FRCP 24 intervention as untimely when the question of whether the interveners' interest would be adequately represented by the government had been apparent from the outset of the litigation).

Courts measure the timeliness of intervention from the point at which the potential inadequacy of representation comes into existence. *Amador County*, 772 F.3d at 904. The future inadequacy of the EPA's representation of State Movants' interest was not apparent within 30 days of the filing of the petitions for review late in 2015, which would have been the intervention deadline under Federal Rule of Appellate Procedure 15(d), nor was it apparent during the merits briefing of this case, where the State Movants'

position was consistent with EPA's. But State Movants are filing this motion within 30 days of Administrator Pruitt's June 6, 2017, letter to state governors undermining EPA's position on background ozone, and therefore good cause exists to extend the intervention timeline in Federal Rule of Appellate Procedure 15(d) to encompass this motion.

Further, while granting this motion to intervene would provide the only way for State Movants to protect their interests in this case, allowing their intervention at this stage would not "unduly delay or prejudice the adjudication of the original parties' rights." Fed R. Civ. P. 24(b)(3). State Movants are not asking to file a new brief if intervention is granted, but only to be put in a position to make arguments consistent with EPA's merits brief,[12] and this case is already in abeyance at EPA's request. Thus, granting this motion to intervene will not delay the litigation in any way. At this stage, State Movants should be allowed to intervene in order to provide a vigorous defense of the strengthened standard in any future proceedings, as is necessary for the proper resolution of this case.

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[12] In a case involving many of the same parties as this one, the Court granted the motion of states that had already filed an amicus brief supporting an EPA rule to change their status to intervenor, even though the 30-day deadline in Rule 15 had long passed. *See In re: Murray Energy*, No. 14-1112 (D.C. Cir., Dec. 17, 2014) (order; ECF No. 1527869).

CONCLUSION

Good cause exists to allow State Movants to intervene at this juncture due to the change in position by Respondent EPA.

Dated: July 6, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2017, I filed the foregoing Motion to Intervene of the States of California, New York, Rhode Island, and Vermont; the Commonwealth of Massachusetts; the Delaware Department of Natural Resources & Environmental Control; and the District of Columbia, using the Court's CM/ECF system, thereby effecting service on all counsel of record for participants in this case.

July 6, 2017	/s/ Timothy E. Sullivan
Dated	Timothy E. Sullivan