IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MINGO LOGAN COAL COMPANY, INC., Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant, and WEST VIRGINIA HIGHLANDS CONSERVANCY, PO Box 306 Charleston, WV 25321; COAL RIVER MOUNTAIN WATCH, P.O. Box 651 Whitesville, WV 25209; OHIO VALLEY ENVIRONMENTAL COALITION, PO Box 6753 Huntington, WV 25773-6753; and SIERRA CLUB, 85 Second Street, 2nd Floor San Francisco, CA 94105; Movants-Defendant-Intervenors.	Case No. 1:10-cv-00541-ABJ

MOTION OF WEST VIRGINIA HIGHLANDS CONSERVANCY, COAL RIVER MOUNTAIN WATCH, OHIO VALLEY ENVIRONMENTAL COALITION, AND SIERRA CLUB TO INTERVENE AS DEFENDANTS

Pursuant to Federal Rules of Civil Procedure 24(a), (b), (c), and Local Rule 7(j) of this Court, West Virginia Highlands Conservancy, Coal River Mountain Watch, Ohio Valley Environmental Coalition, and Sierra Club (collectively, "Movants") hereby move this Court for leave to intervene in this proceeding as Defendants. Movants seek intervention as of right under Rule 24(a)(2), or, in the alternative, permissive intervention under Rule 24(b)(1). In support of this motion, Movants submit the accompanying Memorandum of Points and Authorities and the attached Exhibits.

Movants have conferred with counsel for the parties. Government counsel has indicated to Counsel for Movants that Defendant Environmental Protection Agency ("EPA") takes no position on Movants' intervention at this time. Counsel for Plaintiff Mingo Logan has indicated that Plaintiff does not consent to this motion.

Movants also respectfully request that the Court rule on this motion as soon as possible. Movants seek the opportunity to participate in the briefing schedule established by this Court, including by filing a targeted brief no later than those dates set for Defendant to file such a brief, or any future such date set for Defendant to file such a brief. (Dkt. 15).

Pursuant to the procedure set forth in Rule 24(c), Movants state the following as grounds for this Motion to Intervene:

1. A mining company, Mingo Logan Coal Company, has brought this action to challenge the Final Determination that EPA issued to "veto," or prohibit, withdraw, or deny, the company's ability to dump mining waste into high-quality headwater streams in the Coal River sub-basin in West Virginia. *See* EPA, Final Determination of the Assistant Administrator for Water Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia, 76 Fed. Reg. 3126 (Jan. 19, 2011) ("Final Determination"); Dkt. 16-2

(Pl. Ex. B). Plaintiff seeks to vacate EPA's final veto and remove the protection that EPA has granted to these streams. The relief requested by Plaintiff also threatens numerous other Appalachian streams because it challenges EPA's ability to veto any permit that the Corps has issued. As national and local grassroots conservation groups with significant members in West Virginia, Movants West Virginia Highlands Conservancy ("WVHC"), Coal River Mountain Watch ("CRMW"), Ohio Valley Environmental Coalition ("OVEC"), and Sierra Club ("the Club") seek to intervene to protect their and their members' longstanding interest in protecting the waters covered by EPA's veto and threatened by Mingo Logan's request for relief. Movants have demonstrated this interest by engaging in advocacy and litigation begun in 1998 to protect these specific waters, before Mingo Logan ever applied for the permit that is part of this action, and continuing through their case challenging that permit.

2. Movants satisfy each requirement for intervention of right, pursuant to Federal Rule of Civil Procedure 24(a): they claim an interest in the subject of this action; they are so situated that the disposition of the action may, as a practical matter, impair or impede their ability to protect that interest; their interest may not be adequately represented by parties to the case; and this motion is timely.

3. Movants also satisfy the prerequisites for permissive intervention, pursuant to Federal Rule of Civil Procedure 24(b), because their defense and the main action share common questions of law and fact, and their intervention will not delay or prejudice the adjudication of any rights or defenses of the Parties.

Based on the grounds asserted in this Motion to Intervene and in the supporting Memorandum of Points and Authorities, Movants ask this Court to grant them intervention as of

right pursuant to Federal Rule of Civil Procedure 24(a) or, in the alternative, to grant permissive intervention pursuant to Rule 24(b).

DATED: May 25, 2011

Respectfully submitted,

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FOR THE DISTRICT OF COLUMBIA

MINGO LOGAN COAL COMPANY, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 1:10-cv-00541-ABJ
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant,	)	
and	)	
WEST VIRGINIA HIGHLANDS CONSERVANCY, COAL RIVER MOUNTAIN WATCH, OHIO VALLEY ENVIRONMENTAL COALITION, and SIERRA CLUB,	)	
Movants-Defendant-Intervenors.	)	

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY WEST VIRGINIA HIGHLANDS CONSERVANCY, COAL RIVER MOUNTAIN WATCH, OHIO VALLEY ENVIRONMENTAL COALITION, AND SIERRA CLUB

INTRODUCTION

In this action, Mingo Logan Coal Company, Inc. ("Mingo Logan") challenges the final determination by the U.S. Environmental Protection Agency ("EPA") to veto the specification and use of certain vital headwater streams in West Virginia as disposal sites for waste from a mountaintop removal coal mine, pursuant to section 404(c) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1344(c). *See* EPA, Final Determination of the Assistant Administrator

for Water Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia, 76 Fed. Reg. 3126 (Jan. 19, 2011) ("Final Determination") (providing notice of Final 404(c) Determination, Dkt. 16-2 (Pl. Ex. B)). EPA's veto prohibits Mingo Logan from dumping its mining waste into Oldhouse Branch, Pigeonroost Branch, and their tributaries pursuant to a permit issued by the U.S. Army Corps of Engineers ("Corps"), under § 404(a), 33 U.S.C. § 1344(a). The Corps' permit has a long and controversial history and has been in litigation since issuance. As longstanding advocates who have worked for years to protect their members' interests in the streams that are the subject of EPA's veto, Movants West Virginia Highlands Conservancy ("WVHC"), Coal River Mountain Watch ("CRMW"), Ohio Valley Environmental Coalition ("OVEC"), and Sierra Club ("the Club") seek to intervene as Defendants in support of EPA's veto determination.

LEGAL AND FACTUAL BACKGROUND

EPA's veto withdraws the Corps' prior specification of 6.6 miles of streams in Pigeonroost Branch and Oldhouse Branch and their tributaries as disposal sites for coal mining waste from Mingo Logan's Spruce No. 1 Surface Mine in Logan County, West Virginia. 76 Fed. Reg. at 3126; Dkt. 16-2. It also prohibits the use or specification of these waters and their tributaries as disposal sites for surface coal mining of a similar type with similarly adverse chemical, physical, and biological effects. *Id.* EPA's final veto thus provides permanent protection for these high-quality Appalachian headwater streams, after Movants' decade-long effort to protect these streams by repeatedly challenging the Corps' refusal to follow fundamental requirements of § 404 in regard to the Spruce No. 1 Mine, in litigation brought by WVHC and later joined by other Movants.

The Clean Water Act prohibits the discharge of pollutants to waters of the United States

except when in compliance with a permit issued pursuant to the Act. 33 U.S.C. § 1311(a). Permits for the discharge of "dredged or fill material" may be issued by the Corps under § 404, subject to the requirements of the Act and EPA oversight. *Id.* § 1344(a). The Corps may not issue any such permit unless it complies with environmental guidelines promulgated by EPA (in conjunction with the Corps). *Id.* § 1344(b)(1); 40 C.F.R. Part 230; *see* 40 C.F.R. § 230.2(a); EPA, Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85,336 (Dec. 24, 1980). Those regulations, known as the "404(b)(1) Guidelines," prohibit the permitting of any discharge that will "cause or contribute to significant degradation of the waters of the United States," either individually or cumulatively with other discharges. 40 C.F.R. § 230.10(c). Factors that could lead to significant degradation, either individually or cumulatively, include significant adverse effects on: municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites; life stages of aquatic life and other wildlife dependent on aquatic ecosystems; aquatic ecosystem diversity, productivity, and stability; and recreational, aesthetic, and economic values. *Id.* The guidelines also bar the permitting of any discharge that "[c]auses or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard." *Id.* § 230.10(b)(1).

EPA, as the primary agency responsible for protecting the environment, has ultimate oversight authority under § 404. EPA may prohibit, withdraw, deny or restrict the use or specification of any U.S. waters as a disposal site for fill "whenever" EPA makes the required determination pursuant to § 404(c). 33 U.S.C. § 1344(c); *see* 40 C.F.R. Part 231 (404(c) regulations). Specifically, section 404(c) authorizes EPA to

> prohibit the specification (*including the withdrawal of specification*) of any defined area as a disposal site, and . . . deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, *whenever* [the

> agency] determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Id. (emphasis added). As EPA explained in promulgating its 404(c) regulations:

> [S]ection 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued. [I]n each case, the Administrator may prevent any defined area in waters of the United States from being specified as a disposal site, or may simply prevent the discharge of any specific dredge or fill material into a specified area.

EPA, Denial or Restriction of Disposal Sites; 404(c) Procedures, 44 Fed. Reg. 58,076 (Oct. 9, 1979) (emphasis added); *see id.* at 58,077 (discussing use of 404(c) after issuance of a permit); 45 Fed. Reg. at 85,337 (same). EPA's § 404(c) authority is known as its "veto" authority. 40 C.F.R. § 231.1(a). Congress enacted § 404 because, "[w]hile Congress had faith in the Corps' administrative experience, it recognized EPA as the 'environmental conscience' of the Clean Water Act." 44 Fed. Reg. at 58,081.

EPA regulations define "unacceptable adverse effect" as

> impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines (40 CFR part 230).

40 C.F.R. § 231.2(e). In making a determination under § 404(c), the EPA must "take into account *all information available* to [the agency]." *Id.* § 231.1(a) (emphasis added). It is longstanding EPA policy that "one of the basic functions of 404(c) is to police the [Corps'] application of the 404(b)(1) Guidelines." 44 Fed. Reg. at 58,078.

In its final veto of Spruce No. 1, EPA appropriately exercised its § 404(c) authority and reached a robust and reasonable determination that is well-supported by scientific research and other information in the administrative record. EPA's final determination is well within its statutory authority and meets the highly deferential standard of review applicable under the Administrative Procedure Act, 5 U.S.C. § 706(2). Indeed, the overwhelming scientific data and information on the devastating potential impacts of the mining discharges demonstrate that EPA, the "conscience of the Clean Water Act," was required to take the action that it did.

Before issuing its final veto in regard to Spruce No. 1, EPA gave public notice, held a public hearing, considered extensive public comment, conferred with Mingo Logan and the Corps, and satisfied each requirement of § 404(c) and EPA's regulations. Final Determination at 9; *id.* at 18-25 (describing project and veto history). EPA exercised its 404(c) authority to withdraw Mingo Logan's permit for discharges into Oldhouse Branch and Pigeonroost Branch and their tributaries because EPA determined these discharges would have unacceptable adverse effects on wildlife both within and downstream from the permit area. *Id.* at 6. For example, EPA found that

> Pigeonroost Branch and Oldhouse Branch and their tributaries are some of the last remaining streams within the Headwaters Spruce Fork sub-watershed and the larger Coal River sub-basin that represent "least-disturbed" conditions. As such, they perform important hydrologic and biological functions, support diverse and productive biological communities, contribute to prevention of further degradation of downstream waters, and play an important role within the context of the overall Headwaters Spruce Fork sub-watershed and Coal River sub-basin.

Id. at 12. On the site of the Spruce No. 1 Mine, EPA determined that the dumping of mining waste would bury "virtually all of Oldhouse Branch and its tributaries and much of Pigeonroost Branch and its tributaries," resulting in a significant loss of valuable habitat to many species in

the watershed. *Id.* at 13. Examining the science and potential effects downstream from the site, EPA found that the mine as authorized would lead to "increased pollutant loadings in Spruce Fork and the Little Coal River," "loss of macroinvertebrate communities and population shifts to more pollution-tolerant taxa," and "the extirpation of ecologically important macroinvertebrates." *Id.* Additionally,

> loss of macroinvertebrate prey populations, combined with increased potential for harmful golden algal blooms and additional exposure to selenium will have an unacceptable adverse effect on the 26 fish species found in Spruce Fork as well as amphibians, reptiles, crayfish, and bird species that depend on aquatic organisms and downstream waters for food or habitat.

Id. As EPA explained, "[b]urial of Pigeonroost Branch and Oldhouse Branch would also result in unacceptable adverse effects on wildlife downstream caused by the removal of functions performed by the buried resources and by transformation of the buried areas into sources that contribute contaminants to downstream waters." *Id.* at 98.

EPA's withdrawal of specification for Oldhouse Branch and Pigeonroost Branch and their tributaries was also informed by the fact that the Corps' permit did not comply with the § 404(b)(1) guidelines. *Id.* at 13. For example, EPA concluded that the dumping of mining waste into those streams would significantly degrade the Nation's waters because it would "eliminate the entire suite of important physical, chemical and biological functions provided by the streams of Pigeonroost Branch and Oldhouse Branch including maintenance of biologically diverse wildlife habitat and will critically degrade the chemical and biological integrity of downstream waters." *Id.* at 77; *see also* 40 C.F.R. § 230.10(c). EPA recognized that degradation would be particularly significant because it would occur in the context of the long-term, cumulative degradation of streams in the Spruce Fork and Coal River watersheds. Final Determination at 77–82; *see also* 40 C.F.R. § 230.11(g). Moreover, EPA found that Mingo Logan's proposed

mitigation plan would not replace the high quality aquatic resources that would be destroyed by the Spruce No. 1 Mine, in part because the company's plan failed to "adequately account for the quality and function of the impacted resources." Final Determination at 83–84; *see also* 40 C.F.R. §§ 230.10(c)-(d), 230.11(e).

Although Movants contend that none of the grounds raised by Mingo Logan to challenge EPA's veto has merit, its lawsuit and claims threaten Movants' interests in the specific streams at issue and others subject to EPA's § 404(c) authority. In the Amended Complaint, Mingo Logan attacks EPA's veto and its substantive findings concerning the "unacceptable adverse effects" of the Spruce No. 1 Mine as arbitrary and capricious. It also claims that EPA acted outside its authority by issuing this veto after the Corps issued the permit and by considering new information including science discussed in its April 2010 guidance. Am. Compl. ¶¶ 220–31, 311–43 (Dkt. 16); *see also id.* ¶¶ 248–56, 297–310; *id.* ¶¶ 164–82, 257–73. Mingo Logan asks the Court to make declarations regarding EPA's authority, the Corps' permit, and EPA's Final Determination, to order EPA to rescind its Final Determination, and to enjoin any further action under § 404(c) with respect to the permit. Am. Compl. 46 (Dkt. 16).

Movants are West Virginia and national environmental groups who for many years, and long before Plaintiff filed this permit application, have been working to protect the waters that would be destroyed by the Spruce No. 1 Mine. Movants have consistently challenged the Corps' § 404 permits for this mine and advocated for the Corps to recognize the prevailing science and comply with the Clean Water Act by protecting waters from harmful impacts caused by mountaintop removal mining and valley fills. In particular, WVHC has worked for over a decade to protect these waters during the long, controversial history that preceded EPA's final veto in 2011. WVHC's prior litigation first prevented the streams from being buried under mining waste

in 1999. *Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D. W. Va. 1999) (granting preliminary injunction). Movants' members use and enjoy the streams and wildlife in the Spruce Fork watershed—the same resources that EPA has found will suffer unacceptable adverse effects if the Spruce No. 1 Mine is allowed to go forward as planned. *See, e.g.*, Declaration of Cindy Rank (Exhibit 1). Moreover, Movants' members have recreational, aesthetic, and other personal interests in many Appalachian streams that are similarly at risk of damage from surface coal mining operations. *See, e.g.*, Decl. of Vivian Stockman (Ex. 2).

A ruling in favor of Mingo Logan on any of its claims would threaten Movants' longstanding interests in the Spruce Fork watershed and other Appalachian streams subject to EPA protection. If Mingo Logan were successful in challenging EPA's veto, Movants would need to recommence their challenge to the Spruce No. 1 § 404 permit in the Southern District of West Virginia (discussed below), in order to attempt to protect their interests in the streams and watershed protected by EPA's veto. Beyond the harm to the Spruce Fork watershed and Coal River sub-basin, Mingo Logan's request for a declaration limiting EPA's veto authority threatens Movants' and their members' interests in EPA retaining its full authority to gather and consider information and to protect other Appalachian streams from unacceptable effects from surface mining pursuant to § 404(c).

During their years of experience working to protect the streams in Spruce Fork and the Coal River sub-basin and advocating for lawful agency action in regard to mountaintop removal mining in Appalachia, Movants have gained particular familiarity with the history and impacts of this mine and the science in the administrative record. Because Movants cannot rely solely on Defendant EPA to protect their interests in this case, Movants seek intervention as Defendants to

protect their and their members' interests in the Spruce Fork watershed and Coal River sub-basin and to help demonstrate that Mingo Logan's claims lack merit.

ARGUMENT

Movants respectfully request that the Court grant their intervention pursuant to Federal Rule of Civil Procedure 24(a), or, in the alternative, Rule 24(b), for reasons discussed below.

I. MOVANTS ARE ENTITLED TO INTERVENE AS OF RIGHT.

Federal Rule of Civil Procedure 24(a) provides that:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a)(2). Thus, the Court must grant intervention as of right if: (1) the motion is timely; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest may not be adequately represented by existing parties. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Movants satisfy these conditions.

A. Movants' Motion to Intervene is Timely.

The Court determines the timeliness of a motion to intervene "in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Smoke v. Norton*, 252 F.3d 468 (D.C. Cir. 2001) (granting post-judgment motion to intervene on appeal).

This motion is timely. Plaintiff filed a premature complaint to challenge EPA's proposed

veto in April 2010 while EPA was still engaged in its 404(c) veto process. (Dkt. 1). EPA moved to dismiss that complaint in June 2010. (Dkt. 9). EPA issued its final veto determination on January 13, 2011, rendering Plaintiff's initial complaint moot. *See* 76 Fed. Reg. 3126; Dkt. 12. Plaintiff filed the Amended Complaint on February 28, 2011 and EPA answered on March 30, 2011. (Dkts. 16, 19). The case is still at a preliminary stage at which no dispositive motion has been filed. Briefing is not scheduled to be completed in this case until October 21, 2011. (Dkt. 15). This Court has not yet decided any merits issue.

Granting intervention at this stage would cause no prejudice to any party. Movants will respect judicial efficiency and intend to submit joint filings before this Court. Movants intend to abide by the briefing schedule that the Court has already established. (Dkt. 15). With this Court's approval, Movants would plan to file a targeted brief (that aims to avoid duplication) in opposition to Plaintiff's motion for summary judgment and in reply no later than the dates already established for the briefs of Defendant EPA.

B. Movants and Their Members Have Legally Protected Interests at Stake.

The interest required for Rule 24(a) intervention as of right "is a significantly protectable interest." *Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981) (quotation omitted). As the D.C. Circuit has explained, in the intervention area "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* at 1324 (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). Movants' interests in the waters and watershed protected by EPA's veto have led them to engage in many years of advocacy and litigation to try to prevent and then challenge the Corps' issuance of unlawful valley fill permits for the Spruce No. 1 Mine. Movants meet the intervention standard because their members have personal, environmental,

recreational, and aesthetic interests in the integrity of the waters covered by EPA's veto and other streams and associated natural resources in Appalachia threatened with degradation due to other current and potential Corps permits. *See* Rank Decl. (Ex. 1); Stockman Decl. (Ex. 2).

In 1998, Movant West Virginia Highlands Conservancy and local residents challenged and obtained a preliminary injunction against the Corps' authorization of valley fills for the Spruce No. 1 Mine under the then-applicable Nationwide Permit ("NWP") 21. *Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D. W. Va. 1999). The *Bragg* court discussed the harm from the proposed stream filling and found standing to challenge the mine. *Id.* at 642, 653. In June 1999, the Corps withdrew the NWP 21 authorization and agreed to prepare an Environmental Impact Statement (EIS) on this mining project.

Years later, Mingo Logan applied to the Corps for an individual § 404 permit for the Spruce No. 1 Mine. The Corps issued a draft EIS on the proposed mine in March 2006 and a final EIS in September 2006. U.S. Army Corps, Availability of a Draft Environmental Impact Statement 71 Fed. Reg. 16,293 (Mar. 31, 2006). Movants WVHC, Coal River Mountain Watch, and Ohio Valley Environmental Coalition filed extensive and timely comments on the draft EIS in opposition to the project. Still, the Corps issued a Record of Decision and an individual § 404 permit to Mingo Logan on January 22, 2007.

Eight days later, these three Movants moved for leave to file a supplemental complaint to challenge the Spruce permit in a pending federal court action against the Corps. The Court granted leave to do so. *OVEC v. U.S. Army Corps of Eng'rs*, Civ. No. 3:05-0784 (S.D. W.Va.)

(complaint filed Jan. 30, 2007).[1] When EPA issued its final veto of Mingo Logan's permit in January 2011, these Movants' claims were still unresolved because the district court had stayed the proceedings. On March 20, 2011 the district court in the permit challenge further extended that stay and placed that case on that court's inactive docket, pending this Court's review of EPA's final veto.

During the § 404(c) veto process in 2010, Movants submitted comments in support of EPA's veto that are in the administrative record before this Court. *See* Doc. ID No. EPA-R03-OW-2009-0985-1335.1 (comments submitted on behalf of WVHC, CRMW, OVEC, and Sierra Club) (June 3, 2010). Many of Movants' members and supporters also submitted comments into this record, as part of the more than 50,000 total written comments EPA received on its proposed veto. Movants also submitted comments in support of the EPA guidance that Mingo Logan criticizes, during the public comment process EPA undertook for that guidance in 2010.[2]

Movants have engaged in these activities and challenged the Spruce No. 1 permit for years to protect their members' specific interests in the streams that would be destroyed and contaminated by that permit. Movants represent thousands of people living in West Virginia

[1] Movants sought a temporary restraining order ("TRO") against this permit. After the Court scheduled a hearing on the TRO motion, Movants agreed to withdraw it in exchange for Mingo Logan's agreement not to conduct further mining activities outside a designated area where activities had already started unless it provided Movants with advance notice. The Court then granted these Movants' motion to file their supplemental complaint. The agreement with Movants is discussed in the Spruce veto record.

[2] *See* Memorandum from P. Silva & C. Giles, EPA, Detailed Guidance, Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order (Apr. 1, 2010) ("EPA Guidance"), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mtntop_mining_detailed.pdf; Doc. ID No. EPA-HQ-OW-2010-0315-0610.1 (Movants' comments, submitted Dec. 1, 2010).

who share their mission. *See, e.g.*, Declaration of Vivian Stockman (Exhibit 2) at 1. Movants' members regularly visit the Oldhouse Branch and Pigeonroost Branch areas of the Spruce Fork watershed and have done so for over 15 years. *See, e.g.*, Rank Decl. (Ex. 1) at 4–7; *see also* Stockman Decl. (Ex. 2) at 2. Movants' members hike, watch birds, and examine wildflowers and medicinal herbs in Pigeonroost hollow. Ex. 1 at 5-6; *see also* Ex. 2 at 2. They engage in these activities with friends in the area. Ex. 1 at 5-6. Movants' members also visit the areas of Spruce Fork directly downstream from Pigeonroost Branch and Oldhouse Branch. Ex. 1 at 6-7; Ex. 2 at 2. They enjoy viewing the birds, fish, and other wildlife that inhabit the streams that they visit. Ex. 1 at 6-7; Ex. 2 at 2. Movants' members intend to continue to visit and enjoy these streams, wildlife, and natural resources and their ability to continue to do so is threatened by the Corps' permit and Mingo Logan's challenge to EPA's veto. Ex. 1 at 5-8; Ex. 2 at 2.

Movants also have a significant personal interest in ensuring that EPA is able to consider all available information and take into account the most up-to-date science, including the types of information relied upon in the Final Determination in its review of the Corps' § 404 permitting decisions, and in using this information themselves to evaluate potential permits and protect their members' interests. Ex. 1 at 1-2, 4, 8; Ex. 2 at 1-2. It is important to the core mission of each movant organization for the EPA to be able to consider such information in order to protect Movants' members' interests in the waters and natural resources affected by the Corps' and EPA's decisions, and to uphold the integrity of the permitting process. Ex. 1 at 1–2; Ex. 2 at 1–2.

Movants also have members with aesthetic, recreational, and health interests in other waters of Appalachia that are subject to degradation from other Corps-permitted valley fills that fall under EPA's § 404 oversight authority. For example, some of Movants' members travel

throughout the coal mining areas of West Virginia to recreate in and near those waters. Ex. 1 at 3; Ex. 2 at 2. Movants' members enjoy observing and photographing the wildlife that rely on those waters for their survival. Ex. 1 at 3-7; Ex. 2 at 1-2. Movants also have an interest in EPA retaining its full authority to consider and address, using its veto power, all available information in regard to Spruce No. 1, because there are other Appalachian waters currently threatened by § 404 permits.[3]

Movants have demonstrated their legally protected interests in numerous Appalachian waterways subject to harm from surface coal mining operations in prior advocacy and legal actions involving the regulation or permitting of those operations.[4] In such cases and others where Movants have intervened, courts have recognized that Movants and similar plaintiffs have Article III standing and that they have significant interests relating to waters affected by surface

[3] *See, e.g.*, Surface Coal Mining Activities Enhanced Coordination Procedures - Project List, http://water.epa.gov/lawsregs/guidance/wetlands/mining-projects.cfm.

[4] Movants have successfully sued the Corps over its issuance of other § 404 permits allowing coal mine operators to fill Appalachian streams with mining waste. *See, e.g.*, *OVEC v. Hurst*, 604 F. Supp. 2d 860 (S.D. W. Va. 2009) (vacating Corps' Nationwide Permit 21 under § 404 of the CWA); *OVEC v. U.S. Army Corps of Eng'rs*, 674 F. Supp. 2d 783 (S.D. W. Va. 2009) (remanding individual § 404 permits under the CWA). Movants have successfully sued private mine operators to enforce violations of their NPDES permits for discharges of pollutants into Appalachian streams. *See, e.g.*, *OVEC v. Hobet Mining, LLC*, 723 F. Supp. 2d 886 (S.D. W. Va. 2010); *OVEC v. Apogee Coal Co., LLC*, 555 F. Supp. 2d 640 (S.D. W. Va. 2008) (requiring coal mining company to comply with its § 402 permit limits). Movants have also successfully challenged the WV Department of Environmental Protection's recurring failures to follow CWA requirements in connection with surface mining. *See, e.g.*, *W. Va. Highlands Conservancy v. Norton*, 161 F. Supp. 2d 676 (S.D. W. Va. 2001) (requiring federal Office of Surface Mining to address WVDEP's inadequate bonding program); *W. Va. Highlands Conservancy v. Huffman*, 651 F. Supp. 2d 512 (S.D. W. Va. 2009) (requiring WVDEP to obtain § 402 permits for three bond forfeiture sites); *Sierra Club v. Clarke*, No 10-34-EQB, WV Env'tl Quality Board Order (Mar. 25, 2011) (remanding WVDEP § 402 permit issued to Patriot Mining Co. for New Hill West mine due to failure to follow § 402 requirements, apply state water quality standards, and set effluent limits for conductivity, sulfate, Total Dissolved Solids, manganese, and selenium).

coal mining operations in Appalachia. Courts have also granted Movants intervention in cases involving § 404 permitting issues. For example, in the pending case brought in the U.S. District Court for the District of Columbia by the National Mining Association to challenge EPA's Appalachian surface mining guidance, the court has granted all Movants intervention as of right.[5]

C. If Successful, Mingo Logan's Action May Impair Movants' Interests.

Movants seek intervention to oppose Mingo Logan's request for relief from EPA's veto withdrawing specification of Pigeonroost Branch and Oldhouse Branch. Movants' members have environmental, recreational, and aesthetic interests in those streams and their tributaries and other Appalachian headwater streams that are threatened by valley fills. If Mingo Logan's requested relief were granted, it plans to bury and destroy Pigeonroost Branch and Oldhouse Branch, and to discharge mining waste downstream. Each action would impair Movants' interests in the buried waters and in the Spruce Fork watershed and Coal River sub-basin. As described above, in order to try to prevent this harmful outcome, Movants would be required to expend valuable resources to continue their challenge to the Corps' issuance of the Spruce No. 1 § 404 permit in the Southern District of West Virginia.

Moreover, a ruling in favor of Mingo Logan could short-circuit EPA's ability to consider all available information, including the most up-to-date science, in its review of the Corps' issuance of permits for valley fills. All of the information that EPA considered in its Final Determination—including the information discovered after permit issuance—is important for

[5] *Nat'l Mining Ass'n v. Jackson*, No. 10-cv-1220-RBW (D.D.C.) (consolidated with Nos. 11-cv-0295, 11-cv-0446, 11-cv-0447); *see also, e.g.*, *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 116 (D.D.C. 2006) (intervention of Sierra Club in industry challenge to regulations for nationwide permits to fill wetlands under § 404); *Am. Mining Congress v. U.S. Army Corps of Eng'rs*, 120 F. Supp. 2d 23 (D.D.C. 2000) (intervention of Sierra Club in § 404 regulatory challenge).

EPA to be able to assess whether a § 404-permitted valley fill will have unacceptable adverse impacts on the resources identified in § 404(c). *See* 33 U.S.C. § 1344(c); 40 C.F.R. § 231.2(e). During the course of this mine's controversial history, EPA staff and other scientists have made significant advances in understanding the importance of headwater streams, the harmful impacts of valley fills on those stream systems (including particularly relevant information concerning impacts in watersheds adjacent to Pigeonroost Branch and Oldhouse Branch), and the limitations of compensatory mitigation in replacing stream functions. *See, e.g.*, Final Determination at 8–9 & References; *see also id.* at 18-25 (project history). Movants and other commenters also submitted recent scientific research into the record. Although new information of this kind is not necessary for EPA to veto a Corps permit after it has been issued, the fact that it may be discovered after permit issuance is one reason why EPA retains full authority under § 404(c) to veto the specification or use of waters for discharge of fill material "whenever" it would have an "unacceptable adverse effect." *See* 40 C.F.R. § 231.1(a); 44 Fed. Reg. at 58,077. Movants' interests in affected streams would thus be impaired if EPA were restricted from considering that available information.

Also important to Movants' interests in the § 404(c) process is EPA's ability to consider the adverse effects of activities that are also considered under other sections of the Act, such as §§ 303, 401, 402, and 404(b)(1), which Mingo Logan also challenges. In making its § 404(c) determination, the EPA must "take into account *all information available*" to the agency. 40 C.F.R. § 231.1(a) (emphasis added). Prohibiting EPA from considering impacts that other state or federal agencies also consider under other sections of the CWA would prevent EPA from conducting the comprehensive evaluation required by the Act and its regulations. For instance, consideration of the adverse effects of the Spruce No. 1 § 404 valley fill permit would be

incomplete without also considering the valley fills' pollutant discharges permitted under § 402. EPA's ability to consider impacts and information and reach an independent conclusion, regardless whether another state or federal agency has considered those impacts, is particularly necessary in light of recent assessments of the permitting agencies' Section 402 and 404 practices for surface coal mining projects in Appalachia. For example, EPA found that "[a]s many as 80% of [reviewed] permits raised concerns with respect to compliance with state narrative water quality standards, while more than half raised concern for the potential for significant degradation of aquatic ecosystems." EPA Guidance, *supra* note 2, at 6. The permitting agencies' past decisions have led to impairment of "nine out of every 10 streams downstream from surface mining operations." *Id.* at 3. Thus, approval of such activities by other agencies under other sections of the CWA cannot be presumed to ensure that the related § 404 permit will not lead to unacceptable adverse impacts, particularly where there is evidence in the record showing they have not done so in the past. EPA's ability to consider *all* available information as part of the § 404(c) process provides an essential backstop to prevent unacceptable adverse impacts.

If Mingo Logan succeeds in restricting EPA's ability to consider all available information independent from any Corps conclusion and regardless whether the Corps has issued a permit, Movants' interests in the integrity of Appalachian streams threatened by valley fills may be impaired. Restricting EPA's authority as Mingo Logan seeks to do at minimum would require Movants to expend additional time and resources to engage in advocacy and to help their members address permitting impacts, such as by trying to protect their homes and communities from the impacts of harmful mining waste disposal and by investigating and possibly filing new lawsuits that they would not otherwise have had to bring against the Corps for issuing unlawful

permits. Once a valley fill permit has issued, however, it is often difficult or impossible for Movants to bring suit for corrective action before irreparable harm from filling streams occurs. The fact that Mingo Logan has engaged in certain destructive mining activities already in this case demonstrates this very problem. Am. Compl. ¶ 145; Final Determination at 6 n.1, 19. Despite Movants' ability to resume their challenge to the Spruce No. 1 § 404 permit in federal court, "there is no question that the task of reestablishing the status quo if the [Plaintiff] succeeds in this case will be difficult and burdensome." *Fund for Animals v. Norton*, 322 F.3d at 735 (granting defensive intervention to support government agency even where intervenor-applicant was not barred from future corrective action).

Moreover, if the Court were to decide an issue in this case related to the scope of EPA's authority, which provides one of the most important legal protections available for Appalachian streams, Movants may not have any future opportunity outside this case to protect their interests on this issue, or may have more difficulty doing so. For reasons similar to these, the D.C. District Court in the *National Mining Association* case and other federal courts have previously granted intervention as of right to Movants and other environmental groups in similar cases where industry plaintiffs challenged government actions related to § 404 permits, as cited above. *See supra* note 5.

D. Movants' Interests May Not Be Adequately Represented by Defendant.

The burden of a movant to demonstrate the potential for inadequate representation "is not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Movants need only show "that representation of [their] interest '*may* be' inadequate, not that representation *will in fact* be inadequate." *Id.* (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (requiring "minimal" showing)) (emphasis added). Based on the history of this permit and the administrative context in which it operates, Defendant EPA may not adequately

represent Movants' interests in this matter.

Although Movants support the action EPA took in this veto, they cannot rely solely on the United States to defend their interests in this case. "Although there may be a partial congruence of interests, that does not guarantee the adequacy of representation." *Fund for Animals*, 322 F.3d at 736–37 (granting intervention where federal defendant and movant's interests "might diverge during the course of litigation"). As the Supreme Court has recognized, the primary purpose of centralizing litigation responsibility in the Department of Justice is to assure that the United States speaks with "one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people." *United States v. Providence Journal Co*., 485 U.S. 693, 706 (1988); *see also Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1459 (1st Cir. 1992). The United States technically represents all of its agencies.

EPA and the Corps have taken opposing positions on permits for coal mining operations and the United States has in the past defended the Corps' position, including in Movants' challenge to the Corps' § 404 permit for Spruce No. 1 discussed above. *See also supra* note 4. The need for the United States to accommodate both the Corps and EPA in formulating its "one voice" may lead the United States to be more limited or circumspect in addressing controversial aspects of this case. Movants need the opportunity to participate in order to protect their and their members' interests in the waters at stake and to advocate for the full application of the Clean Water Act standards, consistent with the Act's singular environmental purpose.

Additionally, the United States may attempt to represent constituencies who have interests that differ from those of Movants. *Cf. Dimond*, 792 F.2d at 192–93 (recognizing that interests of the United States and individual constituents may diverge). By contrast, Movants

have the mission of protecting waters and natural resources and will represent their members who oppose Mingo Logan's challenge to EPA's veto because they depend on the preservation and integrity of the affected streams and the Coal River sub-basin for personal use and enjoyment. Movants seek to intervene to protect the interests of individuals who have long histories of enjoyment and deep connections to these and other Appalachian streams threatened by valley fills, as evidenced by the decade-long struggle over the permit at issue in this case. Consequently, although the United States and Movants may share some of the same objectives in preserving EPA's Spruce veto and its veto authority, this case is personal for Movants' members.

For these reasons, Movants must not be required to depend solely on the United States to defend their specific and personal interests in the waters at stake here. Instead, Movants need the opportunity to intervene to protect their own interests vigorously. In analogous situations, other courts have granted Movants' motions to intervene as defendants. *See, e.g.*, *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991) (explaining that "Sierra Club does not need to consider the interests of all South Carolina citizens and it does not have an obligation, though [South Carolina] does, to consider its position vis-a-vis the national union"); *see also supra* note 5.

II. ALTERNATIVELY, MOVANTS REQUEST INTERVENTION BY PERMISSION.

If this Court does not grant Movants intervention of right, Movants request, in the alternative, that the Court grant permissive intervention under Rule 24(b) because Movants' defense "shares with the main action a common question of law or fact" and their intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(1) and (b)(3). First, as demonstrated above, no significant events have yet occurred in this case, Movants' motion is timely, and they will cause neither prejudice nor undue delay to any party. Movants do not bring new claims. They intend directly to oppose claims and requests

for relief made by Mingo Logan in this action and to offer defensive arguments that share central questions of law raised by this case.

Movants seek intervention to ensure that this Court is able to hear the perspective of people affected by the issues involved in this case. Movants have gained special knowledge and expertise from serving West Virginia and Appalachian communities for years as nonprofit, membership-based organizations, working across different Administrations. They offer a perspective that is different from the coal company's short-term profit interest and from the government's institutional interest. Movants have particular familiarity with the administrative record in this case due to their extensive involvement with the Spruce No. 1 Mine for years. Through their efforts, Movants also have gained significant knowledge on the science on the effects of mining waste disposal and valley fills on Appalachian streams contained in the administrative record and on which these documents rely, as scientists who developed some of the significant scientific research on which these documents rely have also provided expert testimony in permit challenges brought by Movants. Movants also have worked on the broader environmental issues discussed in the Spruce veto for decades, across multiple corporate transfers and agency personnel turnover, including the issue of mountaintop removal mining and protecting water quality in Appalachia. Most importantly, Movants have organizational commitments to protect the communities and the ecological integrity of West Virginia and Appalachia for the long run, as described in the attached declarations. *See* Ex. 1 at 1-2; Ex. 2 at 1. This perspective and experience would target Movants' briefing to their core aim of preventing Mingo Logan from burying Pigeonroost Branch and Oldhouse Branch and from unduly restricting EPA's ability to consider and, when necessary, prevent adverse impacts to the streams of Appalachia, thus complementing the Government's defense. *Cf. Natural Res. Def.*

Council v. Costle, 561 F.2d 904, 912–13 (D.C. Cir. 1977) (granting intervention for movant to protect own interests where it "may also be likely to serve as a vigorous and helpful supplement to EPA's defense"). Granting Movants intervention would be consistent with the federal courts' history of granting intervention to private entities, including nonprofit conservation groups, based on the distinct perspective they can contribute to courts' consideration of government policies that go to the heart of their organizational missions and directly affect their members' lives as cited above.

III. MOVANTS HAVE STANDING TO INTERVENE AS DEFENDANTS.

If the Court determines that Article III standing is required for Movants to intervene as defendants, Movants meet this standard for reasons already discussed and further elaborated below.[6] Standing requires a showing of: (1) injury in fact; (2) a causal relationship between the injury and the challenged action, such that the injury can be fairly traced to the challenged action; and (3) the likelihood that a favorable decision will redress the injury. *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1370 (D.C. Cir. 2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). After finding that a single movant satisfies these standing requirements, the Court may grant intervention to all listed Movants. *See, e.g.*, *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (granting intervention to all co-applicants based on a finding for one named intervenor-applicant).

First, Movants have associational standing. Under this standard, an association "must

[6] Movants have provided declarations in support of their motion even though they seek to intervene as defendants. *See* Exs. 1, 2; *cf. County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 45 n.15 (D.D.C. 2007) (citing *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)); *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("requiring standing of someone who seeks to intervene as a defendant runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction.") (citations omitted). If the Court requires additional evidence, Movants are prepared to provide it.

demonstrate that at least one member would have standing under Article III to sue in his or her own right, that the interests it seeks to protect are germane to its purposes, and that neither the claim asserted nor the relief requested requires that an individual member participate in the lawsuit." *NRDC*, 489 F.3d at 1370 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977)). For reasons similar to those demonstrated above showing that Movants and their members satisfy the standard to intervene of right, Movants' members have Article III standing in their own right. *Cf. Fund for Animals*, 322 F.3d at 735 (holding that finding of standing is sufficient to establish an "interest" under Rule 24(a)(2)).

Movants' members have legally protected recreational and aesthetic interests in waters covered by the Spruce veto, as discussed in Part I.B and the attached declarations. Courts have frequently found standing for Movants and similar plaintiffs in cases involving permits similar to the Spruce No. 1 permit, including in *Bragg v. Robertson*. *See* 54 F. Supp. 2d at 642, 653; *supra* note 4. If Mingo Logan were to succeed, Movants' members' ability to use and enjoy these waters would therefore be diminished, and the resulting injuries to the interests of Movants' members are sufficient to establish Movants' standing. *Cf. NRDC*, 489 F.3d at 1371 (finding standing where organization's members "use or live in areas affected" by the action at issue "and are persons 'for whom the aesthetic and recreational values of the area'" would be lessened as a result of the action) (citation omitted). Furthermore, Movants will face additional harm because they will need to resume litigating their case in the Southern District of West Virginia to protect their members' interests in the Spruce Fork watershed. Protecting these waters and their members' interests is an important part of Movants' organizational missions.

This Court can redress, or prevent, this harm by denying Plaintiff's requested relief for the reasons discussed above. Doing so would protect the waters threatened by Mingo Logan's

proposed valley fills, allow EPA to fully and effectively review the potential impacts of other valley fill permits, and allow the agency to prevent those impacts when appropriate. Vacating EPA's veto of the Spruce No. 1 § 404 permit and issuing the other declarations and relief requested by Mingo Logan would, at minimum, cause "a distinct risk to a particularized interest" of Movants' members. *Cf. City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1185–86 (D.C. Cir. 2007) (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663, 668 (D.C. Cir. 1996) (*en banc*)). It would remove the protection EPA has granted and require Movants to proceed with their original (currently stayed) litigation against the Corps as a last attempt to prevent the harm to the streams at issue.

Movants also have standing in their own right due to their concrete, institutional interest in the subject matter of this action, the harm Plaintiff's suit is likely to cause to those interests, and this Court's authority to redress that harm by denying Plaintiff's requested relief. *Cf. Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 113 (D.D.C. 2009) ("A plaintiff suffers an organizational injury if the alleged violation 'perceptibly impair[s]' its ability to carry out its activities.") (citations omitted). As part of their core mission, Movants expend resources engaging citizens to protect mountains, streams, and people from the devastating impacts of surface coal mining in their communities and the communities they visit. Ex. 1 at 1–2; Ex. 2 at 1. Interference with EPA's § 404 oversight duties – including interference that could prevent the agency from considering and releasing relevant information regarding impacts of pending permit applications – threatens Movants' ability to provide key information to their members and the public and to use that information to prevent or minimize harmful impacts from valley fills.

Movants also are squarely within the "zone of interests" protected and regulated by the Clean Water Act, including § 404, and therefore satisfy the requirements for prudential standing.

Cf. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970). The interests of Movants and their members are based in the waters protected by the Clean Water Act. *See* 33 U.S.C. § 1251(a). EPA's authority to veto § 404 permits that will have unacceptable adverse impacts is designed to protect Movants' interests. *Cf. Fund For Animals*, 322 F.3d at 734 n.6 (finding no bar to prudential standing for intervention where movant's interests coincided with statutory factors required to be taken into account).

Congress established strong protections in the Clean Water Act that grant "any citizen" the right to challenge violations of the Clean Water Act, 33 U.S.C. § 1365(a), and the right to participate in the permitting and veto processes. *Id*. §§ 1344(a), (e), 1251(e). These statutory provisions demonstrate that Congress intended there to be no bar to the ability of concerned citizens to participate, and support the agency defendant, in a matter such as this. *Cf. Bennett v. Spear*, 520 U.S. 154, 165-66 (1997) (holding that a similar citizen suit provision demonstrates congressional decision to remove bar of prudential standing); *OVEC v. U.S. Army Corps of Eng'rs*, 674 F. Supp. 2d 783, 805 (S.D. W. Va. 2009) (finding a public right to mitigation-related and other "pivotal data" in the permitting process) (quotation omitted) (citing *Nat'l Wildlife Fed'n v. Marsh*, 568 F. Supp. 985 (D.D.C. 1983)). Congress' grant of these citizen participation and enforcement rights would mean little if Movants could have no voice in litigation involving EPA's veto.

CONCLUSION

For all of the foregoing reasons, Movants West Virginia Highlands Conservancy, Coal River Mountain Watch, Ohio Valley Environmental Coalition, and Sierra Club respectfully request leave to intervene as Defendants in Case No. 1:10-CV-00541, as of right, pursuant to FED. R. CIV. P. 24(a), or alternatively, by permission, pursuant to FED. R. CIV. P. 24(b).

DATE: May 25, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2011, I caused a copy of the Movants' Motion to Intervene as Defendants, Memorandum in Support, Exhibit Nos. 1-2, Proposed Order, Proposed Answer, and Rule 7.1 Statement to be served on the following counsel by First-Class Certified U.S. Mail:

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