IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA, Plaintiffs, v. MASSEY ENERGY COMPANY, *et al.*, Defendants.	)	Civil Action No. 2:07-0299

SIERRA CLUB'S MOTION TO INTERVENE AS OF RIGHT

The Sierra Club hereby moves to intervene as a matter of right in the above-captioned action pursuant to Fed. R. Civ. P. 24(a)(1) and (a)(2), and Clean Water Act ("CWA") § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B). Alternatively, since it meets the requirements for permissive intervention under Rule 24(b), the Sierra Club moves to be allowed to intervene by permission. In addition, the Sierra Club moves to adopt the principal complaint in this action. In support of its motion, the Sierra Club states as follows.

This action was filed on May 10, 2007, by the United States on behalf of the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Administrator"), against Defendant Massey Energy and its subsidiaries ("Defendants"). The Administrator's complaint alleges more than 60,534 days of violation of CWA effluent limitations and permit limits by Massey Energy and its subsidiaries, collectively. *See* Complaint at 2. The Administrator's suit seeks a permanent injunction against further CWA violations, an injunction to compel Defendants to take all necessary steps to comply with the CWA and applicable permit limitations and conditions, and civil monetary penalties to redress those violations. *See* Complaint at 26.

The Sierra Club is a conservation group whose individual members are or may be adversely affected by the disposition of the Administrator's enforcement action against the Defendants, as discussed below. Accordingly, it is entitled to "intervene as a matter of right" in the Administrator's action. 33 U.S.C. § 1365(b)(1)(B); Fed. R. Civ. P. 24.

ARGUMENT

The Sierra Club is entitled to intervene as a matter of right in this action. Rule 24 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 24, permits "intervention of right" in two circumstances: (1) under Rule 24(a)(1), when another statute "confers an unconditional right for citizens to intervene"; and (2) under Rule 24(a)(2), "when the applicant claims an interest relating to the property or transaction which is the subject of the action and 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, unless the applicant's interest is adequately represented by existing parties."

The first of those circumstances applies in this case, since CWA § 505(b)(1)(A) confers an unconditional right to intervene upon citizens, including citizen organizations like the Sierra Club. *See* 33 U.S.C. § 1365(b)(1)(A). That provision states that "any citizen may intervene as a matter of right" in a civil enforcement action such as this one. *Id*. The Sierra Club also satisfies the requirements for intervention of right under the second provision of Rule 24, because it and its individual members have an interest in this matter that is not adequately represented by the government or the Defendants, and its ability to protect that interest may be impaired if it is not allowed to intervene.

Finally, the Sierra Club meets the requirements for permissive intervention under Fed. R. Civ. P. 24(b). Individual members of the Club are or may be directly and adversely affected by

the Defendants' unlawful activities that are alleged in the Administrator's complaint. Thus, the Sierra Club's "claims" against the Defendants "have a question of law or fact in common" with the Administrator's suit within the meaning of Rule 24(b).[1] Further, members of the Sierra Club bring to this suit their valuable local experience and knowledge as leaders in citizen efforts to protect the Nation's and Kentucky's land and water resources from the damaging effects of coal mining. Finally, participation by the Sierra Club will not unduly delay or prejudice the adjudication of the Administrator's suit or prejudice the Defendants.

I. INTERESTS OF THE SIERRA CLUB AND ITS INDIVIDUAL MEMBERS

The Sierra Club is a national nonprofit organization, headquartered in San Francisco, California, with approximately 1.3 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Ensuring that coal mining operations comply with environmental laws is among the Sierra Club's top national priorities. The West Virginia Chapter of the Sierra Club has approximately 1,914 members who reside in the State of West Virginia, and the Cumberland Chapter of the Sierra Club has approximately 5,195 members who reside in the State of Kentucky.

Individual members of the Sierra Club have suffered or may suffer injury to their aesthetic, environmental, recreational, and/or economic interests as a result of Defendants'

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[1] If it is allowed to intervene, the Sierra Club moves the Court to allow it to adopt the Administrator's Complaint. This will avoid needless duplication of effort, and will not delay the progress of this case. *See Payne v. Weirton Steel Co.*, 397 F. Supp. 192, 197 (N.D. W. Va. 1975) (allowing proposed intervenors to adopt the complaint of the plaintiffs in the principal case); 7C Wright & Miller: Federal Prac. & Proc. § 1913, Discretion of Court, and § 1914, Motions and Pleading (2007) (citing with approval the approach adopted in *Payne v. Weirton*).

In addition to the grounds for jurisdiction set forth in the Administrator's Complaint, the Court also has jurisdiction over the Intervenor's claims under CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B).

activities. These activities have resulted in unpermitted pollutant discharges, discharges of pollutants that violate applicable CWA effluent limitations, and violations of applicable CWA permit limitations or requirements. The Sierra Club has members and staff that live in and frequently travel throughout southern West Virginia and Kentucky in order to enjoy the natural beauty of the area, including mountains, forests, rivers and streams, and the extraordinary array of wildlife living in the area. These members observe and experience the adverse effects of pollutant discharges from surface coal mining activities, including impairment of water quality, increased acidity, and increased siltation in streams that are listed in the Administrator's Complaint and are located in or near areas where Sierra Club members live and recreate. *See* Ex. A, Declaration of Mickey McCoy ; Ex. B, Declaration of James Evans; Ex. C, Declaration of David Cooper. Because the Sierra Club's members and staff have or will continue to suffer such injuries if the Defendants' unlawful activities alleged in the Administrator's Complaint are allowed to continue, it has a strong interest in this case.

II. THE SIERRA CLUB MEETS THE REQUIREMENTS FOR INTERVENTION OF RIGHT UNDER CWA § 505 AND RULE 24(A)(1)

The Siera Club meets the requirements for intervention as a matter of right under Fed. R. Civ. P. 24(a)(1) and CWA § 505(b)(1)(B): its application for intervention is timely; CWA § 505 confers an unconditional right to intervene in this action; and the Sierra Club has a substantial interest in the subject matter of this action sufficient to meet the requirements for intervention as a matter of right under CWA § 505.

A. This Application to Intervene is Timely

Under Rule 24, an application for intervention must be timely. *See* Fed. R. Civ. P. 24; *Kentuckians for the Commonwealth v. Rivenburgh*, 204 F.R.D. 301, 306 (S.D. W.Va. 2001). For purposes of intervention of right under Fed. R. Civ. P 24(a)(1) based on the unconditional right

to intervene under CWA § 505(b)(1)(B), "intervention of right without prior notice is to be allowed if all the prerequisites to such intervention are met," and "any pre-suit inaction does not preclude intervention." *United States v. Ketchikan Pulp Co.*, 74 F.R.D. 104, 106 (D. Alaska 1977) (citing *State of Ohio ex rel. Brown v. Callaway*, 497 F.2d 1235, 1242 (6th Cir. 1974)).

EPA filed its complaint on May 10, 2007. Defendants have filed a motion to dismiss and three West Virginia organizations have moved to intervene[2], but no additional motions or other papers have been filed, and no briefing schedule or substantive order has issued. The Sierra Club has not delayed in filing its motion to intervene. Therefore, this motion is timely filed.

B. CWA § 505(b)(1)(B) Confers an Unconditional Right Upon the Sierra Club to Participate in This Action.

Rule 24(a)(1) provides for intervention of right "when a statute of the United States confers an unconditional right to intervene." Section 505(b)(1)(A) of the CWA confers such an unconditional right to intervene in this case. That provision states that no citizen action may be commenced for CWA violations

> if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, *but in any such action in a court of the United States any citizen may intervene as a matter of right*.

[2] The three West Virginia organizations that previously moved to intervene in this action support Sierra Club's instant motion to intervene. Sierra Club is represented in this action by the same lawyers that represent the three West Virginia organizations. Many of Defendants' discharges of pollutants challenged in this action occurred in Kentucky. The Sierra Club has attached to this motion declarations of its members in Kentucky who are adversely affected by Defendants' discharges in that State. The West Virginia organizations believe that Sierra Club should be permitted to intervene to protect the interests of its members in Kentucky, who will have no voice in this action if Sierra Club is not made part of this action.
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33 U.S.C. § 1365(b)(1)(B) (emphasis added).[3] Thus, Section 505 confers an unconditional right to intervene, as long as all other applicable requirements under Rule 24(a)(1) are met. *See Ohio v. Callaway*, 497 F.2d 1235, 1242 (6th Cir. 1974) (explaining that "33 U.S.C. § 1365(b)(1)(B) confers upon all applicants an unconditional right to intervene under rule 24(a)(1)"). *See also United States v. Metropolitan St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir. 1989) ("The plain language of section 1365 states that, if the Administrator has commenced a civil action such as the one here, "any citizen may intervene as a matter of right") (Emphasis in original)); *U. S. v. Hooker Chemicals and Plastics Corp*., 540 F. Supp. 1067, 1080 (W.D.N.Y. 1982) ("[S]uch a right [to intervene under Rule 24(a)(1)] is granted to the petitioners by the Citizens Suit provision of the Clean Water Act."); *U.S. v. Ketchikan Pulp Co.*, 74 F.R.D. 104, 106 (D. Alaska 1977) (granting intervention under Fed. R. Civ. P. 24(a)(1) on the basis of CWA § 505(b)(1)(B)).[4]

C. The Sierra Club Has an Interest in the Subject Matter of This Action, and Therefore is a "Citizen" Within the Meaning of CWA § 505

For the purposes of intervention under CWA § 505, "the term 'citizen' means a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). The

[3] This case is an "action to require compliance with a standard, limitation, or order" within the meaning of CWA § 505(b)(1)(B). For purposes of intervention under CWA § 505, the term "effluent standard or limitation" includes, *inter alia*, (1) an unlawful discharge of pollutants under CWA § 301; (2) an effluent limitation or other limitation under CWA § 301 (effluent limitations) or CWA § 302 (water quality related effluent limitations); and (3) a permit issued under CWA § 402 or a condition thereof. *See* 33 U.S.C. § 1365(f). EPA's Complaint alleges violations of the foregoing types, including violations of minimum and maximum daily effluent limitations and monthly average limitations contained in NPDES permits (Complaint at 21) and unpermitted discharge of pollutants from point sources (Complaint at 25).

[4] Under § 505(b)(1)(A), the Sierra Club is entitled to intervene without undue limitations on its participation in the action. *See U.S. v. Ketchikan Pulp Co*, 74 F.R.D. at 108 (rejecting the government's request to limit the participation of citizen intervenors, and noting that "[n]othing in [CWA § 505] supports this theory of limited intervention. While [intervenors] clearly are subject to the normal proscriptions of the Federal Rules regarding discovery and may not make oppressive demands the court will not prejudge their intentions for entry into this case.").

question whether a person or an organization possesses sufficient interest to fall within the meaning of "citizen" under CWA § 505(g) is closely related to principles of standing. *See Ohio v. Callaway*, 497 F.2d at 1235, 1242 (6th Cir. 1974) ("Congress has explained that 'citizen' should be interpreted in light of the Supreme Court's decision in *Sierra Club v. Morton* . . . where the Court held that persons, or associations of persons, have the requisite interest to seek review if they allege that they have been or will be harmed by the challenged action."). *See also U.S. v. Ketchikan Pulp Co.*, 74 F.R.D. at 106 ("The first requirement for such intervention [under CWA § 505] is that of standing. In the present case the definition of 'citizens' who may intervene clearly is an attempt by Congress to authorize intervention to the broadest extent allowable under *Sierra Club v. Morton*, 405 U.S. 727 (1972).").

The Fourth Circuit has held that interests of owners and users of a downstream lake had sufficient interest to demonstrate standing where they stated that they were concerned about the threat of adverse effects from pollutant discharges that violated a facility's CWA permit:

> The district court, however, required that plaintiffs present further evidence concerning one or more of the following: (1) "the chemical content of the waterways affected by the defendant's facility"; (2) "any increase in the salinity of the waterways"; and (3) "other negative change in the ecosystem of the waterway." *Gaston Copper Recycling*, 9 F.Supp.2d at 600. But the Supreme Court does not require such proof. In *Laidlaw*, 120 S.Ct. at 704-05, the Court found that several citizen affidavits attesting to reduced use of a waterway out of reasonable fear and concern of pollution "adequately documented injury in fact." Each of the citizens alleged that he or she would make greater recreational use of some part of the affected waterway were it not for their concern about the harmful effects of the defendant's discharges. See *id*. The Court required no evidence of actual harm to the waterway, noting: "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id*. at 705 (quoting *Sierra Club v. Morton*, 405 U.S. at 735, 92 S.Ct. 1361).

Friends of the Earth v. Gaston Copper Recycling, 204 F.3d 149, 159 (4th Cir. 2000), discussing *Friends of the Earth v. Laidlaw Environmental Serv.*, 528 U.S. 167, 183 (1999).[5]

In *U.S. v. Metropolitan St. Louis Sewer Dist.*, the court held that an environmental group possessed sufficient interest to satisfy CWA § 505 because the group's individual members were injured by pollution of the particular waters addressed by the action:

> Missouri Coalition and two of its named members allege that many of the 25,000 members visit, cross, and frequently observe the bodies of water identified in the United States' complaint and that from time to time these members use these waters for recreational purposes. They also allege that these interests are adversely affected by the pollution of these waters. These allegations are sufficient to give the Coalition and its members constitutional standing and to classify them as "citizens" as defined in section 1365(g).

883 F.2d 54, 56 (8th Cir. 1989). Thus, Sierra Club demonstrates sufficient interest under CWA § 505 when it "allege[s] that [its] members have suffered a specific injury as the result" of the defendants' CWA violations, as opposed to a "generalized interest." *U.S. v. Ketchikan Pulp Co.*, 74 F.R.D. at 106.

In general, "[c]itizen groups with members whose livelihood or recreational pursuits are threatened. . . by the alleged CWA violations have standing to intervene as plaintiffs." Am. Jur. 2d *Pollution* § 934 (2007); *U.S. v Ketchikan Pulp Co.*, 74 F.R.D. at 106 (concluding that Alaska Center for the Environment met the "interest" requirement in CWA § 505(b)(1)(B) because members alleged on behalf of the group that "the waters which may be impacted by defendant KPC's discharge are used by members of the Alaska Center for recreation"). *Accord U.S. v. Hooker Chemicals & Plastics Corp.*, 540 F. Supp. at 1082 ("The test is not whether the

[5] The Sierra Club seeks leave to intervene as a representative of its respective individual members. For the reasons discussed in this motion, it meets the requirements for representational standing set forth by the Fourth Circuit: "(1) at least one of its members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit." *See Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d at 159.

applicants for intervention have been or will certainly be harmed by the defendant's action, but whether their interests *may be* adversely affected") (Emphasis added)). In *U.S. v. Hooker Chemicals,* the court stated that the applicants for intervention showed sufficient interest where they alleged

> . . . specific injury in that the value of the property of the members has depreciated because of the presence of the chemicals contained within the Site and the public perception of the dangers these chemicals represent. The intervenors allege additionally that their health has been affected by exposure to the contaminants.

Id. In *Ohio v. Callaway*, 497 F.2d at 1242, the court stated that "conservation groups have alleged that their members use and enjoy the property that will be adversely affected by the projects and therefore have standing to maintain their action."

In this case, as demonstrated in the attached declarations, individual Sierra Club members possess interests that have been or may be affected by the outcome of the Administrator's suit against the Defendants. The Sierra Club's aims include protecting environmental resources in the areas where Defendants conduct the activities that are the subject of this lawsuit. Its individual members, many of whom live near, travel to, and recreate in or near streams where the Defendants' CWA violations occurred, are injured by such violations. In particular, the Defendants' CWA violations alleged in the Administrator's Complaint cause or contribute to water quality degradation in groundwater and streams that Sierra Club's members use or would like to use for drinking water, fishing, and recreational and aesthetic enjoyment. Such violations may impair stream ecosystem function and biodiversity, degrade aquatic habitat, and harm aquatic and other wildlife populations that the Sierra Club and its members seek to protect.

As demonstrated by the Declarations that are exhibits to this Motion, specific injury to individual members of the Sierra Club has resulted or may result from the Defendants' CWA

violations. For example, Mickey McCoy is a member of the Cumberland Chapter of the Sierra Club and lives in Inez, Kentucky. He was born and raised in Inez and has lived there most of his life working as a teacher at the local high school and once serving as the Mayor of Inez. His home on Rockcastle Creek is downstream from a number of sites where Massey Energy permits were cited for violations. Mr. McCoy also spends time on the Tug Fork River downstream from Massey Energy permits cited for violations. He once enjoyed these streams for recreation including swimming and boating but now refrains from these activities because of pollution and the unlawful discharges coming from the Massey Energy mining sites. He also refrains from drinking his tap water that comes from the Tug River for fear of health impacts from the pollution coming from mines upstream.

James E. Evans, a member of the Cumberland Chapter of the Sierra Club, has lived in Hatfield, Kentucky since 1979. He is a retired underground miner and was a mine foreman for Massey Coal Company for seventeen years. Mr. Evans owns property in Big Creek downstream from a number of Massey mines cited for violations of their permits. His home and his son's home are located on the property. The Creek was once home to many fish but now is, by all appearances, nearly dead. Mr. Evans is concerned about the degradation of Big Creek over the years and his and his family's loss of the use of the stream.

David Cooper, a member of the Cumberland Chapter of the Sierra Club, has lived in Lexington Kentucky for the past 17 years. Mr. Cooper frequently travels though the coalfields of Kentucky including downstream of the cited Massey facilities located on Wolf Creek, Coldwater Fork and Long Fork of Big Creek all of the Tug Fork. He has witnessed various blackwater spills in these streams and was a witness to the catastrophic Martin County

impoundment failure in 2000. Mr. Cooper is aesthetically offended by this pollution and refrains from using these streams because of it.

In short, these statements demonstrate that the Sierra Club's individual members have a direct and substantial interest in the outcome of the Administrator's suit against the Defendants, and therefore they fall within the category of citizens who are entitled to intervene as a matter of right under CWA § 505. Thus, the Sierra Club meets the requirements for intervention as a matter of right under Fed. R. Civ. P. 24(a)(1) and CWA § 505(b)(1)(B).

III. THE SIERRA CLUB ALSO MEETS THE REQUIREMENT FOR INTERVENTION OF RIGHT UNDER FED. R. CIV. P. 24(a)(2)

In addition to the foregoing, the Sierra Club meets the requirements for intervention of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, which provides for intervention of right:

> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and 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, unless the applicant's interest is adequately represented by existing parties.

Thus, "[a] party seeking intervention of right [under Rule 24(a)(2)] must show 'interest, impairment of interest, and inadequate representation.'" *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991); *Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n*, 646 F.2d 117, 121 (4th Cir. 1981). The Sierra Club satisfies each of these requirements.

A. The Sierra Club Demonstrates an Interest Sufficient to Permit Intervention of Right under Rule 24(a)(2)

As discussed above, members of the Sierra Club have legally protected interests that are or may be harmed by the Defendants' illegal pollutant discharges. The Court of Appeals for the Fourth Circuit has held that injury to such individualized interests satisfies Rule 24(a)(2). *See In*

re Sierra Club, 945 F.2d at 779 (noting that, in addition to their interest as parties to the related administrative proceedings, the proposed intervenors also demonstrated individualized injury from "the adverse effect of a specific decision . . . on their members' use and enjoyment of the fish and wildlife" of the waters affected by defendants' activities). Therefore, Sierra Club meets the interest requirement under Rule 24(a)(2) and should be allowed to intervene as of right.

B. Disposition of the Case Absent the Sierra Club's Participation May Impair or Impede Its Ability to Protect Its Interests and the Interests of Its Members

Disposition of this action in the absence of the Sierra Club's participation may, as a practical matter, impair or impede its ability to protect its members' unique interests in this matter. First, the Sierra Club brings to this case decades of knowledge and experience in working to enforce CWA and other legal limitations on destructive coal mining activities. It is therefore in a special position to contribute significantly to the disposition of the Administrator's claims. Absent participation in this case, the Sierra Club's ability to "bring [its] particular knowledge and expertise to bear on the statutory issue" may be impaired. *See* 76 A.L.R. Fed. 762 § 5[a] (citing *Southeast Alaska Conserv. Council v. Watson*, 701 F.2d 186 (Table) (9th Cir. 1983) (unpublished)).

Moreover, the Sierra Club's ability to protect its interests may be impaired due to the potentially preclusive effect of the Administrator's suit. In particular, under CWA § 505, no citizen suit can be filed once the Administrator files an enforcement action such as this one. 33 U.S.C. § 505(b)(1)(B) ("No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance with the standard, limitation, or order . . . ."). Moreover, the disposition of this case might result in an agreement that allows the Defendant to proceed with certain actions that degrade water quality in connection with these mines, an outcome that the Sierra Club could be prohibited from

challenging as a result of CWA § 505's restriction on citizen actions where the government is prosecuting an enforcement case against a potential violator.

Because EPA's action may result in a preclusive effect, the Sierra Club's ability to protect its unique interests by means of a CWA citizen suit could be impaired by the ultimate disposition of this case. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) ("An adverse decision in this suit would impair the society's interest in the preservation of birds and their habitats"); *U.S. v Reserve Mining Co.*, 56 F.R.D 408, 414 (D. Minn. 1972):

> Any judgment entered by this Court, whether maintaining the status quo or forcing [the defendant] to take corrective action, would be of binding force, and would leave the applicants without apparent judicial recourse to assert their claimed interests . . . . [H]owever, the availability of an alternative forum is not necessarily controlling. It should be sufficient to say that the ability of these applicants to represent their interests in the face of a final judgment by the Court or a settlement of this case, would be substantially impaired or impeded.

C. The Sierra Club's Interests are Not Adequately Represented by the Administrator

"[T]he application satisfies Rule 24(a)'s third requirement if it is shown that representation of its interest 'may be' inadequate." *Kentuckians for the Commonwealth*, 204 F.R.D. at 306; *In re Sierra Club*, 945 F.2d at 779. This requirement is fulfilled under the circumstances of this case, because the Sierra Club represents different interests than does the United States.

In *In re Sierra Club*, an industry group challenged a state environmental regulation and the Sierra Club moved to intervene on the side of the State. 945 F.2d at 777. The Fourth Circuit held that a state environmental agency did not adequately represent the interests of Sierra Club members for several reasons. First, Sierra Club's members had a more specific interest in the matter than that of the State. While the agency in theory represented the interests of all citizens of the State, Sierra Club represented "only a subset of citizens concerned with hazardous waste –

those who would prefer that few or no new hazardous waste facilities receive permits." *Id*. at 780. Second, Sierra Club was not beholden to the same variety of considerations that the state agency had to consider. In particular, "Sierra Club does not need to consider the interests of all South Carolina citizens and it does not have an obligation, though DHEC does, to consider its position vis-a-vis the national union." *Id*. Consequently, the two parties' interests, though overlapping in part, would diverge on some issues. Specifically:

> Although the interests of Sierra Club and South Carolina DHEC may converge at the point of arguing that Regulation 61-99 does not violate the Commerce Clause, the interests may diverge at points involving the appropriate disposition of sections of Regulation 61-99 that may not violate the Commerce Clause, the balance of hardships accruing to the parties if part of Regulation 61-99 is enjoined by preliminary injunction, and the public interest factor to be weighed in a preliminary injunction analysis.

Id. For these reasons, among others, the Fourth Circuit allowed the Sierra Club to intervene.

Similarly, this Court stated in *Kentuckians for the Commonwealth* that an industry association, and owners and lessors of surface and mineral rights at issue in that action, had "interests in the action that are divergent from those named Defendants, who are regulators, such that representation of their interests may be inadequate." 204 F.R.D. at 306. Therefore, intervention was allowed.

Also instructive is a West Virginia Supreme Court of Appeals case, *State ex rel. Ball v. Cummings*, 540 S.E.2d 917, 926 (W.Va. 1999), involving a CWA enforcement action filed by the West Virginia Department of Environmental Protection ("DEP"), which foreclosed several citizens' plans to file their own suit. The court granted the citizens' request to intervene as of right, based on the citizen suit-precluding effect of CWA § 505(b)(1)(B), as well as inadequate representation of the citizen group's interests by DEP. *Id*. In so ruling the court noted that "West Virginia Rule of Civil Procedure 24(a)(2) and Federal Rule of Civil Procedure 24(a)(2),

upon which it is based, are substantially similar." *Id*. at 923. Regarding inadequate representation by DEP of the citizens' interests, the court stated:

> [T]he DEP action will likely be disposed of by a consent order between the DEP and the defendants. This order may enact a longer deadline for the construction of a new waste water treatment facility or other abatement activities than the petitioners are willing to accept. Also, we agree with the petitioners that an opportunity for comment on any proposed consent order, while usually effective to address the concerns of the public at large, is a poor substitute for actual participation by parties with the immediate interests of the petitioners.

Id. These reasons supporting intervention apply equally here.

Finally, as representatives of Kentucky's citizens who are particularly interested in protecting the natural resources of that State from destructive effects of coal mining activities, the Sierra Club is in a unique position to represent its members' individual interests vis-à-vis the United States. As one federal district court has explained,

> [i]t is true that the environmental groups represent only a portion of Minnesota citizens interested in this lawsuit, but it is also true that the State of Minnesota is not a party to this lawsuit. This raises the possibility that the interests of the citizens of Minnesota who are represented by the environmental groups would be inadequately represented by the United States. While there may be a similarity of interests asserted between the environmental groups and the United States, the similarity does not necessarily mean that there will be adequate representation of those interests by the United States.
> * * *
> In addition, there may be a difference in approach between the environmental groups and the United States. The United States is charged with representing a broad public interest, and, as the Government of the people, must represent varying interest, industry as well as individuals.

U.S. v. Reserve Mining Co., 56 F.R.D. at 419.

Thus, although the Sierra Club and the Administrator share the general aim of enforcing CWA effluent limitations and permit requirements and halting unpermitted pollutant discharges, their interests may diverge on subsequent issues. In particular, the Sierra Club is not required, as the Administrator may be, to accord consideration or weight to a variety of factors not related to

water quality in advocating particular remedies or schedules for compliance. Therefore, within the meaning of Rule 24(b), representation of the Sierra Club's interests by the Administrator "'may be' inadequate." *See Kentuckians for the Commonwealth*, 204 F.R.D. at 306.

Thus, for all the reasons discussed above, the Sierra Club meets all requirements for intervention as a matter of right under Fed. R. Civ. P. 24(a) and CWA § 505(b)(1)(B).

IV. THE SIERRA CLUB ALSO MEETS THE REQUIREMENTS FOR PERMISSIVE INTERVENTION

As discussed above, the Sierra Club meets all the requirements for intervention as a matter of right and should therefore be allowed to participate fully in this action. Alternatively, because it also meets the requirements under Rule 24(b), the Sierra Club requests leave to intervene by permission of the Court.

Rule 24(b)(2) provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). The Supreme Court has stated that Rule 24(b) "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. U.S. Realty & Improvement Co*., 310 U.S. 434, 459 (1940). A leading treatise has explained:

> The rule does not specify any particular interest that will suffice for permissive intervention…. Indeed, it appears that the intervenor-by-permission does not even have to be a person who would have been a proper party at the beginning of the suit….
>
> Close scrutiny of the kind of interest the intervenor is thought to have seems especially inappropriate under Rule 24 since it makes no mention of interest. The rule requires only that his claim or defense and the main action have a question of law or fact in common. . . . If there is a common question of law or fact, the requirement of the rule has been satisfied and it is then discretionary with the court whether to allow intervention.

7C Wright, Miller & Kane, Federal Practice and Procedure § 1911, 357-63 (2d ed.1986). *See also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-1109, 1111 (9th Cir. 2002)

(holding that permissive intervention requirements were met where, "though intervenors do not have a direct interest in the government rulemaking, they have asserted an interest in the use and enjoyment of roadless lands, and in the conservation of roadless lands, in the national forest lands subject to the Roadless Rule, and they assert 'defenses' of the government rulemaking that squarely respond to the challenges made by plaintiffs in the main action"). Here, the Sierra Club has amply demonstrated an interest in the use and enjoyment of the same waters that are or may be impaired by unlawful pollutant discharges stemming from the Defendants' activities. Because they share the Administrator's goal of halting the Defendants' violations of CWA effluent limitations, permit limitations, and other requirements aimed at protecting waters, the Sierra Club's "claims" share common questions of law and fact with those of the Administrator. Accordingly, it should be allowed to intervene by permission.

CONCLUSION

For all the foregoing reasons, the Court should grant the Sierra Club leave to intervene in this case as a matter of right under Fed. R. Civ. P. 24(a)(1) and CWA § 505(b)(1)(B) or, alternatively, grant leave to intervene of right under Fed. R. Civ. P. 24(a)(2). If the Court concludes that the Sierra Club does not meet the requirements for intervention of right, it requests leave to intervene by permission under Fed. R. Civ. P. 24(b).

Respectfully submitted by Counsel for the Sierra Club this 27th day of August, 2007.

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 2:07-0299
MASSEY ENERGY COMPANY, *et al.*,	)	
Defendants.	)	

DECLARATION OF MICKEY MCCOY

I, Mickey McCoy, state and affirm as follows:

1. I currently live at P.O. Box 922, Cassady Avenue, Inez, KY 41224. I was born and raised in Inez and have lived here most of my life. I teach at the local high school and I served as Inez's mayor for several years. I am very gratified that, as mayor, I was able to help bring about the installation of our first sewage system.

2. I am a member of the Cumberland Chapter of the Sierra Club. The Sierra Club is a national non-profit membership organization with a chapter in Kentucky that works to protect members of coal communities from the destruction of their mountains, streams, and ways of life. I joined the Sierra Club because of their efforts to protect Kentucky's land and water resources from the effects of illegal coal mining.

3. Martin County Coal Corporation holds Surface Mining Reclamation and Control Act ("SMCRA") permit number 8800032 and Clean Water Act ("CWA") permit number KYG041306, which regulate discharges into Middle Fork Rockcastle Creek. Martin County Coal Corporation holds SMCRA permit number 4805074 and CWA permit number KYG042789, which regulate discharges into Middle Fork Rockcastle Creek. Martin County Coal Corporation holds SMCRA permit number 8800043 and CWA permit number KYG040931, which regulate discharges into Middle Fork Rockcastle Creek. Middle Fork Rockcastle Creek flows into Rockcastle Creek which empties into Tug Fork of the Big Sandy River. Martin County Coal Corporation holds SMCRA permit number 8800109 and CWA permit number KYG044895, which regulate discharges into Coldwater Fork. Martin County Coal Corporation holds SMCRA permit number 8805147 and CWA permit number KYG045204, which regulate discharges into Coldwater Fork. Martin County Coal Corporation holds SMCRA permit number 6808002 and CWA permit number KY0054810, which regulate discharges into Coldwater Fork. Coldwater Fork flows into Rockcastle Creek which empties into Tug Fork of the Big Sandy River.

4. I live on Rockcastle Creek downstream from the permits listed above. The Creek is less than forty yards from my living room window. I grew up in and around the Creek, fished it, and played in it, but I would not dip my big toe in it anymore. If the water quality in Rockcastle Creek was improved, free of unlawful discharges of pollutants, I would enjoy wading and fishing in it again.

5. Long Fork Coal Company holds SMCRA permit number 8988068 and CWA permit number KY0000396, which regulate discharges into Long Fork of Big Creek. Sidney Coal Company holds SMCRA permit number 8985743 and CWA permit number KYG044633, which regulate discharges into Long Fork of Big Creek. Sidney Coal Company holds SMCRA permit number 8985746 and CWA permit number KYG043433, which regulate discharges into Long Fork of Big Creek. Sidney Coal Company holds SMCRA permit number 8985736 and CWA permit number KYG041666, which regulate discharges into Long Fork of Big Creek. Long Fork flows into Big Creek which empties into Tug Fork of the Big Sandy River.

6. Martin County Coal Corporation holds SMCRA permit number 6808002 and CWA permit number KY0054810, which regulate discharges into Wolf Creek. Martin County Coal Corporation holds SMCRA permit number 8800103 and CWA permit number KYG044684, which regulate discharges into Wolf Creek. Wolf Creek flows into Tug Fork of the Big Sandy River.

7. I own a canoe and once enjoyed canoeing on local rivers and streams including Tug Fork. However, I refuse to put my canoe onto the Tug Fork now because I am concerned about pollution in the water potentially harming my health as well as my boat. This pollution is the result of ongoing CWA and SMCRA violations in the Tug Fork and its tributaries.

8. The tap water in my home comes from the Crum Reservoir, which pumps its water from the Tug Fork. I refuse to drink any tap water in my house, or even to make ice with it. I am very afraid that drinking this water, which I know has received discharges from numerous mines upstream, would be hazardous to my health and the health of my family. As a result, we buy bottled water to drink, make ice, and even can vegetables from our garden. We still must use tap water for showering and washing dishes and clothes and I worry about the health effects that this has on my family and me. I believe this continued pollution has cost myself, my family, and many other residents of Martin County thousands of dollars because we cannot trust that the water flowing from our taps is not polluted by mining waste discharges into the Tug Fork and its tributaries.

9. As a lifelong resident and civic leader of Inez, I am very concerned about the negative health effects the mining discharges are likely to have on the local population. Many of my neighbors, former constituents when I was Mayor, obtain their drinking water from the rivers and streams in the area, and use them for fishing, swimming, and boating. The consistent pollution of our local waterways is troubling to me because many people do not have any option except to use that water. I fear that the ongoing pollution will cause health problems for the members of my community.

10. As a teacher in the local high school I am also concerned about the effects the water pollution from all the mining in the area will have on the children I teach. The way I look at it is that there is no way the mining companies can do all this damage to the watershed and not expect significant negative effects on the people who live along and use the streams and rivers the mines discharge into.

11. I have been involved in this struggle for a long time. We have lobbied the state legislature for years for an emergency disaster plan in case of a major sludge blowout. All of us live downstream from that eventuality. But despite the federal government's statement that there should be such a plan, the state legislature has turned deaf ears.

12. A group of us in Martin County received a grant from the Kentucky Environmental Quality Council to enable us to conduct water monitoring of tap water drawn from the Tug Fork. This has been a serious concern since the major sludge blowout in October of 2000, but our concerns continue since additional discharges have been ongoing. With the grant, we sampled sludge in hot water heaters that contained extremely high residues of arsenic and barium. Arsenic in my church's water, for example, was far above the safety standards set by the EPA.

13. I believe that if the court were to require Massey Coal Company and its subsidiaries to comply with the Clean Water Act and their mining permits the mining would less harmful to my family's ability to use and enjoy our property.

14. I also believe that it is important that the public be allowed to participate in the process of enforcing CWA and SMCRA permits. Public intervention is the lawsuit that the federal government has finally brought against Massey Coal Company and its subsidiaries would promote that public interest.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct. Executed on this 21st day of August 2007.

Mickey McCoy

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 2:07-0299
MASSEY ENERGY COMPANY, *et al.*,	)	
Defendants.	)	

DECLARATION OF JAMES E. EVANS

I, James E. Evans, state and affirm as follows:

1. I currently live at 114 Hatfield, KY 41514, and have lived there since 1979. I am a retired underground miner. I was a mine foreman for Massey Coal Company for seventeen years.

2. I am a member of the Cumberland Chapter of the Sierra Club. The Sierra Club is a national non-profit membership organization with a chapter in Kentucky that works to protect members of coal communities from the destruction of their mountains, streams, and ways of life. I joined the Sierra Club because of their efforts to protect Kentucky's land and water resources from the effects of illegal coal mining.

3. I own approximately forty acres on Big Creek, which runs through my property. My house and my son's house are on the property.

4. Massey Coal Company and some of its subsidiaries hold Clean Water Act ("CWA") and surface mining permits in the upper waters of Big Creek near our houses. These include Surface Mining Reclamation and Control Act ("SMCRA") permit numbers 8989091, 8985168, and 8985986, the latter two of which are above our houses. Sidney Coal Company holds SMCRA permit number 8989091 and CWA permit KYG045161, which regulate discharges into Big Creek. Aero Energy Inc. & Clean Energy Mining Co. & Freedom Energy Mining Co. & Sidney Coal Co., Inc. hold SMCRA permit number 8985168 and CWA permit number KY0025950, which regulate discharges into Big Creek. Sidney Coal Company holds SMCRA permit number 8985986 and CWA permit number KYG040365, which regulate discharges into Big Creek. Massey Coal Company and these subsidiaries have been responsible for many spills and discharges into Big Creek and its tributaries, and these are ongoing. Diesel spills that go into creeks and streams have also occurred several times. This past week one was reported by the *Williamson Daily News*.

5. Big Creek is by all appearances dead. It once held many smallmouth bass, catfish, smaller fish, and other aquatic animals and insects. We have experienced fish kills in both 2005 and 2006. I have stored some of the fish in my freezer hoping that someone in some lab could tell me exactly what

happened. I expect they died from a release of sediment and heavy metals from the impoundments above us. I did walk above (inby) those impoundments after the fish kills and found that Big Creek seemed healthy above (inby) the mining operations. I could see a couple of fish swimming by the discharge point of the impoundment.

6. Our homes are directly downstream of a series of three settlement ponds and two impoundments. Coal is cleaned at a tipple above these water bodies. The fine dust and metals that come out of this cleaning process (called "fines") are discharged into them. Hence the term "blackwater" that folks around here use to describe the waters that leak and are discharged from these water bodies. I believe that the companies may have discharged black waters on weekends when there are no state inspectors around or discharged black waters after the state inspectors' regular shifts were over.

7. I remember my children happily playing in the clean waters of Big Creek. Sadly, we no longer allow our three grandchildren to play in Big Creek, a joy of a country childhood deprived to them by water pollution caused by the coal companies. If the water quality in Big Creek was improved, free of unlawful discharges of pollutants, I would allow my grandchildren to play there again.

8. I understand that one of the impoundments perched above us holds one million gallons of polluted water. This impoundment—along with the others—is the source of the blackwater that continues to pollute Big Creek through periodic spills and discharges. But my even bigger concern is that these dams would completely breach. And this would not be unprecedented in Martin and Pike Counties. Big Creek empties into the Tug Fork of the Big Sandy River. The Tug is severely polluted by surface mining operations, including a blowout in October, 2000, that released millions of gallons of blackwater and sludge into the river.

9. I believe that if the court were to require Massey Coal Company and its subsidiaries to comply with the Clean Water Act and their mining permits, particularly by mitigating pollution of Big Creek, the mining would be less harmful to my family's ability to use and enjoy our property.

10. I also believe that it is important that the public be allowed to participate in the process of enforcing Clean Water Act permits. Public intervention in the lawsuit that the federal government has brought against Massey Coal Company would further that public interest.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct. Executed on this 21ST day of August 2007.

James E. Evans

James E. Evans

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 2:07-0299
MASSEY ENERGY COMPANY, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF DAVID COOPER

I, David Cooper, state and affirm as follows:

1. I live at 608 Allen Ct, Lexington, KY 40505-1824. I have lived in Kentucky for seventeen years.

2. I am a member of the Cumberland Chapter of the Sierra Club. The Sierra Club is a national non-profit membership organization with a chapter in Kentucky that works to protect members of coal communities from the destruction of their mountains, streams, and ways of life. I support the Sierra Club's efforts to protect Kentucky's land and water resources from the effects of coal mining activities.

3. I am very familiar with the negative impacts of surface mining. In October of 2000, when a coal sludge impoundment in Martin County, KY broke through an underground mine, I witnessed firsthand the effects of the over 300 million gallons of sludge that poured into two tributaries of the Tug Fork – Wolf Creek and Coldwater Fork. I visited Wolf Creek and Coldwater Fork numerous times and was outraged by the oozing sludge and blackwater that poisoned at least 80 miles of waterways. This catastrophe spurred me to eventually leave my job as an engineer and spend a year working for the Ohio Valley Environmental Coalition (OVEC), a nonprofit environmental organization working to safeguard Appalachian lands and waters from large scale surface coal mining. For the last four years, I have traveled across the Midwest presenting *The Mountaintop Removal Road Show* – a slide show about the impacts of mountaintop removal on coalfield residents, communities, and the environment. I have also shown the Appalshop documentary film about the Martin County spill, *Sludge*, to many different audiences.

4. Martin County Coal Corporation holds Surface Mining Reclamation and Control Act ("SMCRA") permit number 8800103 and Clean Water Act ("CWA") permit number KYG044684, which regulate discharges into Wolf Creek. Martin County Coal Corporation holds SMCRA permit number 8800109 and CWA permit number KYG044895, which regulate discharges into Coldwater Fork. Martin County Coal Corporation holds SMCRA permit number 8805147 and CWA permit number KYG045204, which regulate discharges into Coldwater Fork.

Martin County Coal Corporation holds SMCRA permit number 6808002 and CWA permit number KY0054810, which regulate discharges into Wolf Creek and Coldwater Fork. Wolf Creek and Coldwater Fork flow into the Tug Fork of the Big Sandy River.

5. Sidney Coal Company holds SMCRA permit number 8985743 and CWA permit number KYG044633, which regulate discharges into Long Fork of Big Creek. Sidney Coal Company holds SMCRA permit number 8985746 and CWA permit number KYG043433, which regulate discharges into Long Fork of Big Creek. Sidney Coal Company holds SMCRA permit number 8985736 and CWA permit number KYG041666, which regulate discharges into Long Fork of Big Creek. Long Fork Coal Company holds SMCRA permit number 8988068 and CWA permit number KY0000396, which regulate discharges into Long Fork of Big Creek. Long Fork flows into Big Creek which empties into Tug Fork of the Big Sandy River.

6. On June 30, 2005, I witnessed a blackwater discharge into Long Fork from the Long Fork Coal Prep Plant, SMCRA permit number 8988068 and CWA permit number KY0000396. I photographed the blackwater downstream from the plant and the clear water upstream from the site. I documented and reported the illegal discharges to the Kentucky Environment and Public Protection Cabinet.

7. I enjoy watching for wildlife, taking photography, and walking along and wading in streams and creeks throughout eastern Kentucky. I would engage in these activities at Cold Fork, Wolf Creek, and Big Creek in the future if they were not so polluted by ongoing illegal mining discharges. The cumulative impact of these discharges offends my aesthetic experience of these waterways. I am also concerned that these polluted waters could negatively affect my health if I were to come into contact with the water while recreating along the streams.

8. I believe that if the court were to require Massey Energy Company and its subsidiaries to comply with the Clean Water Act and their mining permits, particularly by mitigating discharges, the mining would be less harmful to my recreational use and aesthetic enjoyment of Cold Fork, Wolf Creek, and Big Creek.

9. I also believe that it is important that the public be allowed to participate in the process of enforcing CWA and SMCRA permits. Public intervention is the lawsuit that the federal government has finally brought against Massey Energy Company and its subsidiaries would promote that public interest.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22 day of AUGUST 2007.

David Cooper

CERTIFICATE OF SERVICE

I hereby certify that the foregoing, **Sierra Club's Motion to Intervene as of Right** has been served electronically through the CM/ECF system on this 27th day of August, 2007, upon the following:

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I hereby certify that the foregoing Sierra Club's Motion to Intervene As of Right has been served by United States first-class mail, postage pre-paid, this 27th day of August, 2007, on the following:

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/s/ Zoë Maxfield

Zoë Maxfield