ORAL ARGUMENT NOT YET SCHEDULED

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

MURRAY ENERGY CORP., *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 15-1385 (consolidated with No. 15-1392)

MOTION OF HEALTH AND ENVIRONMENTAL ORGANIZATIONS TO INTERVENE ON BEHALF OF RESPONDENT

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27, and Rule 15(b) of this Court, American Lung Association, Sierra Club, Natural Resources Defense Council ("NRDC"), and Physicians for Social Responsibility (collectively, "Health and Environmental Organizations") hereby respectfully move to intervene in support of Respondent ("EPA") in the above-captioned petition for review, and in any other cases, including later filed ones, involving the same agency action except for any filed by any of the same Health and Environmental Organizations, per D.C. Circuit Rule 15(b). The petition that is the subject of this intervention motion seeks review of the final rulemaking promulgated by EPA titled "National Ambient Air Quality Standards for Ozone," published at 80 Fed. Reg. 65,292 (Oct. 26, 2015) ("Final Rule").

BACKGROUND

The Clean Air Act requires EPA to adopt and periodically update National Ambient Air Quality Standards for harmful air pollutants, including ozone. 42 U.S.C. §7409. The standards must include "primary" standards requisite to protect public health with an adequate margin of safety and "secondary" standards requisite to protect public welfare against all "known or anticipated adverse effects." *Id.* §7409(b)(1)-(2). Once in place, standards are to be implemented by enforceable regulatory programs sufficient to ensure that air quality will meet the standards. 42 U.S.C. §§7410(a), (c), 7502; *see also id.* §§7511-7511f (provisions specific to areas that do not meet ozone standards).

The petition for review here addresses EPA's 2015 revision of the standards for ozone. Ozone, the main component of smog, is a corrosive air pollutant that inflames the lungs, can leave people gasping for breath, and is linked to premature deaths. *See Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 359 (D.C. Cir. 2002); 80 Fed. Reg. 65,308/3-09/1. Ozone is not emitted directly into the atmosphere, but results from the reaction of precursor chemicals with sunlight in the atmosphere. *Am. Trucking Ass'ns*, 283 F.3d at 359. Cars, power plants, and factories are among the primary sources of these precursors. *Id.*; *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981).

In 2008, EPA recognized that ozone was more dangerous than it had previously understood and accordingly strengthened the primary and secondary ozone standards to a level of 0.075 parts per million ("ppm").[1] 73 Fed. Reg. 16,436 (Mar. 27, 2008). Subsequently, EPA missed a statutory deadline for again updating the ozone standards, and, following litigation, was ordered to complete a review and any revision of the standards by October 1, 2015. Order 2, *Sierra Club v. EPA*, No. 4:13-cv-02809-YGR (N.D. Cal. Apr. 30, 2014). The resulting Final Rule was published in the Federal Register on October 26, 2015. In it, EPA found that the 2008 standards were not requisite to protect public health and welfare, and made the ozone standards more protective by setting their level at 0.070 ppm. 80 Fed. Reg. 65,292/1. EPA also discussed implementation of the standards and made certain changes to air quality monitoring requirements and other reporting requirements. *Id.* 65,410/1-30/3, 65,434/3-44/2.

Health and Environmental Organizations are national nonprofit groups that advocate for stronger health protections and a cleaner environment for their members and the general public. American Lung Association is dedicated to saving lives through the prevention of lung disease and the promotion of lung

[1] As well as the "level," the standards consist of other components that go into calculating whether a given area complies with the standards and is thus "designated" an "attainment" area or a "nonattainment" area. *See Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 516 (D.C. Cir. 2009). Those other components are not relevant to this motion.

health. Sierra Club is dedicated to protecting and restoring the quality of the natural and human environment. NRDC works to protect and restore the environment, including air quality. Physicians for Social Responsibility works to protect public health and prevent degradation of the environment by giving voice to the values and expertise of medicine and public health. Collectively, they have hundreds of thousands of members in all states and the District of Columbia, including in areas that do not meet the new 2015 ozone standards. They have long engaged in litigation and other advocacy to advance their organizational missions to protect public health and the environment against, among other threats, air pollution.[2]

These organizations submitted extensive comments on the EPA proposal that led to adoption of the Final Rule challenged by the petitioners here. DKT[3]-1173 (Physicians for Social Responsibility); DKT-2720 (American Lung Association, Sierra Club, and NRDC, among others). Many members and staff of

[2] *E.g.*, *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (all the Health and Environmental Organizations intervened to defend EPA rule governing air pollution emitted from power plants); *Mississippi v. EPA*, 744 F.3d 1334 (D.C. Cir. 2013) (American Lung Association and NRDC challenged 2008 ozone standards as insufficiently protective of public health and welfare and intervened to defend them against industry and state challenge); *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998) (American Lung Association challenged EPA national ambient air quality standard for sulfur dioxide).

[3] For concision, we use "DKT" to stand for "EPA-HQ-OAR-2008-0699." Thus, for example, "DKT-1173" means "EPA-HQ-OAR-2008-0699-1173."

these organizations also testified at public hearings on the standards.[4] Health and Environmental Organizations argued that the 2008 standards were not adequate to protect public health and welfare and urged EPA to adopt revised standards even more protective than those ultimately adopted by the agency in the Final Rule at issue here. DKT-1173 at 2 (calling for primary standard with 0.060 ppm level); DKT-2720 at 11-12 (calling for primary standard with 0.060 ppm level and distinct secondary standard better calibrated to protect public welfare); *see* 80 Fed. Reg. 65,292/1 (setting both standards to be identical, with 0.070 ppm level).

By contrast, it appears likely that Petitioner will challenge the Final Rule as being overly strict. Petitioner filed comments in the rulemaking process to make the sole argument that EPA should retain the 2008 standards without change. DKT-3817 at 68 ("For all these reasons, EPA should refrain from lowering either the primary or secondary [ozone] standards."). In this case, it is therefore reasonable to expect that Petitioner will advance similar arguments for a less protective standard than the Final Rule adopted.

[4] *E.g.*, DKT-4245 at 281-84 (Sierra Club); DKT-4246 at 22-26, 31-36, 221-25, 246-51 (American Lung Association, Sierra Club, and Physicians for Social Responsibility); DKT-4247 at 349-52 (Sierra Club).

ARGUMENT

Under Federal Rule of Appellate Procedure 15(d), a motion to intervene need only make "a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d). This Court has noted that "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." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (internal quotation marks removed) (reversing denial of intervention under Fed. R. Civ. P. 24(a)). Health and Environmental Organizations satisfy this test, as explained below and shown by the attached declarations.

I. HEALTH AND ENVIRONMENTAL ORGANIZATIONS' STATEMENT OF INTEREST AND GROUNDS

Health and Environmental Organizations' members live, work, and recreate in areas with ozone levels that exceed the level the Final Rule establishes, and weakened ozone standards would prolong their exposure to harmful pollution. *See* Declarations. Such areas that have ozone levels above the new 0.070 ppm standards include the Detroit, Michigan, area; Cincinnati, Ohio, area; Columbus, Ohio, area; Hartford, Connecticut, area; the Baltimore, Maryland, area; and numerous others. *See* EPA, 2014 Ozone Design Values, tbls.1b, 4 (Design Values in Areas Previously Designated Nonattainment for the 1997 8-Hour Ozone

NAAQS, County-Level Design Values for the 2008 8-hour Ozone NAAQS), www3.epa.gov/airtrends/pdfs/Ozone_DesignValues_20122014_FINAL_08_03_15.xlsx (air quality level in Detroit area is 0.074 ppm; in Cincinnati area, 0.075 ppm; in Columbus area, 0.075 ppm; in Hartford area ("Greater Connecticut"), 0.080 ppm; in Baltimore area, 0.075 ppm; in Washington, DC, area, 0.076 ppm; in Tulsa County, Oklahoma, 0.074 ppm).

Health and Environmental Organizations seek to intervene to oppose any attempts by Petitioner to have the Final Rule weakened. Fed. R. App. P. 15(d). As described above, Petitioner is likely to seek to weaken the protectiveness of the Final Rule. Such a weakening would allow exposure of Health and Environmental Organizations' members to levels of ozone pollution that—according to EPA, its independent science advisors, and the nation's leading medical societies—endangers their health and welfare.[5] Health and Environmental Organizations have strong interests in protecting their members' health and ability to enjoy everyday activities in their communities, and thus strong interests in preventing weakening

[5] *E.g.*, 80 Fed. Reg. 65,342/2-3, 65,389/1; DKT-0190 at ii-iii (Clean Air Scientific Advisory Committee ("CASAC") Letter, June 26, 2014) (finding "clear scientific support for the need to revise the [primary] standard" and "that the current secondary standard is not adequate to protect against current and anticipated welfare effects of ozone on vegetation"); DKT-3863 at 2 (comments of American Academy of Pediatrics, American Heart Association, American Medical Association, and others) ("We share the conclusion repeatedly presented to EPA by the CASAC: EPA cannot justify retention of the current standard based on the health evidence.").

of the regulations governing the maximum level of ozone pollution allowed in the air that their members breathe.

For all the foregoing reasons, Health and Environmental Organizations have a clear "interest" in this matter within the meaning of Federal Rule of Appellate Procedure 15(d). Further, that interest and the injury Health and Environmental Organizations' members face from a weakening or reversal of the Final Rule are more than sufficient to satisfy the requirements of Article III standing (were such a demonstration necessary for parties who, as here, seek to intervene in support of respondents[6]). *See, e.g.*, *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 317-18 (D.C. Cir. 2015) (intervention justified where "a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit"); *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000) (environmental group has standing to enforce pollution

[6] *See, e.g.*, *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316, 319-20 (D.C. Cir. 2015) (discussing case law and holding intervenor-defendants must show Article III but not prudential standing); *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193-94 (D.C. Cir. 2013); *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013). *But see Bond v. United States*, 131 S. Ct. 2355, 2361-62 (2011) (Article III requirements apply to those "who seek[] to initiate or continue proceedings in federal court," not to those who defend against such proceedings); *McConnell v. FEC*, 540 U.S. 93, 233 (2003) (holding that where the position of the respondent-intervenors is identical to that of the agency and the agency's standing is unquestionable, no separate inquiry regarding intervenor standing is necessary), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

limits where members have reasonable concern about adverse effects of pollution in area they use); *Sierra Club v. EPA*, 129 F.3d 137, 139 (D.C. Cir. 1997) (environmental group with members in affected areas has standing to challenge weakening of Clean Air Act requirements for such areas).

II. HEALTH AND ENVIRONMENTAL ORGANIZATIONS' INTERVENTION IS WARRANTED

Health and Environmental Organizations' interests would not be adequately represented in the absence of intervention. *Cf. Dimond v. District of Columbia*, 792 F.2d 179, 192-94 (D.C. Cir. 1986). The agency's interpretation of the factual and legal issues in this case may differ from Health and Environmental Organizations' interpretation. For example, Health and Environmental Organizations have repeatedly argued that a 0.070 ppm primary ozone standard is not strong enough to protect human health and public welfare. *E.g.*, DKT-2720 at 59-134; *see* DKT-1173 at 3-6 (0.065 ppm standard would be inadequate). Without Health and Environmental Organizations' intervention, the Court will hear only EPA's arguments. This Court "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003); *see also NRDC v. Costle*, 561 F.2d

904, 913 (D.C. Cir. 1977).[7] That is especially true here, where the Health and Environmental Organizations submitted extensive comments during the rulemaking arguing that the scientific and medical evidence called for much stronger standards than those adopted in the Final Rule. Indeed, Movants have frequently disagreed with—and challenged in rulemaking comments and court proceedings—EPA's actions and inaction under the Clean Air Act.[8] Health and Environmental Organizations cannot rely on EPA to make all arguments that Health and Environmental Organizations believe should be advanced to protect their interests and their members' interests.

Health and Environmental Organizations respectfully submit that their views on the arguments advanced by petitioners will be of assistance to the Court. A party seeking to intervene "may also be likely to serve as a vigorous and helpful supplement to EPA's defense." *NRDC*, 561 F.2d at 912-13. Health and environmental citizens' groups with members living and working in areas with

[7] This Court has permitted Health and Environmental Organizations to intervene in support of EPA in past suits where petitioners sought to weaken a rule. *E.g.*, *Nat'l Ass'n of Mfrs. v. EPA*, 750 F.3d 921 (D.C. Cir. 2014) (American Lung Association, Sierra Club, and NRDC); *White Stallion Energy Ctr.*, 748 F.3d 1222 (all the Health and Environmental Organizations).

[8] *E.g.*, *Mississippi*, 744 F.3d 1334 (American Lung Association and NRDC); *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (Sierra Club, NRDC, and, as intervenor-petitioner, Physicians for Social Responsibility).

ozone pollution problems offer a perspective different from the one EPA is likely to provide.

Health and Environmental Organizations' participation as intervenors in support of EPA will not delay the proceedings or prejudice any party. This motion to intervene is being timely filed within the 30-day period allowed under Federal Rule of Appellate Procedure 15(d). As Health and Environmental Organizations share common interests and intend to file briefs and other submissions jointly, as directed by D.C. Circuit Rule 28(d)(4), their participation will be conducted efficiently. The Court has not yet scheduled oral argument or established a briefing schedule. Health and Environmental Organizations' participation will not undermine the efficient and timely adjudication of this case.

CONCLUSION

In sum, Health and Environmental Organizations meet the requirements for intervention: They have an interest relating to the subject matter of this action and legitimate grounds for seeking to participate in the case. This motion is also timely filed, and granting it will not delay the proceedings or prejudice any party. Accordingly, Health and Environmental Organizations respectfully request leave to intervene in the above-captioned petition for review, and in any other cases, including later filed ones, involving the same agency action except for any filed by any of the same Health and Environmental Organizations.

DATED: November 24, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2015, I have served the foregoing **Motion of Health and Environmental Organizations to Intervene on Behalf of Respondent** and its attachments on all registered counsel through the court's electronic filing system (ECF).

/s/Seth L. Johnson
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