

ORAL ARGUMENT POSTPONED

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

)	
MURRAY ENERGY COPORATION,)	
)	
Petitioner,)	
)	Case No. 15-1385
v.)	(Consolidated with Nos.
)	15-1392, 15-1490,
UNITED STATES ENVIRONMENTAL)	15-1491, and 15-1494)
PROTECTION AGENCY,)	
)	
Respondent.)	
)	

INDUSTRY AND STATE PETITIONERS’ OPPOSITION TO MOTION OF CALIFORNIA *ET AL.* TO INTERVENE OUT OF TIME

Petitioners in Case No. 15-1385, Murray Energy Corporation, and in Case No. 15-1491, the Chamber of Commerce of the United States of America *et al.*,¹ (jointly “Industry Petitioners”), and petitioners and petitioner-intervenors the States of Arizona, Wisconsin, Arkansas, Louisiana, North Dakota, Oklahoma, Utah, and the New Mexico Environment Department in Case No. 15-1392 and the State of Texas and Texas Commission on Air Quality in case No. 15-1494 (jointly “State

¹ The other petitioners in No. 15-1491 are: the National Association of Manufacturers, the American Petroleum Institute, the Utility Air Regulatory Group, the Portland Cement Association, the American Coke and Coal Chemicals Institute, the Independent Petroleum Association of America, the National Oilseed Processors Association, and the American Fuel & Petrochemical Manufacturers.

Petitioners”), submit this opposition to the Motion To Intervene filed by the States of California, New York, Rhode Island, Vermont, and Washington; the Commonwealth of Massachusetts; the Delaware Department of Natural Resources & Environmental Control; and the District of Columbia, (jointly “California Movants”), filed on July 6, 2017, long after the 30-day deadline has passed for such motions under Federal Rule of Appellate Procedure 15(d).

INTRODUCTION AND SUMMARY

After arriving very late in the present case as amici curiae and then seeking an extension of time in which to file their brief, the California Amici—plus an additional State appearing for the first time—now ask to be treated as intervenors. Such a request is due 30 days after the petition for review is filed in this Court. Fed. R. App. P. 15(d). California’s request arrives 619 days after the first-filed petition in these consolidated cases. The Court should deny the motion as untimely.

ARGUMENT

Rule 15(d) of the Federal Rules of Appellate Procedure provides that a motion to intervene “*must* be filed within 30 days after the petition for review is filed.” Fed. R. App. P. 15(d) (emphasis added). The first petition for review in this consolidated matter, which involves challenges to the U.S. Environmental Protection Agency’s (“EPA’s”) revised National Ambient Air Quality Standards

(“NAAQS”) for ozone, 80 Fed. Reg. 65292 (Oct. 26, 2015), was filed on October 26, 2015. In the year-and-a-half since that petition, the parties, intervenors, and amici have fully briefed this case, and the parties and intervenors have reached a carefully negotiated agreement regarding the division of time for oral argument.

To permit the California Movants’ intervention so long after the initiation of these cases would “sanction[] an undisputed failure to comply with applicable . . . rules.” *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1366–68 (D.C. Cir. 1988). For this reason alone, the motion should be denied.

The California Movants argue that “good cause” exists for this Court to extend the Rule 15(d) deadline by eighteen months. The California Movants allege that they should be allowed to intervene at this late date because they only recently learned that, in their view, EPA “will no longer vigorously defend” the revised ozone NAAQS, and thus they wish to intervene “in order to provide a vigorous defense” of the standard. Motion at 3, 14. Movants argue that EPA’s alleged change in position resets the clock on Rule 15(d) and renders their motion for intervention timely. For three reasons—one legal and two factual—these developments do not constitute “good cause.”

First, there is no legal authority for extending Rule 15(d)’s deadlines based on one party’s perceived vigor in defending an argument. Both cases cited by the California Movants for the proposition that good cause exists involved district

court intervention under Federal Rule of Civil Procedure 24—a completely different rule that lacks Federal Rule of Appellate Procedure 15(d)’s 30-day deadline. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977); *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986).² Indeed, the California Movants have failed to cite a single example of this Court extending Rule 15(d)’s express deadline after a petition for review of final agency action has been filed, and State and Industry Petitioners are unaware of any such example.

Second, there is no evidence that EPA has, in fact, pared back its defense of the contested NAAQS. The California Movants cite two documents they claim prove that EPA’s defense of the NAAQS “may no longer be zealous and forceful.” Motion at 6. The first is a letter from EPA Administrator Pruitt to the Governor of Arizona stating that EPA was extending for one year the deadline for initial designations of areas as “attainment” or “nonattainment” under the 2015 NAAQS in order to provide EPA time to “consider completely” the States’ designation recommendations and to “complete its review of the 2015 ozone NAAQS.”³ The second document is a Federal Register notice, which embodies the same extension

² Industry Petitioners and State Petitioners do not dispute that this Court can draw on “policies underlying” Fed. R. Civ. P. 24 when construing intervention under Fed. R. App. P. 15. That collateral consideration, however, does not erase the explicit timeliness standard in Fed. R. App. P. 15(d).

³ Letter from EPA Administrator E. Scott Pruitt to Governor Doug Ducey, June 6, 2017, available at https://www.epa.gov/sites/production/files/2017-06/documents/az_ducey_6-6-17.pdf.

of time for initial attainment area designations under the 2015 NAAQS and gives the same reasons.⁴ Neither of these documents states that EPA has decided not to defend the NAAQS.⁵ Each simply indicates that there is insufficient information at this time for EPA to complete the area designations and that EPA needs time to complete its review of the 2015 NAAQS.

Third, even if such thin indications of altered support for the NAAQS were sufficient to re-open the window for intervention (and they are not), the California Movants fail to explain why they did not intervene earlier this year. EPA stated in its April 7, 2017 motion to this Court to continue oral argument that, in light of the change in administration, it needed time to review the 2015 NAAQS. That motion also stated that the Agency needed “adequate time to review the 2015 Rule to determine whether it will be reconsidered,” and that it “intends to closely review the 2015 Rule, and the prior positions taken by the Agency with respect to the 2015 Rule may not necessarily reflect its ultimate conclusions after that review is complete.”⁶ Thus, the California Movants knew as early as April 7, 2017 that EPA intended to review the 2015 ozone NAAQS for potential reconsideration. Yet they

⁴ Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards, 82 Fed. Reg. 29246 (June 28, 2017).

⁵ State Petitioners note that, not only do these documents fail to establish an actual change in position, but that a changed position was always possible. At any point during this litigation, EPA could have revised its position and eschewed a NAAQS that dips dangerously close to background levels in substantial parts of the country.

⁶ Doc. 1670218 at 6 & 1.

waited another full *three months* before filing their motion to intervene. The California Movants offer no explanation whatsoever for their failure to file within 30 days of the government's April 7 motion.

Further belying the California Movants' insistence that good cause exists to ignore Rule 15(d) is the fact that other intervenors had no trouble joining the case in support of the NAAQS in the cases' earliest days. On November 24, 2015—590 days before the current motion for intervention—the Environmentalist Petitioners filed their motion to intervene in the lawsuits brought by the State and Industry Petitioners. Their timely intervention shows that diligent litigants could comply with Rule 15(d). It also assures that, even if EPA someday retreats from defending aspects of the 2015 ozone NAAQS, there are already litigants in this case who will champion the Agency's prior, extreme position.

CONCLUSION

This Court should deny the California Movants' motion to intervene as untimely.

Respectfully submitted,

/s/ Scott C. Oostdyk

Scott C. Oostdyk
E. Duncan Getchell, Jr.
Michael H. Brady
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219-3916
(804) 775-4743
soostdyk@mcguirewoods.com
Counsel for Petitioner Murray Energy Corporation

/s/ James R. Bieke

James R. Bieke
C. Frederick Beckner III
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jbieke@sidley.com
Counsel for Petitioners the Chamber of Commerce of the United States, National Ass'n of Mfrs, American Petroleum Inst., Portland Cement Ass'n, American Coke & Coal Chemicals Inst., Independent Petroleum Ass'n of America, and National Oilseed Producers Ass'n

/s/ Lucinda Minton Langworthy

Lucinda Minton Langworthy
Aaron M. Flynn
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500
clangworthy@hunton.com
Counsel for Petitioner Utility Air Regulatory Group

/s/ Thomas A. Lorenzen

Thomas A. Lorenzen
Robert J. Meyers
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
TLorenzen@crowell.com
Counsel for Petitioner American Fuel & Petrochemical Manufacturers

Of Counsel:

Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-3187

*Counsel for Petitioner the Chamber of
Commerce of the United States*

Of Counsel:

Stacy Linden
Mara E. Zimmerman
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005-4070
(202) 682-8000

*Counsel for Petitioner American
Petroleum Institute*

Of Counsel:

Richard S. Moskowitz
AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS
1667 K Street, N.W., Suite 700
Washington, D.C. 20006
(202) 457-0480

*Counsel for Petitioner the American
Fuel & Petrochemical Manufacturers*

Of Counsel:

Linda E. Kelly
Quentin Riegel
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL
ACTION
733 10 Street, N.W., Suite 700
Washington, D.C. 20001
(202) 637-3000

*Counsel for Petitioner the National
Association of Manufacturers*

Of Counsel:

Michael B. Schon
Elizabeth L. Horner
PORTLAND CEMENT ASSOCIATION
1150 Connecticut Ave NW, Suite 500
Washington, D.C. 20036
(202) 719-1977

*Counsel for Petitioner the Portland Cement
Association*

/s/ Misha Tseytlin
Brad D. Schimel
Attorney General
Misha Tseytlin
Solicitor General
Counsel of Record
Daniel P. Lennington
WISCONSIN DEPARTMENT OF JUSTICE
17 W. Main Street
Madison, WI 53707
(608) 267-9323
Counsel for the State of Wisconsin

/s/ Lee Rudofsky
Leslie C. Rutledge
Attorney General
Lee Rudofsky
Solicitor General
Counsel of Record
Jamie L. Ewing
Assistant Attorney General
323 Center Street
Suite 200
Little Rock, AR 72201
(501) 682-2637
Counsel for the State of Arkansas

/s/ Lara Katz
Lara Katz
Assistant General Counsel
Counsel of Record
1190 St. Francis Drive
Santa Fe, New Mexico 87505
(505) 827-2885
*Counsel for New Mexico Environment
Department*

/s/ Dominic E. Draye
Mark Brnovich
Attorney General
Dominic E. Draye
Solicitor General
Counsel of Record
Keith Miller
OFFICE OF THE ATTORNEY GENERAL
1275 W. Washington Street
Phoenix, AZ 85007
(602) 542-8255
dominic.draye@azag.gov
Counsel for the State of Arizona

/s/ Elizabeth Murrill
Jeff Landry
Attorney General
Elizabeth Murrill
Solicitor General
Counsel of Record
Louisiana Department of Justice
1185 North Third Street
Baton Rouge, LA 70802
(225) 326-6085
Counsel for the State of Louisiana

/s/ Margaret I. Olson
Wayne Stenehjem
Attorney General
Margaret I. Olson
Assistant Attorney General
Counsel of Record
500 North 9th Street
Bismarck, ND 58501-4509
(701) 328-3640
Counsel for the State of North Dakota

/s/ P. Clayton Eubanks
Mike Hunter
Attorney General
P. Clayton Eubanks
Deputy Solicitor General
Counsel of Record
313 N.E. 21st St
Oklahoma City, OK 73105
(405) 521-3921
Counsel for the State of Oklahoma

/s/Tyler Green
Sean Reyes
Attorney General
Tyler Green
Solicitor General
Counsel of Record
UTAH ATTORNEY GENERAL'S OFFICE
350 North State Street, Ste. 230
Salt Lake City, UT 84114-2320
(801) 538-9600
Counsel for the State of Utah

/s/ Craig J. Pritzlaff
Ken Paxton
Attorney General
Jeffrey C. Mateer
First Assistant Attorney General
Priscilla M. Hubenak
Chief, Environmental Protection
Division
Craig J. Pritzlaff
Assistant Attorney General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL OF
TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC-066
Austin, TX 78711-2548
(512) 463-2012
Counsel for the State of Texas

Dated: July 17, 2017

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d) because this brief contains 1,300 words, well under the permitted 5,200 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

/s/ Dominic E. Draye

Dominic E. Draye

Solicitor General

OFFICE OF THE ATTORNEY GENERAL

1275 W. Washington Street

Phoenix, AZ 85007

(602) 542-8255

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2017, I served one copy of the foregoing Industry Petitioners' and State Petitioners' Opposition to Motion of California *et al.* to Intervene Out of Time on all registered counsel in these consolidated cases through the Court's CM/ECF system.

/s/ Dominic E. Draye

Dominic E. Draye

Solicitor General

OFFICE OF THE ATTORNEY GENERAL

1275 W. Washington Street

Phoenix, AZ 85007

(602) 542-8255