

ORAL ARGUMENT NOT YET SCHEDULED

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

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ROBINSON ENTERPRISES, INC., <i>et al</i>)	
)	
<i>Petitioners,</i>)	
)	Nos. 19-1175, 19-1176,
consolidated)	19-1179, 19-1185
	v.)	
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
<i>Respondent.</i>)	
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MOTION OF AMERICAN LUNG ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, APPALACHIAN MOUNTAIN CLUB, CENTER FOR BIOLOGICAL DIVERSITY, CHESAPEAKE BAY FOUNDATION, INC., CLEAN AIR COUNCIL, CLEAN WISCONSIN, CONSERVATION LAW FOUNDATION, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL LAW & POLICY CENTER, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENT

Not-for-profit public health and environmental organizations American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law & Policy Center, Minnesota Center for Environmental

Advocacy, Natural Resources Defense Council, and Sierra Club (“Movant-Intervenors”) respectfully seek to intervene in the above-captioned petitions in support of Respondent United States Environmental Protection Agency (“EPA” or “the Agency”), pursuant to Federal Rule of Appellate Procedure 15(d) and D.C. Circuit Rule 15(b).¹ These cases seek judicial review of EPA’s final rule titled “Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations; Final Rule,” 84 Fed. Reg. 32,520 (July 8, 2019) (“Final Rule”).

¹ Counsel who responded to Movant-Intervenors’ request for a position on this motion represented their clients’ positions as follows: Petitioners American Wind Energy Association and Solar Energy Industries Association (19-1187) support the motion; Petitioner Biogenic CO2 Coalition (19-1185) does not oppose the motion; Petitioners Robinson Enterprises, Inc., et al. (19-1175) oppose the motion; and the following parties take no position on the motion: Respondent EPA, Petitioners North American Coal Corporation (19-1179), Westmoreland Mining Holdings (19-1176), and State and Municipal Petitioners (19-1165), and Respondent-Intervenors America’s Power, National Rural Electric Cooperative Association, Chamber of Commerce of the United States of America, Murray Energy Corporation, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, International Brotherhood of Electrical Workers, United Mine Workers of America, Public Service Company of Oklahoma, Wheeling Power Company, Indiana Michigan Power Company, Kentucky Power Company, Appalachian Power Company, Southwestern Electric Power Company, AEP Generation Resources Inc., and AEP Generating Company. Power Company Petitioners (19-1188) consent to this motion with respect to case numbers 19-1175, 19-1176, and 19-1179, and take no position on the motion with respect to case number 19-1185.

INTRODUCTION

On July 8, 2019, EPA promulgated a Final Rule that 1) repealed the Clean Power Plan, the Agency's emission guidelines for carbon dioxide emissions from existing fossil-fuel fired power plants promulgated in 2015 pursuant to Clean Air Act section 111(d), 42 U.S.C. § 7411(d); 2) promulgated new section 111(d) emission guidelines for carbon dioxide emissions from existing coal-fired power plants, titled the Affordable Clean Energy or "ACE" rule; and 3) amended the general implementing regulations for EPA's emission guidelines issued under section 111(d). 84 Fed. Reg. at 32,520. Movant-Intervenors subsequently submitted petitions for review of the Final Rule.² The Court also received ten other petitions for review of the Final Rule,³ and all petitions have been consolidated under 19-1140, *American Lung Association v. EPA*.⁴ In addition, 13 motions for leave to intervene in *American Lung Association* on behalf of Respondent EPA

² *Am. Lung Ass'n., et al. v. EPA*, 19-1140; *Appalachian Mountain Club, et al. v. EPA*, 19-1166; *Chesapeake Bay Found., Inc. v. EPA*, 19-1173.

³ *New York, et al. v. EPA*, 19-1165; *Robinson Enters., Inc., et al. v. EPA*, 19-1175; *Westmoreland Mining Holdings v. EPA*, 19-1176; *The North Am. Coal Corp. v. EPA*, 19-1179; *City and Cnty. of Denver Colorado v. EPA*, 19-1177; *Biogenic CO2 Coal. v. EPA*, 19-1185; *Advanced Energy Economy v. EPA*, 19-1186; *Am. Wind Energy Ass'n, et al. v. EPA*, 19-1187; *Consol. Edison, Inc., et al. v. EPA*, 19-1188; *Nevada v. EPA*, 19-1189.

⁴ *See, e.g.*, Order, 19-1140, (D.C. Cir. Aug. 15, 2019), ECF 1802141; Order, 19-1140, (D.C. Cir. Sept. 11, 2019), ECF 1805728 (consolidating cases).

have been submitted.⁵ To date, the Court has granted seven of these motions and denied none.⁶

Of the petitions for review filed with respect to the Final Rule, four are relevant to this motion: *Robinson Enterprises, Inc., et al. v. EPA*, 19-1175, *Westmoreland Mining Holdings v. EPA*, 19-1176, *The North American Coal Corporation v. EPA*, 19-1179, and *Biogenic CO2 Coalition v. EPA*, 19-1185. The petitioners in case numbers 19-1175, 19-1176, and 19-1179 (“Industry Petitioners”) have indicated, either in their public comments on the proposed rule⁷ or in filings in this case,⁸ that they intend to challenge EPA’s underlying authority

⁵ See, e.g., Nat’l Rural Elec. Coop. Ass’n, Mot. for Leave to Intervene, 19-1140 (D.C. Cir. Aug. 1, 2019), ECF 1800270; United Mine Workers of Am., et al., Mot. for Leave to Intervene, 19-1173 (D.C. Cir. Sept. 17, 2019), ECF 1806915.

⁶ See Order, 19-1140, (D.C. Cir. Sept. 11, 2019), ECF 1806066 (granting motions for leave to intervene).

⁷ See, e.g., Comments of Texas Public Pol’y Found., et al., Dkt. ID EPA-HQ-OAR-2017-0355-23639, at 4 (Oct. 31, 2018) (“EPA is precluded from regulating emissions from power plants under Section 111 of the Clean Air Act because such emissions are already regulated under Section 112 of the Act.”), 7 (arguing that EPA must “make an endangerment finding that carbon dioxide emissions from fossil fuel-fired power plants cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare” before regulating those emissions under section 111(d)), 8-13 (arguing that EPA may only regulate power plant carbon dioxide emissions under the section 108-110 NAAQS program, not section 111).

⁸ The North Am. Coal Corp., Resp. in Supp. of EPA’s Mot. To Expedite, at 2, 19-1140 (D.C. Cir. Sept. 9, 2019), ECF 1805626, at 2 (explaining that “NA Coal [plans to] ... challenge ... EPA’s failure to make an essential threshold determination prior to issuing the Affordable Clean Energy Rule”); Robinson Enters., Inc., et al., Opp. to EPA’s Mot. to Expedite, at 3, 19-1140 (D.C. Cir. Sept.

to issue *any* emission guidelines for carbon dioxide emissions from fossil fuel-fired power plants under section 111(d) of the Clean Air Act, or that any such authority is severely limited. As described below, Movant-Intervenors have a compelling interest in defending EPA's authority to regulate power plant carbon dioxide emissions under section 111(d). Indeed, in their capacity as petitioners in *American Lung Association*, Movant-Intervenors plan to challenge EPA's ACE rule as failing to satisfy the Agency's obligations under section 111(d) to adequately control harmful carbon dioxide pollution from existing power plants. Any arguments that EPA entirely *lacks* such authority are diametrically opposed to Movant-Intervenors' interests.

Furthermore, Petitioner in 19-1185, Biogenic CO2 Coalition, has repeatedly urged EPA to "categorically exclude from the methods for determining compliance with the ACE Rule those CO2 emissions resulting from the combustion of [crop-derived] biomass" in affected sources.⁹ The Agency has refused to do so in the

19, 2019), ECF 1807284, at 3 ("Petitioners support the repeal of the Clean Power Plan but oppose the new emissions standards as suffering from the same legal flaws that plagued the Clean Power Plan.").

⁹ Biogenic CO2 Coal., Pet. for Reconsideration, Dkt. ID EPA-HQ-OAR-2017-0355-26751, 2-3 (Sept. 5, 2019); Comments of Biogenic CO2 Coal., Dkt. ID EPA-HQ-OAR-2017-0355-23710, at unnumbered p. 2 (Oct. 30, 2018). Biogenic CO2 Coalition has moved to sever this petition from the rest of the litigation and to hold it in abeyance pending the outcome of an anticipated forthcoming rulemaking by EPA related to biogenic carbon dioxide emissions. Biogenic CO2 Coal., Mot. to

Final Rule, 84 Fed. Reg. at 32,557-58, and Movant-Intervenors expect Biogenic CO2 Coalition to challenge the Final Rule on those grounds. Movant-Intervenors oppose Biogenic CO2 Coalition's efforts to secure a regulatory exemption or relaxation of emission standards for biogenic carbon dioxide. Burning biomass in power plants cannot be assumed to be carbon neutral from a life-cycle perspective, and typically produces *more* carbon dioxide per unit of energy than burning coal or other fossil fuels. Combusting biomass in power plants also generates significant amounts of other pollutants that harm Movant-Intervenors' members.

Therefore, by the present motion, Movant-Intervenors seek to intervene in the cases numbered 19-1175, 19-1176, 19-1179, and 19-1185 in support of Respondent EPA. Pursuant to D.C. Circuit Rule 15(b), Movant-Intervenors specify that this motion constitutes a motion to intervene only in these four cases, and not in any other cases to which they have been consolidated. This motion is timely filed within the thirty-day period specified in Fed. R. App. P. 15(d) and prior to this Court's October 7, 2019 deadline for procedural motions.¹⁰

STATEMENT OF INTEREST AND GROUNDS FOR INTERVENTION

Federal Rule of Appellate Procedure 15(d) "requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought."

Sever and Hold Issues Relating to Biogenic Emissions in Abeyance, 19-1185 (D.C. Cir. Sept. 26, 2019), ECF 1808208.

¹⁰ Order, 19-1140 (D.C. Cir. Sept. 11, 2019), ECF 1806060 (aligning deadlines).

Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys., 952 F.2d 426, 433 (D.C. Cir. 1991). Movant-Intervenors are public health and environmental organizations that have long been committed to protecting their members and others from the impacts of dangerous air pollution, including climate change and other serious harms to public health and welfare.¹¹ For years, Movant-Intervenors have consistently advocated for reducing emissions of carbon dioxide and other pollutants from existing fossil-fuel fired power plants, which are among the nation's largest sources of climate-destabilizing pollution.

EPA formally determined in 2009 that emissions of greenhouse gases, including carbon dioxide, threaten public health and welfare. *See* Endangerment Finding, 74 Fed. Reg. 66,496, 66,497-98 (Dec. 15, 2009); *see also* *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 117-126 (D.C. Cir. 2012)

¹¹ *See* **Ex. A**, Decl. of Harold Wimmer (American Lung Association) ¶¶ 2-3; **Ex. B**, Decl. of David G. Hill (American Lung Association) ¶¶ 3-4; **Ex. C**, Decl. of Georges C. Benjamin (American Public Health Association) ¶¶ 4-5; **Ex. D**, Decl. of John Judge (Appalachian Mountain Club) ¶¶ 2-3; **Ex. E**, Decl. of Kassia R. Siegel (Center for Biological Diversity) ¶¶ 2-11; **Ex. F**, Decl. of William C. Baker (Chesapeake Bay Foundation) ¶¶ 7-16; **Ex. G**, Decl. of Joseph O. Minott (Clean Air Council) ¶¶ 3-5; **Ex. H**, Decl. of Mark Redsten (Clean Wisconsin) ¶¶ 5-6; **Ex. I**, Decl. of Philip B. Coupe (Conservation Law Foundation) ¶¶ 3-5; **Ex. J**, Decl. of Robert King (Conservation Law Foundation) ¶¶ 3-5; **Ex. K**, Decl. of Sara Molyneaux (Conservation Law Foundation) ¶¶ 3-5; **Ex. L**, Decl. of John Stith (Environmental Defense Fund) ¶¶ 5-6; **Ex. M**, Decl. of Kevin Brubaker (Environmental Law & Policy Center) ¶¶ 4-7; **Ex. N**, Decl. of Kathryn Hoffman (Minnesota Center for Environmental Advocacy) ¶¶ 3, 5-6; **Ex. O**, Decl. of Gina Trujillo (Natural Resources Defense Council) ¶¶ 3-7; **Ex. P**, Decl. of Mary Anne Hitt (Sierra Club) ¶¶ 4-10.

(upholding Endangerment Finding), *aff'd in part, rev'd in part on other grounds, Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). Since then, EPA has reaffirmed this finding, *see* 80 Fed. Reg. 64,662, 64,683 (Oct. 23, 2015) (concluding that more recent scientific assessments “improve understanding of the climate system and strengthen the case that [greenhouse gases] endanger public health and welfare both for current and future generations”), and the U.S. Global Change Research Program’s Fourth National Climate Assessment¹² introduced compelling new evidence of the serious and mounting damages to public health, the economy, and natural resources climate change has already caused throughout the United States, as well as the risks of catastrophic damage yet to come.

Fossil fuel-fired power plants are responsible for approximately one-third of the nation’s anthropogenic carbon dioxide emissions—more than any other stationary source category.¹³ Emissions of carbon dioxide from power plants contribute to climate change immediately and continue to do so for as long as they remain and accumulate in the atmosphere—up to several centuries after their

¹² U.S. Global Change Research Prog., *Fourth National Climate Assessment, Volume II: Impacts, Risks and Adaptation in the United States* (Nov. 23, 2018), <https://nca2018.globalchange.gov/>.

¹³ *See* EPA, EPA 430-R-19-001, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2017*, at ES-6 tbl. ES-2 (2019), <https://www.epa.gov/sites/production/files/2019-04/documents/us-ghg-inventory-2019-main-text.pdf> (32.8% of total 2017 carbon dioxide emissions attributable to “Electricity Generation,” a subcategory of “Fossil Fuel Combustion”).

release. 80 Fed. Reg. at 64,682; *see also* 74 Fed. Reg. at 66,518–19. EPA has correctly concluded that it is obliged under section 111(b) of the Clean Air Act to issue performance standards that limit carbon dioxide emissions from new, modified, and reconstructed power plants, as well as emission guidelines under section 111(d) that govern standards of performance for carbon dioxide emissions from existing units. 83 Fed. Reg. 44,746, 44,749 (Aug. 31, 2018); 84 Fed. Reg. at 32,533–34. The Supreme Court has affirmed the Agency’s conclusion. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (holding that section 111 “speaks directly to emissions of carbon dioxide from [fossil fuel-fired power] plants”) (internal quotations omitted).

For many years, Movant-Intervenors have advocated for strong federal standards under section 111 to limit carbon dioxide emissions from power plants. As early as 2003, Sierra Club, one of the Movant-Intervenors, initiated lawsuits against EPA for (among other things) its failure to update the section 111(b) new source performance standards for power plants to include carbon dioxide limits.¹⁴ That same year, several Movant-Intervenors initiated petitions in this Court¹⁵ that ultimately led to *Massachusetts v. EPA*, in which the Supreme Court held that

¹⁴ *Save Our Children’s Earth Found. v. EPA*, No. 03-cv-00770-CW (N.D. Cal. Feb. 21, 2003).

¹⁵ *Int’l Ctr. for Tech. Assessment, et al., v. EPA*, No. 03-1363 (D.C. Cir. Oct. 23, 2003).

greenhouse gases are air pollutants subject to control under the Clean Air Act. *See* 549 U.S. 497, 532 (2007). A number of Movant-Intervenors challenged EPA's 2006 refusal to set carbon dioxide emission standards for power plants under section 111, which this Court remanded to EPA for action consistent with *Massachusetts*.¹⁶

After EPA finally reached a settlement¹⁷ with those litigants and agreed to take action under section 111 to limit power plant carbon dioxide emissions, many of the Movant-Intervenors submitted extensive technical and legal comments in the rulemakings for both EPA's section 111(b) carbon dioxide standards for new and modified units,¹⁸ 80 Fed. Reg. 64,510 (Oct. 23, 2015), and the Clean Power Plan,¹⁹ 80 Fed. Reg. 64,662 (Oct. 23, 2015), its section 111(d) carbon dioxide emission guidelines for existing units. Similarly, many of the Movant-Intervenors submitted

¹⁶ Order on Mot. to Govern, *New York v. EPA*, 06-1322, (D.C. Cir. Sept. 24, 2007), ECF 1068502.

¹⁷ 75 Fed. Reg. 82,392 (Dec. 30, 2010) (proposed settlement agreement).

¹⁸ *See, e.g.*, Comments of Am. Lung Ass'n, et al., Dkt. ID EPA-HQ-OAR-2013-0495-10693 (May 9, 2014); Comments of Ctr. for Biological Diversity, et al., Dkt. ID EPA-HQ-OAR-2013-0495-10119 (May 9, 2014); Comments of Clean Wisconsin, Dkt. ID EPA-HQ-OAR-2013-0495-10106 (May 9, 2014); Comments of Sierra Club, et al., Dkt. ID EPA-HQ-OAR-2013-0495-9514 (May 9, 2014).

¹⁹ *See, e.g.*, Comments of Clean Air Council, Dkt. ID EPA-HQ-OAR-2013-0602-23034 (Dec. 1, 2014); Comments of Conservation Law Found., Dkt. ID EPA-HQ-OAR-2013-0602-23369 (Dec. 1, 2014); Comments of Env'tl. Def. Fund, Dkt. ID EPA-HQ-OAR-2013-0602-23140 (Dec. 1, 2014); Comments of Env'tl. Law & Pol'y Ctr., Dkt. ID EPA-HQ-OAR-2013-0602-23328 (Dec. 1, 2014); Comments of Minnesota Ctr. for Env'tl. Advocacy, et al., Dkt. ID EPA-HQ-OAR-2013-0602-22806 (Dec. 1, 2014).

detailed comments in response to EPA's advance notice of proposed rulemaking on a revised section 111(d) rule,²⁰ its proposed Clean Power Plan repeal,²¹ and its proposed ACE rule.²²

Many of the Movant-Intervenors also participated extensively in the litigation over both EPA's carbon pollution standards for new power plants and the Clean Power Plan, intervening on behalf of EPA in six distinct categories of proceedings: three separate premature lawsuits challenging the Clean Power Plan,²³

²⁰ See, e.g., Comments of Appalachian Mountain Club, et al., Dkt. ID EPA-HQ-OAR-2017-0545-0298 (Feb. 26, 2018); Comments of Chesapeake Bay Found., Dkt. ID EPA-HQ-OAR-2017-0545-0355 (Feb. 26, 2018); Comments of Nat. Res. Def. Council, Dkt. ID EPA-HQ-OAR-2017-0545-0358 (Feb. 26, 2018); Comments of Sierra Club, et al., Dkt. ID EPA-HQ-OAR-2017-0545-0256 (Feb. 26, 2018).

²¹ See, e.g., Comments of Am. Lung Ass'n, et al., Dkt. ID EPA-HQ-OAR-2017-0355-20913 (Apr. 26, 2018); Comments of Ctr. for Biological Diversity, et al., Dkt. ID EPA-HQ-OAR-2017-0355-19872 (Apr. 26, 2018); Comments of Chesapeake Bay Found., Dkt. ID EPA-HQ-OAR-2017-0355-8317 (Jan. 16, 2018).

²² See, e.g., Comments of Appalachian Mountain Club, et al., Dkt. ID EPA-HQ-OAR-2017-0355-24260 (Oct. 31, 2018); Comments of Ctr. for Biological Diversity, et al., Dkt. ID EPA-HQ-OAR-2017-0355-24415 (Oct. 31, 2018); Comments of Chesapeake Bay Found., ID EPA-HQ-OAR-2017-0355-25876 (Oct. 31, 2018); Comments of Clean Air Council, et al., Dkt. ID EPA-HQ-OAR-2017-0355-23806 (Oct. 31, 2018); Comments of Clean Wisconsin, Dkt. ID EPA-HQ-OAR-2017-0355-23733 (Oct. 30, 2018); Comments of Env'tl. Def. Fund, Dkt. ID EPA-HQ-OAR-2017-0355-24419 (Oct. 31, 2018); Comments of Env'tl. Law & Pol'y Ctr., Dkt. ID EPA-HQ-OAR-2017-0355-23656 (Oct. 30, 2018); Comments of Nat. Res. Def. Council, et al., Dkt. ID EPA-HQ-OAR-2017-0355-24266 (Oct. 31, 2018); Comments of Sierra Club, Dkt. ID EPA-HQ-OAR-2017-0355-26581 (original comments submitted Oct. 31, 2018; corrected comments submitted Nov. 9, 2018).

²³ Order, *In re: Murray Energy Corp.*, 14-1112 (D.C. Cir. Dec. 17, 2014), ECF 1527869 (granting intervention); Order, *West Virginia v. EPA*, 14-1146 (D.C. Cir.

one timely set of lawsuits challenging the Clean Power Plan,²⁴ one set of lawsuits challenging the new source carbon pollution standards,²⁵ one timely set of lawsuits challenging EPA's denial of petitions for reconsideration on the new source carbon pollution standards,²⁶ one set of lawsuits challenging EPA's denial of petitions for reconsideration on the Clean Power Plan,²⁷ and one set of lawsuits (which were severed from the primary Clean Power Plan litigation) challenging EPA's refusal to exempt biogenic carbon dioxide emissions from regulation under the Clean Power Plan.²⁸

The litigation (both premature and timely) over the Clean Power Plan, as well as the litigation over the new source carbon pollution standards, proceeded to extensive briefing on the merits. Furthermore, the Court heard oral arguments from the parties and intervenors in both stages of the Clean Power Plan litigation,

Oct. 2, 2014), ECF 1515118 (granting intervention); Order, *In re: West Virginia*, 15-1277 (D.C. Cir. Sept. 9, 2015), ECF 1572191 (granting intervention).

²⁴ Order, *West Virginia v. EPA*, 15-1363 (D.C. Cir. Jan. 11, 2016), ECF 1592885 (granting intervention).

²⁵ Order, *North Dakota*, 15-1381 (D.C. Cir. Jan. 12, 2016), ECF 1592984 (granting intervention).

²⁶ Order, *North Dakota v. EPA*, 15-1381 (D.C. Cir. Aug. 30, 2016), ECF 1632753 (granting intervention).

²⁷ Mot. of Am. Lung Ass'n, et al. for Leave to Intervene in Support of Resp., *North Dakota v. EPA*, 17-1014 (D.C. Cir. Feb. 1, 2017), ECF 1658886.

²⁸ Unopp. Mot. of Am. Lung Ass'n, et al. for Leave to Intervene in Support of Resp., *Nat'l All. of Forest Owners v. EPA*, 15-1478 (D.C. Cir. Feb. 22, 2016), ECF 1600142; Unopp. Mot. of Am. Lung Ass'n, et al. for Leave to Intervene in Support of Resp., *Biogenic CO2 Coal. v. EPA*, 15-1480 (D.C. Cir. Apr. 25, 2016), ECF 1610372.

including seven hours of arguments before the full *en banc* Court for the timely Clean Power Plan cases. The Movant-Intervenor litigants in those cases defended not only EPA's section 111 rules themselves, but responded to the very questions regarding EPA's authority to regulate power plants *at all* under section 111 that Industry Petitioners are likely to press in this litigation.

For instance, in *North Dakota v. EPA*, Movant-Intervenor litigants opposed industry arguments that EPA may not regulate power plants at all under section 111, claiming EPA has not issued a carbon dioxide-specific endangerment finding for power plants under section 111(b)(1)(A).²⁹ And in both the premature and timely Clean Power Plan cases, Movant-Intervenors argued against industry positions that EPA may not regulate carbon dioxide emissions from existing power plants pursuant to section 111(d) because EPA already regulates power plant mercury emissions under section 112.³⁰ As noted above, Industry Petitioners have advanced these very same arguments in their administrative comments on the ACE rule or in filings in this docket, and are very likely to raise them in this case on the

²⁹ Final Br. of Intervenor Env'tl. and Public Health Orgs. in Support of Resps., 18-20, *North Dakota v. EPA*, 15-1381 (D.C. Cir. Feb. 3, 2017), ECF 1659430.

³⁰ *See, e.g.*, Corrected Br. of the Nat. Res. Def. Council, et al. as Intervenors in Support of Resp., and Clean Wisconsin, et al. as *Amici Curiae* in Support of Resp, 6-32, *In re: Murray Energy Corp.*, 14-1112 (D.C. Cir. Feb. 12, 2015), ECF 1538051; Final Br. of Intervenor Env'tl. and Pub. Health Orgs. in Support of Resps., 20-27, *West Virginia v. EPA*, 15-1363 (D.C. Cir. Apr. 22, 2016), ECF 1610004.

merits. Movant-Intervenors are thus acutely interested in the issues that Industry Petitioners are likely to raise in this litigation and have a recent history of opposing and rebutting those arguments in closely related contexts.

Movant-Intervenors are also deeply invested in rejecting any attempt to exempt biogenic carbon dioxide emissions from regulation under section 111, or to regulate those emissions in a way that ignores the climate impacts of biogenic carbon dioxide. As this Court has correctly noted, “the atmosphere makes no distinction between carbon dioxide emitted by biogenic and fossil-fuel sources.”

Ctr. for Biological Diversity v. EPA, 722 F.3d 401, 406 (D.C. Cir. 2013).³¹

Furthermore, several Movant-Intervenors explained in extensive comments to EPA that burning biomass in power plants cannot be assumed to be carbon-neutral from a lifecycle perspective, and typically generates *more* carbon dioxide per unit of energy than burning coal.³² Combusting biomass in power plants also produces

³¹ See also EPA, Responses to Public Comments on the EPA’s Proposed Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units, Dkt. ID EPA-HQ-OAR-2017-0355-26741, 6-26 (June 2019) (“[A]ll CO₂ emissions, regardless of source, influence radiative forcing equally once they reach the atmosphere and therefore there is no distinction between biogenic and non-biogenic CO₂ regarding the CO₂ and the other well-mixed GHGs within the definition of air pollution that is reasonably anticipated to endanger public health and welfare.”).

³² See generally Joint Comments of Clean Air Task Force and Nat. Res. Def. Council, et al. on Treatment of Biomass-Based Power Generation, Dkt. ID EPA-HQ-OAR-2017-0355-24037 (Oct. 31, 2018); *Envtl. Def. Fund*, *supra* n. 22, at 63-68.

comparable amounts of certain other health-harming pollutants as coal combustion, such as particulate matter and smog-forming nitrogen oxides.³³

Movant-Intervenors also have Article III standing. This Court has held repeatedly that environmental organizations have standing to sue to protect their members from pollution that adversely affects those members. *See, e.g., Nat. Res. Def. Council v. EPA*, 755 F.3d 1010, 1016–17 (D.C. Cir. 2014); *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 672–73 (D.C. Cir. 2013). Movant-Intervenors have members who live, work, and recreate in areas that are increasingly affected by climate change.³⁴ These members also use, own, and enjoy property and natural resources that are harmed and threatened by climate change.³⁵

³³ Partnership for Pol’y Integrity, *Air pollution from biomass energy*, 5 (Apr. 2011), available at <https://www.pfpi.net/wp-content/uploads/2011/04/PFPI-air-pollution-and-biomass-April-2011.pdf>.

³⁴ *See, e.g., Ex. B*, Hill Decl. ¶ 18; *Ex. Q*, Decl. of Nsedu Obot Witherspoon ¶¶ 9, 11-16; *Ex. R*, Decl. of Fred Beddall ¶¶ 8-10; *Ex. S*, Decl. of Abel Valdivia ¶ 22-33; *Ex. T*, Decl. of Christopher Scott Irwin ¶¶ 2-3, 5, 8, 10-11; *Ex. U*, Decl. of Collette Lucille Adkins ¶¶ 11-13; *Ex. V*, Decl. of Robert Ake ¶¶ 3-11; *Ex. G*, Minott Decl. ¶¶ 7-12, 16-21; *Ex. I*, Coupe Decl. ¶¶ 7-9, 17-21; *Ex. J*, King Decl. ¶¶ 7-9, 17-21; *Ex. K*, Molyneaux Decl. ¶¶ 7-10, 17-21; *Ex. W*, Decl. of Denise Fort ¶¶ 7-8, 16-18; *Ex. X*, Decl. of Arthur P. Cooley ¶¶ 6, 15-18; *Ex. Y*, Decl. of Philip Lee ¶¶ 10-14; *Ex. Z*, Decl. of Tina Doolen ¶ 9; *Ex. AA*, Decl. of Paul Jeffrey ¶¶ 2-14; *Ex. BB*, Decl. of Meredith McGuire ¶¶ 14-15; *Ex. CC*, Decl. of Patricia Schuba ¶¶ 10-11; *Ex. DD*, Decl. of Barbara Einzig ¶ 12; *Ex. EE*, Decl. of Laurence B. Stanton ¶¶ 6, 8.

³⁵ *See, e.g., Ex. B*, Hill Decl. ¶ 18; *Ex. Q*, Witherspoon Decl. ¶¶ 12, 14, 16; *Ex. R*, Beddall Decl. ¶¶ 8-10; *Ex. S*, Valdivia Decl. ¶¶ 26-28, 30-32; *Ex. T*, Irwin Decl. ¶¶ 5, 8; *Ex. U*, Adkins Decl. ¶¶ 12-13; *Ex. V*, Ake Decl. ¶¶ 3-11; *Ex. G*, Minott Decl. ¶¶ 17-18, 20; *Ex. I*, Coupe Decl. ¶ 20; *Ex. J*, King Decl. ¶ 18-19, 21-22; *Ex.*

This is easily sufficient to articulate an injury for standing purposes. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–85 (2000) (disrupted enjoyment of natural resources and decreased property values due to pollution concerns are injuries in fact). In addition, some members suffer from, and have family members and patients who suffer from illnesses exacerbated by climate change.³⁶ Furthermore, at least one Movant-Intervenor has standing to sue based on its own injuries, independent of those of its members.³⁷ Without deep, near-term reductions in carbon dioxide from major sources such as existing power plants, the damage that climate change causes to these members' health, safety, well-being, and quality of life will not diminish, but will only intensify. Mandatory federal regulations to limit such emissions are therefore of critical importance to these members.

K, Molyneaux Decl. ¶¶ 17-18; **Ex. W**, Fort Decl. ¶¶ 16-18; **Ex. X**, Cooley Decl. ¶¶ 15-18; **Ex. Y**, Lee Decl. ¶¶ 10-14; **Ex. AA**, Jeffrey Decl. ¶¶ 2-14; **Ex. BB**, McGuire Decl. ¶¶ 15; **Ex. CC**, Schuba Decl. ¶¶ 10-11; **Ex. EE**, Stanton Decl. ¶¶ 6, 8.

³⁶ *See, e.g., Ex. B* Hill Decl. ¶ 14-15, 18-20; **Ex. Q**, Witherspoon Decl. ¶¶ 13-15; **Ex. T**, Irwin Decl. ¶¶ 2-6, 8; **Ex. G**, Minott Decl. ¶¶ 19-21; **Ex. FF**, Decl. of Geralyn Leannah ¶¶ 10-11, 13; **Ex. I**, Coupe Decl. ¶¶ 19-20; **Ex. J**, King Decl. ¶ 19-20; **Ex. K**, Molyneaux Decl. ¶¶ 19-20; **Ex. AA**, Jeffrey Decl. ¶ 17; **Ex. BB**, McGuire Decl. ¶ 15; **Ex. DD**, Einzig Decl. ¶¶ 9, 12.

³⁷ Movant-Intervenor Chesapeake Bay Foundation owns significant property in the Chesapeake Bay watershed threatened by climate change-induced sea level rise and extreme, unpredictable weather, and operates restoration and education programming harmed by climate change. *See Ex. F*, Baker Decl. ¶¶ 33-45; 17-32.

To that end, Movant-Intervenors' members have a strong interest in preserving EPA's authority under section 111(d) to limit existing power plants' carbon dioxide emissions. If Industry Petitioners succeed in challenging that authority, EPA will be deprived of a major tool under the Clean Air Act for limiting carbon dioxide from the single largest stationary source category of this pollutant in the country. Furthermore, the window for avoiding the worst impacts of climate change is exceedingly narrow,³⁸ and any additional delay in securing mandatory federal standards to limit power plant carbon dioxide pollution would harm Movant-Intervenors' members. *Sierra Club v. EPA*, 129 F.3d 137, 138–39 (D.C. Cir. 1997) (organization had standing to challenge delay in implementation of pollution-control measures to protect their members' interests). Movant-Intervenors thus seek leave to intervene to defend of EPA's critical legal authority in this area. Movant-Intervenors also endeavor to protect their members from all efforts to unjustifiably exempt biogenic carbon dioxide pollution from regulation under section 111.

Movant-Intervenors' members are also substantially harmed by dangerous pollutants other than carbon dioxide that are emitted by power plants. The same

³⁸ See, e.g., Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C- Summary for Policymakers* (2018), available at https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf (to avoid the worst impacts of climate change, global carbon dioxide emissions must decline by approximately 50 percent by 2030).

measures that reduce carbon dioxide emissions from these sources also reduce smog- and soot-forming emissions, such as nitrogen oxides and sulfur dioxide, that degrade these members' air quality and cause them illness. These members suffer from, and have family members and patients who suffer from, conditions such as asthma, other respiratory ailments, and heart problems, which are aggravated by smog- and soot-forming pollution.³⁹ They are also inhibited in their daily lives and recreational activities due to poor air quality, and are harmed by increased exposure to pollutants emitted by power plants.⁴⁰ If Industry Petitioners succeed in preventing EPA from regulating existing power plants' carbon dioxide emissions

³⁹ See, e.g., **Ex. B**, Hill Decl. ¶¶ 6, 14-15, 18-19; **Ex. Q**, Witherspoon Decl. ¶¶ 14-15; **Ex. T**, Irwin Decl. ¶¶ 2-6, 8; **Ex. U**, Adkins Decl. ¶ 10; **Ex. G**, Minott Decl. ¶¶ 19-20; **Ex. FF**, Leannah Decl. ¶¶ 10-11; **Ex. I**, Coupe Decl. ¶¶ 19-20; **Ex. K**, Molyneaux Decl. ¶ 19; **Ex. X**, Cooley Decl. ¶ 19; **Ex. Z**, Doolen Decl. ¶ 10; **Ex. AA**, Jeffrey Decl. ¶ 17; **Ex. BB**, McGuire Decl. ¶¶ 10, 15; **Ex. DD**, Einzig Decl. ¶¶ 4-6, 8-13; **Ex. GG**, Decl. of Catherine Horine ¶¶ 3-9. See also 80 Fed. Reg. at 64,914 (“[E]lectric generating units that emit the most GHGs also have the highest emissions of conventional pollutants, such as SO₂, NO_x, fine particles, and HAP. These pollutants are known to contribute to adverse health outcomes, including the development of heart or lung diseases, such as asthma and bronchitis, increased susceptibility to respiratory and cardiac symptoms, greater numbers of emergency room visits and hospital admissions, and premature deaths.”).

⁴⁰ See, e.g., **Ex. B**, Hill Decl. ¶¶ 14-15, 18-19; **Ex. Q**, Witherspoon Decl. ¶¶ 14-16; **Ex. T**, Irwin Decl. ¶¶ 5-8, 10-11; **Ex. U**, Adkins Decl. ¶ 5-10; **Ex. G**, Minott Decl. ¶¶ 11, 13, 19-20; **Ex. FF**, Leannah Decl. ¶¶ 6-16; **Ex. I**, Coupe Decl. ¶¶ 11, 13, 19-20; **Ex. J**, King Decl. ¶¶ 11, 13, 20; **Ex. K**, Molyneaux Decl. ¶¶ 11, 13, 19-20; **Ex. X**, Cooley Decl. ¶ 19; **Ex. Y**, Lee Decl. ¶ 11; **Ex. Z**, Doolen Decl. ¶¶ 9-10, 13; **Ex. AA**, Jeffrey Decl. ¶¶ 15-17; **Ex. BB**, McGuire Decl. ¶¶ 2, 10-15; **Ex. CC**, Schuba Decl. ¶¶ 3, 7-9, 12; **Ex. DD**, Einzig Decl. ¶¶ 4-6, 8-13; **Ex. GG**, Horine Decl. ¶¶ 5-9.

under section 111(d), Movant-Intervenors' members will also suffer from greater exposure to smog and soot. Similarly, because combusting biomass produces significant amounts of pollutants such as nitrogen oxides and particulate matter in addition to carbon dioxide, Movant-Intervenors' members will be exposed to more harmful emissions than they otherwise would if Biogenic CO2 Coalition succeeds in obtaining an exemption for certain biogenic carbon dioxide emissions.

Because the Movant-Intervenors and their members' "injur[ies] suffice[] for standing purposes," causation and redressability "rationally follow[]." *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015) (movant had standing to intervene and defend challenge to an agency decision favorable to its interests, because invalidation of that decision would expose it to harm). The injuries described above are "directly traceable," *see id.*, to the outcome of this proceeding and redressable by a decision of this Court denying Petitioners' requested relief.

CONCLUSION

For these reasons, Movant-Intervenors respectfully request that they be granted leave to intervene in support of Respondent EPA in the above-captioned proceedings.

Respectfully submitted,

/s/ Sean H. Donahue

Sean H. Donahue
Susannah L. Weaver
Donahue, Goldberg, Weaver,
& Littleton
1008 Pennsylvania Ave., SE
Washington, DC 20003
(202) 277-7085
sean@donahuegoldberg.com
susannah@donahuegoldberg.com

Tomás Carbonell
Martha Roberts
Benjamin Levitan
Vickie L. Patton
Lance Bowman
Environmental Defense Fund
1875 Connecticut Ave., NW
Suite 600
Washington, DC 20009
(202) 387-3500
tcarbonell@edf.org
mroberts@edf.org
blevitan@edf.org
vpatton@edf.org
lbowman@edf.org
*Counsel for Environmental
Defense Fund*

/s/ James P. Duffy

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
114 State Street, 6th Floor
Boston, MA 02109
(617) 359-4077
aweeks@catf.us
jduffy@catf.us

/s/ Andres Restrepo

Andres Restrepo
Sierra Club
50 F Street NW, 8th Floor
Washington, DC 20001
(202) 650-6062
andres.restrepo@sierraclub.org

Joanne Spalding
Alejandra Núñez
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5725
joanne.spalding@sierraclub.org
alejandra.nunez@sierraclub.org

Vera Pardee
Law Office of Vera Pardee
726 Euclid Avenue
Berkeley, CA 94708
(858) 717-1448
pardeelaw@gmail.com
Counsel for Sierra Club

/s/ Melissa J. Lynch

David Doniger
Benjamin Longstreth
Melissa J. Lynch
Natural Resource Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
(202) 289-2403
ddoniger@nrdc.org
blongstreth@nrdc.org
llynch@nrdc.org
*Counsel for Natural Resources
Defense Council*

Counsel for American Lung Association, American Public Health Association, Appalachian Mountain Club, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, and Minnesota Center for Environmental Advocacy

/s/ Howard Learner

Howard Learner

Scott Strand

Alda Yuan

Environmental Law & Policy Center

35 E Wacker Dr. Suite 1600

Chicago, IL 60601

(312) 673-6500

hlearner@elpc.org

ssstrand@elpc.org

ayuan@elpc.org

Counsel for Environmental Law & Policy Center

/s/ Clare Lakewood

Clare Lakewood

Howard M. Crystal

Center for Biological Diversity

1212 Broadway, Suite 800

Oakland, CA 94612

(415) 844-7121

clakewood@biologicaldiversity.org

hcrystal@biologicaldiversity.org

Counsel for Center for Biological Diversity

/s/Brittany E. Wright

Brittany E. Wright

Jon A. Mueller

Chesapeake Bay Foundation, Inc.

6 Herndon Avenue

Annapolis, MD 21403

(443) 482-2077

bwright@cbf.org

jmueller@cbf.org

Counsel for Chesapeake Bay Foundation Inc.

Dated: October 7, 2019

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that, on this 7th day of October 2019, I caused the foregoing **Motion of American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law & Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club for Leave to Intervene in Support of Respondent** to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system.

/s/ Andres Restrepo

Dated: October 7, 2019

CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 27(d)(2), I hereby certify that **Motion of American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law & Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club for Leave to Intervene in Support of Respondent** complies with the type-volume limitations. According to the word processing system used in this office, this document, exclusive the caption, signature block, and any certificates of counsel, contains 5,092 words.

2. Pursuant to Fed. R. App. P. 32(a)(5)-(6), I hereby certify that **Motion of American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law & Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club for Leave to Intervene in Support of Respondent** complies with the typeface requirements and the type-style

requirements because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

/s/ Andres Restrepo

Dated: October 7, 2019