ORAL ARGUMENT NOT YET SCHEDULED

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

WESTMORELAND MINING HOLDINGS LLC, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Case No. 20-1160

On Petition for Review of Final Action of the
United States Environmental Protection Agency

UNOPPOSED MOTION FOR LEAVE TO INTERVENE AS RESPONDENTS

1. Pursuant to Federal Rule of Appellate Procedure (FRAP) 15(d) and Circuit Rule 15(b), the Commonwealths of Massachusetts and Pennsylvania, the States of California, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, and the City of New York (collectively, "State Movants") hereby move for leave to intervene in case number 20-1160 in support of respondent Environmental Protection Agency (EPA). This motion is unopposed: respondent EPA consents to the motion; petitioner Westmoreland Mining Holdings LLC ("Westmoreland") does

not oppose the motion; public health and environmental movant-intervenors American Academy of Pediatrics, et al., consent to the motion.

2. Westmoreland, a coal mining company, has petitioned for review of a May 22, 2020 EPA final rule, 85 Fed. Reg. 31,286 (May 22, 2020) ("2020 Rule"), as well as three prior EPA actions undertaken in December 2000, February 2012, and April 2016. Collectively, Westmoreland's challenges seek to undermine EPA's well-settled authority under section 112 of the Clean Air Act ("Act"), 42 U.S.C. § 7412, to limit emissions of mercury and other hazardous air pollutants from coal- and oil-fired power plants.

3. Pursuant to section 112, EPA was obligated to promulgate standards to limit hazardous emissions from coal- and oil-fired power plants after determining in 2000—based on the findings of Congressionally mandated studies—that regulation was "appropriate and necessary" to protect public health. *See* 42 U.S.C. § 7412(n)(1)(A). For two decades, power companies, industry groups, and their allies have fought regulation under section 112 at every turn. They advocated for, and then defended, a prior Administration's unlawful attempt to regulate hazardous power plant emissions under a different and less prescriptive Clean Air Act provision (*New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), rejecting that approach); they challenged EPA's determination that costs need not be considered in making the appropriate and necessary finding (*Michigan v. EPA*, 135 S. Ct. 2699 (2015), leading

to a remand of EPA's regulations without vacatur); and they sought to overturn EPA's subsequent determination that regulation was appropriate and necessary after accounting for costs (*Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir.), currently in abeyance). Westmoreland's petition is merely the next in a long line of attacks on critically important regulation that Congress intended to be implemented decades ago to protect the health of the American people from dangerous emissions of mercury and other toxins from power plants.

4. These toxic pollutants seriously harm the health of Americans from all walks of life, especially children, and have profoundly disparate impacts on our most vulnerable communities. As of 2013, 68% of African Americans lived within 30 miles of a coal-fired power plant, and Latinx, indigenous, and low-income communities are also more likely to be located near coal-fired power plants.[1]

5. State Movants have long supported and defended EPA's regulatory efforts to reduce hazardous pollution from coal- and oil-fired power plants, including the national emission standards EPA established for those sources in 2012. *See* 77 Fed. Reg. 9,304 (Feb. 16, 2012). To comply with those standards, power plants already have made significant investments to install pollution controls, and operation of those controls has led to dramatic reductions in emissions of mercury and other

[1] *See* NAACP, *Just Energy Policies & Practices*, https://www.naacp.org/climate-justice-resources/just-energy/; 77 Fed. Reg. 9304, 9445, tbl. 12 (Feb. 16, 2012)

hazardous pollutants over the past years. Because those same controls also reduce criteria pollutant emissions, EPA's section 112 regulations also have led to large decreases in emissions of particulate matter and sulfur dioxide—pollutants responsible for premature deaths and adverse respiratory and cardiac health impacts.

6. State Movants thus move to intervene in the instant case to advance our compelling interests in preserving federal limits on power plant hazardous air pollution, and to maintain the long-sought-after regulations critical to protecting our residents' health and preventing toxic contamination of our territories. State Movants also intend to file a timely petition in this Court challenging the 2020 Rule—specifically, a challenge to EPA's attempt to reverse its longstanding position that regulation of hazardous power plant emissions under section 112 is "appropriate and necessary." As this upcoming challenge demonstrates, State Movants have separate and additional legal arguments—beyond positions EPA may be inclined or able to assert—for why EPA is compelled to retain its section 112 regulations. Thus, intervention in this petition is necessary to ensure adequate representation of State Movants' divergent interests. To that end, State Movants seek to intervene as respondents only in case number 20-1160 (and any later-filed suits seeking similar relief) to support EPA's conclusion that the agency must continue regulating hazardous emissions from power plants under section 112.

BACKGROUND

7. Historically, power plants that burn coal and oil have emitted large quantities of hazardous air pollutants such as mercury; other toxic metals like arsenic, chromium, and nickel; and acid gases—all of which pose severe risks to human health and the environment. 77 Fed. Reg. at 9,347. In 1990, Congress amended the Clean Air Act and directed EPA to control emissions of hazardous air pollutants from power plants if, after studying the public health hazards of those emissions, EPA found that regulation was "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). Based on an extensive record reflecting over a decade of scientific research and data on power plant emissions, EPA in 2000 made an affirmative "appropriate and necessary" finding. 65 Fed. Reg. 79,825 (Dec. 20, 2000) ("2000 Finding"). Accordingly, EPA listed coal- and oil-fired power plants as a source category that EPA would regulate under section 112. *Id.* at 79,830; *see* 42 U.S.C. § 7412(c)(1).

8. In 2005, EPA attempted to reverse the 2000 Finding and delist power plants as a regulated source category under section 112, based on an asserted preference to control mercury emissions through a cap-and-trade program under section 111 of the Act. *See* 70 Fed. Reg. 15,994 (Mar. 29, 2005); 70 Fed. Reg. 28,606 (May 18, 2005). EPA's regulation under section 111 would have been substantially less protective of health and the environment than section 112 regulation, and also

would have resulted in disproportionate impacts on vulnerable communities. A large coalition of public health and environmental organizations and state and local governments—including fourteen of State Movants—challenged those EPA actions in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). This Court rejected EPA's claimed authority to undo its "appropriate and necessary" finding and delist power plants without following the specific procedures and making the specific findings required by section 112(c)(9), and the Court thus vacated EPA's actions. *Id.* at 577-78; *see* 42 U.S.C. § 7412(c)(9).

9. In 2012, relying on an extensive and updated body of scientific and public health evidence, EPA reaffirmed its 2000 Finding that regulation of hazardous emissions from power plants is "appropriate and necessary," it confirmed that coal- and oil-fired power plants were properly listed under section 112, and it promulgated emission standards, which—for the first time in the twenty-two years since passage of the 1990 Clean Air Act amendments—imposed national, technology-based limits on mercury and other hazardous emissions from those sources. 77 Fed. Reg. 9304 (Feb. 16, 2012) ("Standards"). Implementation of the Standards has had the additional benefit of reducing harmful emissions of particulate matter and sulfur dioxide, as those pollutants are captured by the same controls that limit hazardous pollutant emissions. *See* 81 Fed. Reg. 24,420, 24,438 (Apr. 25, 2016).

10. Various groups, including members of the regulated industry, petitioned for review and raised an array of challenges to EPA's "appropriate and necessary" finding and the Standards. *See White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (per curiam). A state and local government coalition—including thirteen of State Movants—moved to intervene in support of EPA, and this Court granted that motion. Order, *White Stallion*, No. 12-1100 (May 18, 2012), ECF No. 1374443. In its decision on the merits, this Court upheld the Standards in full. *See White Stallion*, 748 F.3d at 1229.

11. The Supreme Court granted certiorari, limited to the single question of whether EPA had unreasonably failed to consider costs when determining that it was "appropriate" to regulate hazardous air pollutants from power plants. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The Supreme Court ruled against EPA on that question and remanded the case back to this Court for further proceedings. *Id.* at 2712. On remand, EPA opposed vacatur, as did the state respondent-intervenors, on the grounds that vacating the Standards would allow power plants to emit tens of thousands of tons of hazardous air pollutants during the remand period. Joint Mot. at 12, *White Stallion*, No. 12-1100 (Sept. 24, 2015), ECF No. 1574820. Noting that EPA was proceeding expeditiously to complete a rulemaking in response to the *Michigan* decision, this Court remanded to the agency without vacatur and left the

Standards in place. Order at 2, *White Stallion*, No. 12-1100 (Dec. 15, 2015), ECF No. 1588459, *cert. denied sub. nom*, *Michigan v. EPA*, 136 S. Ct. 2463 (2016).

12. Shortly thereafter, in April 2016, EPA issued a supplemental "appropriate and necessary" finding in which the agency, pursuant to the Court's direction in *Michigan*, accounted for the costs of regulation. 81 Fed. Reg. 24,420, 24,452 (Apr. 25, 2016) ("2016 Supplemental Finding"). EPA again described the massive public health and environmental benefits of the Standards and reaffirmed that, after considering costs, regulation of power plant hazardous emissions under section 112 was "appropriate." *Id.*

13. Various industry and state petitioners challenged the 2016 Supplemental Finding. *See Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir.). Once again, a coalition of state and local governments—including thirteen of State Movants—moved to intervene in support of EPA, and this Court granted that motion. Order, *Murray Energy*, No. 16-1127 (Aug. 3, 2016), ECF No. 1628451. In April 2017, after the case was fully briefed and shortly before the scheduled oral argument, EPA moved to continue argument, advising the Court that it intended to reconsider the 2016 Supplemental Finding following the change in presidential administration. EPA Mot. at 6, 8, *Murray Energy*, No. 16-1127 (Apr. 18, 2017), ECF No. 1671687.

The Court granted EPA's motion and put the matter into abeyance pending further order.[2] Order, *Murray Energy*, No. 16-1127 (Apr. 27, 2017), ECF No. 1672987.

14. On February 7, 2019, EPA proposed to reverse its 2016 Supplemental Finding and to find that, after considering costs, regulation of hazardous pollution from power plants is not "appropriate and necessary" under section 112. 84 Fed. Reg. 2,670 (Feb. 7, 2019). EPA also sought comment on whether it had the "authority or obligation" to delist power plants or rescind the Standards. *Id.* at 2,670. A group of twenty-six States and local governments—including sixteen of State Movants—filed comments explaining that EPA could not reconsider its "appropriate and necessary" finding, that EPA lacked authority to repeal the Standards, and that even if EPA had authority to reconsider its "appropriate and necessary finding," EPA's proposed revised finding was unlawful and arbitrary. Comments of the Attorneys General of Massachusetts, et al., on EPA's Proposed Reconsideration of Supplemental Finding (Apr. 17, 2019), Docket ID No. EPA-HQ-OAR-2018-0794-1175 ("State Comments").[3]

[2] With EPA now having finalized its subsequent rulemaking, motions to govern in *Murray Energy* are due on August 5, 2020. Order, *Murray Energy*, No. 16-1127 (June 1, 2020), ECF No. 1845814.

[3] *See also* Comments of the California Air Resources Board (Apr. 16, 2019), Docket ID No. EPA-HQ-OAR-2018-0794-1628.

15. On May 22, 2020, EPA finalized its proposal and published the 2020 Rule. 85 Fed. Reg. 31,286. EPA claimed authority to reconsider its 2016 Supplemental Finding and purported to find that regulation of hazardous emissions from power plants under section 112 is not "appropriate and necessary." *Id.* at 31,286, 31,289-90. Although EPA reversed course on that predicate finding, EPA neither delisted power plants nor rescinded the Standards, claiming that this Court's decision in *New Jersey* prohibited it from taking either step. *Id.* at 31,312. EPA explicitly rejected the position of commenters who argued that EPA had to rescind the Standards if it finalized a negative "appropriate and necessary" determination. *Id.* at 31,312-13.

16. On the same day that EPA published the 2020 Rule, Westmoreland filed its petition for review. Pet. for Judicial Review, *Westmoreland Mining Holdings LLC v. EPA*, No. 20-1160 (D.C. Cir. May 22, 2020), ECF No. 1844031. In addition to challenging the 2020 Rule that explicitly leaves the Standards in effect, Westmoreland's petition also requests review of three prior EPA actions related to section 112 regulation of power plants: the 2000 Finding, the 2012 Standards, and the 2016 Supplemental Finding. Westmoreland asserts that it is challenging these three actions "solely on grounds arising from" the 2020 Rule. *Id.*; *see* 42 U.S.C. 7607(b)(1).

17. Westmoreland is likely to contest the legality of EPA's regulation of power plants under section 112 and to argue, *inter alia*, that EPA is prohibited from regulating sources under section 112 that are also regulated under section 111 of the Act, 42 U.S.C. § 7411.[4] Indeed, by petitioning for review (on after-arising grounds) of three other agency actions—namely, the 2000 "appropriate and necessary" Finding, the Standards issued in 2012, and the 2016 Supplemental Finding—Westmoreland's suit squarely targets EPA's authority to control hazardous emissions from power plants under section 112 *at all*.

STATE MOVANTS' MOTION TO INTERVENE

18. For the same reasons that state and local government litigants have defended EPA's section 112 regulatory authority in challenges to each of the three prior rulemakings named in Westmoreland's petition—defending the 2000 Finding in *New Jersey*, the Standards (and that 2012 rule's confirmation of the 2000 Finding) in *White Stallion* and *Michigan*, and the 2016 Supplemental Finding in the ongoing *Murray Energy* litigation—State Movants now seek to intervene here to oppose Westmoreland's instant petition for review. By intervening, the State Movants seek

[4] *See* Comments of National Bituminous Coal Group, Docket ID No. EPA-HQ-OAR-2018-0794-1663 (arguing that the federal government either should not regulate hazardous emissions from coal-fired power plants at all, or that EPA should regulate such plants only under section 111 of the Act); Br. of Westmoreland et al. at 20-24 *American Lung Assoc. v. EPA*, No. 19-1140 (D.C. Cir. Apr. 17, 2020), ECF No. 1838666 (arguing that EPA cannot simultaneously regulate power plants under section 111 and section 112 of the Act).

to protect the health of their residents, and also to preserve their natural resources and economies, by ensuring that the Standards—which already have achieved and are continuing to provide massive environmental and health benefits—remain in effect. State Movants further seek to reaffirm EPA's obligation to regulate power plants under section 112 and to validate—once again—the "appropriate and necessary" finding that compelled EPA to promulgate the Standards.

19. State Movants also advise, pursuant to Circuit Rule 15(b), that this motion is limited to seeking intervention in this petition (case number 20-1160) and any similar petitions that seek to undermine the Standards or EPA's section 112 authority under the guise of challenging the 2020 Rule. State Movants—as part of a broader group of States and local jurisdictions—intend to file their own petition for review of the 2020 Rule and to challenge as unlawful and arbitrary EPA's reversal of its "appropriate and necessary" finding. State Movants do not seek to intervene as respondents in any cases where the petitioners' interests align with State Movants' interests.[5]

[5] For example, State Movants do not seek to intervene in the petition for review of the 2020 Rule filed on June 19, 2020, by a group of environmental and public health organizations. *See American Acad. of Pediatrics v. Wheeler*, No. 20-1221 (D.C. Cir.).

ARGUMENT

Intervention as of Right

20. The motion to intervene should be granted because State Movants have a compelling interest in defending the Standards and EPA's predicate "appropriate and necessary" finding, and because State Movants have distinct interests that cannot adequately be represented by EPA. Indeed, the interests that the State Movants seek to protect by intervening here are the same interests that this Court found to justify state and local government standing to defend the 2000 Finding in *New Jersey*, and to intervene in *White Stallion* and the ongoing *Murray Energy* suit to defend the Standards and EPA's predicate "appropriate and necessary" finding.[6]

21. In determining whether intervention as of right is warranted, appellate courts—including this Court—assess whether a movant has established the four factors under Federal Rule of Civil Procedure (FRCP) 24. *See, e.g.*, *Massachusetts Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997). Those factors are: timeliness; a legally protected interest; impairment of that interest; and inadequate representation by existing parties. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015). State Movants timely moved

[6] *See* Order, *White Stallion*, No. 12-1100 (May 18, 2012), ECF No. 1374443; Order, *Murray Energy*, No. 16-1127 (Aug. 3, 2016), ECF No. 1628451.

for intervention on June 22, 2020.[7] And State Movants easily satisfy the other three criteria, a conclusion this Court has already reached in granting state and local governments' motions to intervene in prior suits involving the same regulatory framework, the same harms, and the same agency actions.

State Movants' Interests and Impairment of Those Interests

22. State Movants have standing to intervene because of a longstanding, legally-protected interest in attaining and maintaining reductions in mercury and other toxic air pollutants that, when deposited within State Movants' borders, harm the health of our residents, contaminate our natural resources, damage our economies, and impair our ability to meet federal environmental standards. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) (equating showing of legally protected interest with showing needed to demonstrate standing); *Idaho v. ICC*, 35 F.3d 585, 591 (D.C. Cir. 1994) (states have standing to prevent pollution damage to state resources). State Movants also have a significant interest in maintaining reductions in harmful criteria pollutants, like particulate matter, that are directly attributable to power plants' use of the technologies necessary to comply with the Standards. A ruling for petitioner Westmoreland—for example, a ruling that

[7] The instant motion to intervene was timely filed "within 30 days after the petition for review was filed." FRAP 15(d). Westmoreland's petition was filed on May 22, 2020. Because the thirtieth day after that date was a Sunday, the filing period is extended an additional day to Monday, June 22. *See* FRAP 26(a)(1)(c).

EPA cannot regulate power-plant hazardous air pollutants under section 112, or that EPA is obligated to rescind the Standards in light of the 2020 Rule's revised finding—would frustrate State Movants' interest in protecting the health of their residents from harms due to mercury, other toxics, and criteria pollutants. State Movants are entitled to protect against the injury that would result from such a ruling. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (intervention is appropriate when movant would be harmed by successful challenge to agency action and harm could be avoided by ruling denying petitioner relief).

23. The harmful health effects of mercury are well known, and are extensively detailed in the voluminous administrative records for the 2020 Rule and the other EPA actions under review that span twenty years. In particular, mercury has insidious effects on the developing brains of children and fetuses, where exposure can lead to permanent neurological damage and lifetime loss of IQ. State Comments at 6.[8] In adults, mercury exposure also is linked to increased risks of diabetes and autoimmune dysfunction and correlated with adverse cardiovascular effects. *Id.* Studies predating the 2012 Standards showed that large swaths of the population were exposed to levels of mercury that EPA has deemed unsafe. *See, e.g.*, 65 Fed. Reg. at 79,829-30 (finding 7% of women of childbearing age had been

[8] Here and elsewhere, citations to supporting declarations, articles, and studies can be found at the referenced locations in the State Comments.

exposed to mercury levels exceeding EPA's reference dose in 2000); State Comments at 5-6.

24. The predominant way that humans are exposed to mercury is through consumption of contaminated fish. State Comments at 5-6. Mercury emitted by power plants falls back to the earth, where microorganisms convert it to methylmercury, a potent neurotoxin. *Id.* Methylmercury then moves up the food chain in water ecosystems, bioaccumulating—that is, increasing in concentration—as larger predators consume contaminated prey. *Id.*

25. Mercury contamination of water ecosystems is widespread and largely attributable to emissions from power plants, which—before the Standards took effect—contributed half of all mercury emissions in the country. 76 Fed. Reg. at 25,002; 81 Fed. Reg. at 24,423 n.8. Due in significant part to mercury emissions from power plants, the fish in all or nearly all waters of some States are unsafe for consumption, and all fifty States have issued fish consumption advisories for at least some of their waterbodies. State Comments at 5-7. These advisories collectively span (as of 2018) about half of the nation's lake acreage, river miles, and coastlines. *Id.* at 6-7; *see also* 81 Fed. Reg. at 24,423.

26. The great quantity of mercury emitted by power plants is also substantially responsible for thirteen States—including the majority of State Movants—having such high mercury concentrations in their waterbodies that state-

or region-wide "total maximum daily loads" (TMDLs)[9] have been required to meet federal water quality standards. State Comments at 7, 9. Numerous other States have needed to impose waterbody-specific TMDLs to address mercury pollution.[10] *Id.*

27. Mercury pollution from power plants also harms the State Movants' recreational and commercial fisheries and tourism industries. A recent study addressing twelve Northeast and Midwest States found that recreational and commercial fishing in the region contributed to nearly 300,000 full- and part-time jobs, and tens of billions of dollars in additional economic output. State Comments at 8. The presence of fish consumption advisories, however, significantly decreases the economic value of fishing in affected water bodies, thus leading to broad negative effects on the fishing industry and those who rely on vibrant fishing economies. *Id.* at 8, 49.

28. In recognition of the substantial harms that mercury pollution from power plants imposes on State Movants' natural resources, public health, and economies, at least fourteen States—including most of State Movants—had set regulatory limits on emissions from in-state power plants before the Standards took

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[9] *See* 33 U.S.C. § 1313(d)(1). TMDLs function as pollution "budgets" for contaminated waters.

[10] Developing these TMDLs has imposed substantial costs and regulatory burdens on States. *See* EPA, The National Costs of the Total Maximum Daily Load Program 18 (Aug. 2001) (noting EPA's estimates of the costs of developing TMDLs), https://nepis.epa.gov/Exe/ZyPDF.cgi/901K0800.PDF?Dockey=901K0800.PDF.

effect. State Comments at 8.[11] But because mercury emissions can travel hundreds of miles from a power plant's smokestack, *see* 77 Fed. Reg. at 9,444, federal regulation is still necessary to address the significant quantities of mercury pollution emitted in other States that are ultimately deposited within State Movants' borders, State Comments at 9.[12] Before the Standards came into effect, out-of-state sources were contributing such large amounts of mercury that waters in the Northeast could not meet federal water quality standards without reductions from sources in upwind States. *Id.*; *see West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004) (finding standing to challenge EPA action that would have made it more difficult for State to meet federal environmental requirements).

29. State Movants and their residents have benefitted immensely from the Standards that EPA issued pursuant to section 112. Largely due to implementation of the control measures required by the Standards, power plant mercury emissions have declined 86% in recent years. 84 Fed. Reg. at 2,689 tbl. 4. That, in turn, has led

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[11] *See, e.g.*, Conn. Gen. Stat. § 22a-199; Del. Admin. Code tit. 7, § 1146-6; Ill. Admin. Code tit. 35, § 225.230; Md. Code Regs. tit. 26, § 11.27.03.D; Mass. Code Regs. tit. 310, § 7.29; Minn. R. 7011.0561; N.H. Rev. Stat. Ann. § 125-O:11-18; N.J. Admin. Code tit. 7, ch. 27, § 27.7; N.Y. Comp. Codes R. & Regs. tit. 6, § 246.6; Or. Admin. R. 340-228-0606.

[12] Nationally uniform regulation is also required because fish are shipped and sold in interstate commerce, and individuals suffer the same harmful health effects from consuming a mercury-contaminated fish that is caught out-of-state as one caught in-state. *See* State Comments at 9 (discussing study showing that a population that consumed high levels of store-bought fish had excessive blood-mercury levels).

to meaningful declines in the mercury levels of waterbodies within State Movants' borders and across the nation, as well as declines in mercury concentrations in the tissues of important commercial and recreational fish species—with attendant health benefits for the people and wildlife (such as loons and otters) who consume those fish. State Comments at 11.

30. Beyond their effect in reducing mercury, the Standards have significantly reduced emissions of acid gases and other hazardous metals, such as arsenic and chromium, that cause cancer and other adverse health effects. *See* 81 Fed. Reg. at 24,423; *see* 84 Fed. Reg. at 2689 tbl. 4 (finding 81% reduction in non-mercury metals and 96% reduction in acid gases). In addition, power plants' use of the technological controls required to comply with the Standards has generated large reductions in harmful particulate matter and sulfur dioxide emissions—pollutants that cause premature deaths, asthma, and other lung and heart problems. *See* 81 Fed. Reg. at 24,440. Reductions in these criteria pollutants alone has resulted in tens of billions of dollars in annual monetized benefits, which accrue in substantial part to State Movants and their residents. *See id.*

31. Westmoreland's petition threatens to undo the Standards that are responsible for all of these significant benefits and, more broadly, threatens EPA's section 112 authority to protect public health by regulating mercury and other hazardous pollutants from power plants. As the rulings of the Supreme Court and

this Court have repeatedly affirmed, State Movants have a right to argue against a potential ruling in Westmoreland's favor that would injure our sovereign, quasi-sovereign, and proprietary interests by imposing major public health harms and economic consequences, damaging natural resources within our borders, and interfering with state efforts to meet water quality standards. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 518-26 (2007) (finding state standing to compel nationwide regulation of emissions that threatened harm to state territory and natural resources); *West Virginia*, 362 F.3d at 868 (finding state standing where agency action would have impaired ability to meet federal environmental requirements); *Idaho*, 35 F.3d at 591 (finding state standing to prevent pollution damage to state resources).

Inadequate Representation by EPA

33. State Movants satisfy the final factor necessary to intervene as of right because EPA cannot adequately represent the interests of a coalition of sixteen States and one City whose interests diverge from EPA in critical respects. To satisfy this prong, a movant need only "show[] that representation of [its] interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

34. As a general matter, this Court and others have routinely recognized that sovereign States may not be adequately represented by the federal government

even in cases where there is broad alignment in goals and positions.[13] Here, for example, State Movants have interests threatened by this challenge that are generally outside the purview of the federal government, such as protecting the vitality of state fisheries and the integrity of state ecosystems, and avoiding the state regulatory burdens required to address mercury-contaminated waters.

35. In the specific circumstances of this case, there can be no doubt that the interests of the State Movants are sufficiently divergent to warrant intervention. In the 2020 Rule, EPA disclaimed the "appropriate and necessary" finding on which the Standards are predicated, 85 Fed. Reg. at 31,288, and it determined not to rescind the Standards only because of a belief that the law required it to leave them in place, *id.* at 31,312. EPA's view that regulation of power plant hazardous air pollution is not "appropriate and necessary" to protect public health makes it unlikely that EPA will zealously present to this Court all available and necessary arguments to defend a rule that it no longer believes to be good public policy.

36. Relatedly, State Movants intend to make arguments to defend against Westmoreland's challenge that EPA likely cannot or will not assert. For instance,

[13] *See, e.g.*, Order, *Wisconsin v. EPA*, No. 16-1406 (D.C. Cir. Jan. 31, 2017) (granting intervention to state coalition supporting EPA), ECF No. 1658440; Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 11, 2016), ECF No. 1592885 (same); *see also Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (finding that Arizona's interests were not necessarily represented by the Forest Service).

State Movants will likely argue—both in their forthcoming petition for review of the 2020 Rule and as intervenor-respondents here—that the Standards must remain in place because EPA lacks authority to revise its "appropriate and necessary" finding and otherwise erred in determining that section 112 regulation of power plants is not "appropriate and necessary." State Movants thus are not aligned with EPA in critical respects, and will offer distinct perspective and argument that EPA cannot adequately represent.

Permissive Intervention

37. While State Movants readily satisfy the requirements for intervention as of right, State Movants also meet the less burdensome requirements for permissive intervention under FRCP 24(b).[14] To address the same interests and harms detailed above, and because no party would be prejudiced by intervention at this early stage of the litigation, permissive intervention is also warranted.

[14] Under FRCP 24(b), a court may "permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact" so long as the motion is timely and intervention would not "unduly delay or prejudice the rights of the original parties." FRCP 24(b)(1)(B), (3). This Court "eschew[s] strict readings of the phrase 'claim or defense,'" in favor of "a flexible reading of Rule 24(b)." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

CONCLUSION

38. For all the reasons above, State Movants respectfully request that the Court grant their motion to intervene as respondents in case number 20-1160 and any later-filed suits in which a petitioner seeks to invalidate the Standards or otherwise erode EPA's authority to regulate hazardous air pollutants emitted by coal- and oil-fired power plants under section 112 of the Act.

Dated: June 22, 2020

Respectfully Submitted,

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CERTIFICATE OF PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), State Movants submit this certificate of parties.

Petitioner: Westmoreland Mining Holdings LLC.

Respondent: Environmental Protection Agency.

Other Movant-Intervenors: A group of public health and environmental organizations has moved to intervene in support of respondent; that group consists of American Academy of Pediatrics, American Lung Association, American Public Health Association, Chesapeake Bay Foundation, Chesapeake Climate Action Network, Citizens for Pennsylvania's Future, Clean Air Council, Conservation Law Foundation, Environment America, Environmental Defense Fund, Environmental Integrity Project, Environmental Law & Policy Center, Montana Environmental Information Center, National Association for the Advancement of Colored People, Natural Resources Council of Maine, Natural Resources Defense Council, Physicians for Social Responsibility, Sierra Club, and The Ohio Environmental Council.

Parties in Consolidated Action: As of the time of this filing, State Movants are aware of one other challenge to the 2020 Rule that has been consolidated with case number 20-1160. *See American Academy of Pediatrics v. Wheeler*, No. 20-1221 (D.C. Cir.). The public health and environmental petitioners in that suit (many of

whom are movant-intervenors in case number 20-1160) are American Academy of Pediatrics, Air Alliance Houston, American Lung Association, American Public Health Association, Chesapeake Bay Foundation, Inc., Chesapeake Climate Action Network, Clean Air Council, Clean Wisconsin, Citizens for Pennsylvania's Future, Conservation Law Foundation, Downwinders at Risk, Environment America, Environmental Defense Fund, Environmental Integrity Project, Environmental Law and Policy Center, Montana Environmental Information Center, National Association for the Advancement of Colored People, Natural Resources Council of Maine, The Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, and United States Public Interest Research Group, Inc; the respondent in that suit is Andrew Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency.

Anticipated Petition by State Movants: As described in the foregoing motion, State Movants intend to file their own petition for review of the 2020 Rule.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rules 27 and 32 of the Federal Rules of Appellate Procedure, that that the foregoing motion (1) complies with type-volume limitations because, according to Microsoft Word, the document contains 5,101 words excluding the parts exempted by Rule 32(f); and (2) complies with typeface and type-style requirements because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

/s/ David S. Frankel
David S. Frankel

Dated: June 22, 2020

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Intervene as Respondents filed through the Court's CM/ECF System has been served electronically on all registered participants of the CM/ECF System as identified in the Notice of Docket Activity.

/s/ David S. Frankel
David S. Frankel

Dated: June 22, 2020