

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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COALITION FOR RESPONSIBLE)	
REGULATION, INC., <i>et al.</i> ,)	
)	No. 09-1322 (and consolidated
Petitioners,)	Case Nos. 10-1024, 10-1025,
)	10-1026, 10-1030, 10-1035,
v.)	10-1036, 10-1037, 10-1038,
)	10-1039, 10-1040, 10-1041,
ENVIRONMENTAL PROTECTION)	10-1042, 10-1044, 10-1045,
AGENCY,)	10-1046, 10-1049)
)	
Respondent.)	
_____)	

MOTION OF WETLANDS WATCH TO INTERVENE
IN SUPPORT OF RESPONDENT

Wetlands Watch respectfully moves this Court pursuant to Fed. R. App. P. 15(d) and Circuit Rule 15(b) to intervene in support of Respondent United States Environmental Protection Agency (“EPA”) in the Petition for Review filed by the Commonwealth of Virginia, *ex rel.* Kenneth T. Cuccinelli, II (No. 10-1036) (“Virginia Petition”). The Virginia Petition seeks review of the final action of EPA published in the Federal Register at 74 Fed. Reg. 66496 *et seq.* (Dec. 15, 2009), and entitled “Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule” (“Endangerment Finding”). Pursuant to Circuit Rule 15(b), this motion also

constitutes a motion to intervene in all petitions for review of the challenged final action. As grounds for its motion, Wetlands Watch states as follows:

Introduction

1. Petitioner Commonwealth of Virginia, *ex rel.* Kenneth T. Cuccinelli, II, filed this proceeding on February 16, 2010, pursuant to § 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), seeking review of EPA's Endangerment Finding. By order dated February 18, 2010, the Virginia Petition was consolidated with other petitions seeking review of the Endangerment Finding into case number 09-1322, bearing the caption, *Coalition for Responsible Regulation, Inc., et al., Petitioners, v. Environmental Protection Agency, Respondent*.

2. In its Endangerment Finding, EPA determined that six greenhouse gases taken in combination endanger the public health and public welfare of current and future generations, and that the combined emissions of four of those six greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the endangerment. 74 Fed. Reg. 66496 *et seq.* The Endangerment Finding is a prerequisite to EPA promulgating regulations establishing greenhouse gas emissions standards for new motor vehicles and new motor vehicle engines.

3. As a membership organization comprising persons with personal and financial interests in coastal and tidal areas and wetlands in Virginia that are being adversely affected—and will continue to be adversely affected—by the effects of

climate change, Wetlands Watch has a unique interest in defending EPA's Endangerment Finding and in preserving EPA's ability and obligation to regulate greenhouse gases under the Clean Air Act. *See supra* ¶¶ 13-19, 23-28. Therefore, Wetlands Watch seeks leave to intervene in this proceeding in support of EPA's Endangerment Finding in order to promote and protect its organizational interests and the individual interests of its members.

Background

4. On October 20, 1999, nineteen non-governmental organizations petitioned EPA to set standards for emissions of greenhouse gases from new motor vehicles and engines pursuant to its authority under section 202(a) of the Clean Air Act, 42 U.S.C. § 7521(a). *See* 74 Fed. Reg. 66,496, 66,499; *see also Massachusetts v. EPA*, 549 U.S. 497, 510 (2007). On September 8, 2003, EPA denied that petition, asserting that the Clean Air Act does not authorize EPA to regulate greenhouse gas emissions. 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003). EPA further determined that even if it had the authority to set standards for the emission of greenhouse gases, a number of policy considerations rendered it unwise for the agency to do so at that time. *Id.* at 52,929-52,931.

5. A number of states, localities, and organizations sought judicial review of EPA's denial of the petition. In 2007, the United States Supreme Court rejected EPA's position, ruling that the Clean Air Act does authorize EPA to

regulate the emission of greenhouse gases. *Massachusetts*, 549 U.S. at 532. The Supreme Court also found that EPA had not properly justified its refusal to decide whether greenhouse gases cause or contribute to climate change. *Id.* at 534.

6. In response to the Supreme Court's decision, EPA published its "Proposed Endangerment and Cause or Contribute Findings" for six greenhouse gases. *See* 74 Fed. Reg. 18,886 *et seq.* (Apr. 24, 2009). After receiving and reviewing extensive public comment, the EPA Administrator published the Endangerment Finding on December 15, 2009. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009).

7. EPA's Endangerment Finding determined that greenhouse gases endanger public health and welfare. 74 Fed. Reg. at 66498-66,499. As one justification for its determination, EPA specifically noted the risks threatening coastal areas of the United States:

Overall, the evidence on risk of adverse impacts for coastal areas provides clear support for a finding that greenhouse gas air pollution endangers the welfare of current and future generations. The most serious potential adverse effects are the increased risk of storm surge and flooding in coastal areas from sea level rise and more intense storms. Observed sea level rise is already increasing the risk of storm surge and flooding in some coastal areas.... In addition, coastal areas face other adverse impacts from sea level rise such as land loss due to inundation, erosion, wetland submergence, and habitat loss.

Id. at 66,498.

8. Similarly, the Technical Support Document (“TSD”) that accompanied EPA’s Endangerment Finding noted the adverse impacts of the effects of climate change on the Mid-Atlantic region of the United States. For example, page 119 of the TSD cites findings that “[i]t is virtually certain that those tidal wetlands [in the U.S. Mid-Atlantic region] already experiencing submergence by sea level rise, and associated high rates of loss will continue to lose area in the future due to both accelerated rates [of] sea level rise as well as changes in other environmental and climate drivers.” Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 119 (December 7, 2009). The TSD also states that, “[e]ven with no increase in hurricane intensity, more frequent storm surge flooding, shoreline retreat, and permanent inundation of coastal ecosystems and communities [in the “Southeast” region of the United States, which includes Virginia] is likely.” *Id.* at 143.

9. In addition to the determination that six greenhouse gases endanger the public health and welfare, EPA’s Endangerment Finding also included a determination that emissions of four of the six greenhouse gases from new motor vehicles and new motor vehicle engines contribute to that endangerment. *Id.* at 66,496.

10. These two affirmative determinations form the core of EPA's Endangerment Finding and establish the foundation that is necessary for and compels EPA to exercise its regulatory authority to issue standards for greenhouse gas emissions from new motor vehicles under section 202(a) of the Clean Air Act, 42 U.S.C. § 7521(a). *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). In a separate rulemaking process, EPA has begun to take steps toward complying with its statutory duty by jointly proposing with the National Highway Safety Transit Authority a rule to establish standards for greenhouse gas emissions from new motor vehicles. 74 Fed. Reg. 49,454 (Sept. 28, 2009).

11. On December 23, 2009, Petitioners Coalition for Responsible Regulation, Inc., *et al.*, filed a proceeding (case number 09-1322) under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), seeking this Court's review of EPA's Endangerment Finding. On February 16, 2010, Petitioner Commonwealth of Virginia, *ex rel.* Kenneth T. Cuccinelli, II, filed a proceeding with this Court ("Virginia Petition") seeking review of EPA's Endangerment Finding. By order dated February 18, 2010, the Virginia Petition was consolidated, along with other petitions seeking review of the Endangerment Finding, into case number 09-1322.

12. Wetlands Watch seeks leave to intervene in this action in support of EPA under Fed. R. App. P. 15(d) and Circuit Rule 15(b) because Wetlands Watch

and its members have a substantial interest in the subject of the petition, because disposition of the action could significantly impair the ability of Wetlands Watch and its members to protect that interest, and because existing parties to the lawsuit may not be able to represent the interest of Wetlands Watch and its members adequately.

The Interests of Wetlands Watch and Its Members

13. Wetlands Watch has an interest in this litigation and seeks leave to intervene in support of Respondent EPA and its findings that six greenhouse gases taken in combination endanger the public health and public welfare of current and future generations, and that the combined emissions of four of the six greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the endangerment. *See* Declaration of William A. “Skip” Stiles, Jr. ¶¶ 15-16 (“Stiles Declaration”), attached.

14. Wetlands Watch is a not-for-profit corporation comprising persons who live, work, recreate, and own real property in the coastal and tidal areas of Virginia. Wetlands Watch has approximately 50 members. *Id.* ¶ 12. Wetlands Watch and its members are dedicated to the protection and conservation of Virginia’s wetlands and shoreline environments. Wetlands Watch seeks to further its mission by advocating for more effective laws and regulations to address the threats facing Virginia’s wetlands and shoreline environments; educating the

public about responsible stewardship of these areas and resources; and influencing the regulatory, land use, and other governmental decision-making processes that may affect Virginia's wetlands and shorelines. *Id.* ¶ 3.

15. Since 2006, Wetlands Watch has focused extensively on the threats that climate change poses to Virginia's wetlands and shoreline environments, giving particular attention to the accelerating rate of sea level rise and higher storm surges, and their associated impacts such as inundation and erosion. Wetlands Watch has made addressing these threats an organizational priority in light of the damage they are inflicting on the shoreline and wetland areas and resources that the organization and its members seek to protect and conserve. *Id.* ¶ 10.

16. Wetlands Watch has increased its focus on these threats in response to recent scientific studies and reports which project that climate change, if not mitigated, will have serious adverse effects on the shoreline areas and wetlands of Virginia. These studies demonstrate the significant threats that climate change and its associated effects pose to Virginia's coastal and tidal areas and the people who live, work, and recreate in those areas. Stiles Declaration, ¶¶ 6, 10. For example, a recent National Wildlife Federation study found that nearly 20 percent of undeveloped dry land in the Lower Tidewater Region of Virginia is at risk of inundation, and that over 80 percent of the beaches along Virginia's Eastern Shore could disappear and be converted to open water by the year 2100 as a result of sea

level rise due, in significant part, to the effects of climate change. *Id.* ¶ 7. In addition, a catastrophe modeling analysis performed by Risk Management Solutions and referenced in the final report of the Virginia Governor’s Commission on Climate Change (“Virginia Climate Commission”) has determined that the Virginia Beach-Norfolk Metropolitan Statistical Area ranks tenth in the world in value of assets exposed to increased flooding from sea level rise. *Id.* ¶ 6.

17. The members of Wetlands Watch include persons who live, own real property, work, and recreate in coastal and tidal areas of Virginia that are being—and will continue to be—adversely affected by climate change and the unregulated emissions of greenhouse gases. These members’ property and welfare are being negatively affected by rising sea levels and higher storm surges, and the resulting erosion and inundation of coastal and tidal land, wetlands, and other resources. *Id.* ¶ 12; Declaration of Clayton F. Lory, II, at ¶¶ 4-11 (“Lory Declaration”).

18. The members of Wetlands Watch also include persons who joined Wetlands Watch precisely because of their recognition of the many important ecological roles wetlands play in coastal and tidal areas, and because of their desire to help conserve and protect these important resources in Virginia. Stiles Declaration, ¶ 13. These members’ interests are being negatively affected by the damage that rising sea levels, higher storm surges, and other effects of climate change are inflicting on Virginia’s wetlands.

19. To promote its organizational goals and the interests of its members, Wetlands Watch has actively promoted policies to combat climate change, and it has participated in a wide array of proceedings to strengthen efforts to address the adverse effects of climate change on Virginia's wetlands and shoreline environments. *Id.* ¶ 11. In particular, Wetlands Watch served on the Virginia Climate Commission and contributed to the final report outlining a climate change response action plan for Virginia. *Id.* Additionally, Wetlands Watch has participated in numerous federal, state, and local land use and regulatory proceedings to advocate for development patterns that, if combined with reductions to greenhouse gas emissions, can help limit the loss of wetlands and the wetland ecological services that climate change would otherwise inflict in Virginia. *Id.* ¶ 11. Wetlands Watch has also conducted outreach to citizens, businesses, and governmental entities to educate them about climate change and its effects on Virginia's shorelines and wetlands, and to lay the groundwork for a stronger public policy response to climate change.

Argument

Standard for Granting Intervention.

20. Fed. R. App. P. 15(d) states that a motion to intervene in a Court of Appeals proceeding "must contain a concise statement of the interest of the moving party and the grounds for intervention." The standards for intervening in a

District Court proceeding pursuant to Fed. R. Civ. P. 24 help guide this Court's review of a motion to intervene in the Court of Appeals. *See International Union v. Scofield*, 382 U.S. 205, 217 n. 10 (1965). Under Fed. R. Civ. P. 24(a), intervention of right requires that: (1) the intervenor's motion be timely; (2) the intervenor has an interest relating to the subject of the action; (3) disposition of the action may impair or impede the intervenor's ability to protect that interest as a practical matter; and (4) existing parties to the lawsuit may not be able to represent the intervenor's interests adequately. As set forth below, Wetlands Watch meets each of these standards.

Proposed Intervenor Meets the Standard for Intervention.

A. Wetlands Watch's Motion is Timely.

21. On February 16, 2010, the Commonwealth of Virginia, *ex rel.* Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, petitioned this Court for review of EPA's Endangerment Finding. Therefore, this motion is timely because it is filed within 30 days of the date Petitioner Commonwealth of Virginia filed its petition for review with this Court. Fed. R. App. P. 15(d).

22. Several other petitions for review of the same finding have been filed, and all of the petitions have been consolidated into case number 09-1322 bearing the caption, *Coalition for Responsible Regulation, Inc., et al., Petitioners, v.*

Environmental Protection Agency, Respondent. Order of February 17, 2010; orders of February 18, 2010. This intervention will not unduly delay these proceedings. According to the PACER website docket for this case, last searched at 11:30 AM eastern daylight time on March 18, 2010, no briefing schedules for the consolidated proceedings have been established, and none of the parties has submitted its initial submissions. This intervention will not interfere with or complicate the proceedings.

B. Wetlands Watch and Its Members Have an Interest in Protecting Virginia's Wetlands and Shoreline Environments from the Adverse Effects of Climate Change and Unregulated Greenhouse Gas Emissions.

23. This Court has described the interest test for intervention as “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) (reversing denial of intervention under Fed. R. Civ. P. 24(a)). This review proceeding directly and significantly affects the mission and interests of Wetlands Watch and the interests of its members.

24. Wetlands Watch and its members are familiar with EPA’s Endangerment Finding and its importance to EPA’s efforts to set standards for and regulate greenhouse gases that cause or exacerbate climate change and thereby threaten the interests of Wetlands Watch and its members. Stiles Declaration, ¶ 15; Lory Declaration, ¶ 11.

25. Wetlands Watch and its individual members have a direct, demonstrated, and concrete interest in upholding EPA's Endangerment Finding. The mission of Wetlands Watch is to protect and conserve Virginia's wetlands and shoreline environments. Stiles Declaration ¶ 3. Since 2006, Wetlands Watch has worked extensively to address the threats that climate change and its effects pose to Virginia's wetlands and shoreline areas, with particular focus on the accelerating rate of sea level rise and higher storms surges and their associated impacts. As described above, Wetlands Watch actively promotes its organizational interests, as well as its members' particularized interests, through a combination of advocacy for stronger laws and regulations, public education, and participation in relevant governmental proceedings. *Id.* ¶¶ 3, 10.

26. As described above, Wetlands Watch's members include persons who live, own real property, work and recreate along coastal and tidal areas of Virginia that are being—and will continue to be—adversely affected by climate change and unregulated emissions of greenhouse gases. *Id.* ¶ 12. Wetlands Watch's membership also includes persons who joined Wetlands Watch precisely because of their recognition of the important ecological roles wetlands play in coastal and tidal areas, and because of their desire to help conserve and protect these important resources in Virginia. Stiles Declaration, ¶ 13. Wetlands Watch's members' property and welfare are being directly and negatively affected by rising sea levels

and higher storm surges, and the resulting erosion and inundation of coastal and tidal land, wetlands, and resources. *Id.* ¶¶ 12-13; Lory Declaration, ¶ 4-10.

Therefore, Wetlands Watch and its members have direct organizational and personal interests in upholding EPA's Endangerment Finding and in defending EPA's efforts to set standards for and regulate greenhouse gas emissions from new motor vehicles.

27. The Virginia Petition is a challenge to the Endangerment Finding. A decision overruling the Endangerment Finding could preclude or forestall EPA's ability to adopt standards and regulations that limit greenhouse gas emissions from new motor vehicles which, in turn, would undermine Wetlands Watch's organizational purpose and mission to protect and conserve Virginia's wetlands and shoreline environments from, among other threats, the harms posed by climate change. Stiles Declaration, ¶ 16. A decision overruling the Endangerment Finding also would harm the personal interests of the members of Wetlands Watch who live, work, recreate, own real property, and value wetlands in a vulnerable area of the United States that is being—and will continue to be—significantly and adversely affected by climate change and the greenhouse gas emissions that are causing and accelerating it. *Id.* ¶¶ 12, 16.

28. Therefore, Wetlands Watch has a direct and concrete interest in this proceeding to defend EPA's Endangerment Finding, which includes EPA's

conclusion that “the evidence on risk of adverse impacts for coastal areas provides clear support for a finding that greenhouse gas air pollution endangers the welfare of current and future generations.” 74 FR 66,496, 66498 (Dec. 15, 2009).

C. *Vacatur or Other Adverse Disposition of EPA’s Endangerment Finding Will Impair the Ability of Wetlands Watch to Protect its Interests and its Members Interests in this Matter.*

29. As described above, Wetlands Watch and its members have a direct interest in protecting Virginia’s wetlands and shoreline environments from the damaging impacts that climate change and increasing greenhouse gas emissions are already inflicting—and will continue to inflict—on them. Wetlands Watch’s membership comprises persons who live, work, recreate, own property, and value wetlands in the tidal and shoreline areas of Virginia. As set forth above, these areas and resources are particularly vulnerable to the adverse effects of climate change, including rising sea levels and increased intensity of storms. Stiles Declaration ¶¶ 5-9; Lory Declaration ¶¶ 4-10. Therefore, Wetlands Watch and its members have a direct interest in the regulation of greenhouse gas emissions that cause, contribute to, and accelerate climate change.

30. Because EPA’s Endangerment Finding is a prerequisite to EPA having the authority and statutory duty to issue standards for and regulate greenhouse gas emissions from new motor vehicles and new motor vehicle engines under the Clean Air Act, a disposition of this proceeding that vacates or otherwise

undermines the Endangerment Finding could impair EPA's authority and thereby preclude or delay EPA from taking meaningful action to limit such emissions.

Any such prevention or delay would prolong the unregulated emission of greenhouse gases that are causing harm to Wetlands Watch and its members.

Therefore, disposition of this proceeding may significantly impair the ability of Wetlands Watch and its members to protect their interests.

D. *Existing Parties May Not Represent the Interests of Wetlands Watch or its Members Adequately.*

31. The U.S. Supreme Court has explained that the requirement of Fed R. Civ. P. 24(a) that an intervenor's interest not be adequately represented by existing parties "is satisfied if the [intervenor] applicant shows that representation of [its] interest 'may be' inadequate," a showing for which the burden of proof should be "minimal." *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-39 and n. 10 (1972). Wetlands Watch focuses on the protection of highly vulnerable wetlands and shoreline environments in an area of the United States that ranks among those facing the greatest risks from the adverse effects of climate change. Wetlands Watch thus meets the "minimal" burden of proving that the representation of its interests "may be" inadequate.

32. Petitioner Commonwealth of Virginia, *ex rel.* Kenneth T. Cuccinelli, II, is challenging EPA's Endangerment Finding. Wetlands Watch seeks leave to intervene in this proceeding in order to defend EPA's Endangerment Finding.

Therefore, the challenge filed by the Commonwealth of Virginia directly contravenes the interests of Wetlands Watch.

33. Although Wetlands Watch and Respondent EPA share a broad, common interest in upholding EPA's Endangerment Finding, EPA may not adequately protect the interests of Wetlands Watch and its members. Whereas EPA is an Executive Branch agency that must balance a wide range of interests and concerns, Wetlands Watch is a private, non-governmental organization with a mission focusing solely and systematically on the protection and conservation of Virginia wetlands and shoreline environments. As a result, EPA is not required to and may not be able to represent and protect the discrete interests of Wetlands Watch and its members adequately.

34. This Court "[h]as often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003). While EPA is charged with protecting and safeguarding human health and the environment of the nation as a whole, Wetlands Watch's organizational interests and activities are more focused and particularized in nature. Wetlands Watch has a specific interest in addressing the significant damage that climate change is already inflicting, and will continue to inflict, on the particularly vulnerable coastal areas and wetlands of Virginia. Based on the sheer magnitude of the impacts to this area of the country, as outlined

above, Wetlands Watch's specific concerns and interests are likely to be among the many considerations that EPA will balance during this proceeding. However, EPA must also consider numerous other factors and potentially conflicting interests in its role as Respondent, rendering the agency unable to focus upon and represent adequately Wetlands Watch's more specific interests.

35. Further, as an administrative agency charged with protecting and safeguarding human health and the environment of the nation as a whole, EPA has many priorities but finite resources. As a result, EPA may decide to resolve or settle this action in a manner that does not coincide with the interest Wetlands Watch and its members have in the urgent enactment of standards and regulations for greenhouse gas emissions from new motor vehicles.

36. For similar reasons, the other organizations that have filed motions to intervene as respondents in the consolidated proceedings before this Court have interests that are separate and distinct from the interests of Wetlands Watch and its members. Although there are a number of other environmental interest organizations that have moved to intervene on behalf of EPA, their interests are different from the interests of Wetlands Watch. Proposed intervenors Natural Resources Defense Council, Environmental Defense Fund, Sierra Club, and National Wildlife Federation are national groups with a focus on a wide array of environmental threats. Proposed intervenor Conservation Law Foundation, Inc., is

not national in scope or focus, but its organizational interests and the interests of its members are rooted in a different region of the country than are the interests of Wetlands Watch and its members. In addition to these environmental interest groups, there are a number of state and local governmental entities that have proposed to intervene as respondents in the consolidated proceedings. However, like EPA, these are governmental entities that must balance a number of competing interests and considerations, and none of them has a specific focus on protecting the shoreline environments and wetlands of Virginia. Therefore, they cannot be expected to represent the interests of Wetlands Watch and its members adequately.

37. Therefore, Wetlands Watch is uniquely situated to understand and articulate the acute injuries that climate change and increasing greenhouse gas emissions are inflicting, and will continue to inflict, on Virginia's wetlands and shoreline areas and the people who value those areas and resources. Similarly, Wetlands Watch's membership and its organizational goals are substantially and materially different from the roles and claims represented by the current parties in this case. As a result, Wetlands Watch is uniquely situated to represent its organizational interests and the interests of its members in avoiding or lessening the additional harms that climate change and unregulated greenhouse gas emissions will inflict on the wetlands and shoreline environments of Virginia.

Conclusion

38. Wetlands Watch meets the requirements for intervention contained in Fed. R. App. P. 15(d) and Fed. R. Civ. P. 24(a).

WHEREFORE, Wetlands Watch respectfully requests leave to intervene as a Respondent in No. 10-1036, and under Circuit Rule 15(b), in all other petitions for review of the Endangerment Finding.

RESPECTFULLY SUBMITTED,
this 18th day of March, 2010, by

/s/Deborah M. Murray

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