ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

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

STATE OF WEST VIRGINIA, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 15-1363 (and
	)	consolidated case
ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	No. 15-1398)
	)	
	)	
Respondents.	)	
	)	

EPA'S OPPOSITION TO PETITIONER ENERGY & ENVIRONMENT LEGAL INSTITUTE'S MOTION FOR LEAVE TO FILE A SEPARATE BRIEF

Respondents United States Environmental Protection Agency and Administrator Gina McCarthy (collectively "EPA") hereby oppose the motion filed by the Energy & Environment Legal Institute ("EELI"), the petitioner in consolidated case No. 15-1398, seeking leave to file a 1300-word separate brief in this consolidated proceeding. *See* Motion for Leave to File Separate Supplement to Petitioners Brief (Doc. No. 1599886) (filed February 19, 2016) (hereinafter "Motion"). EELI has not justified why it, alone among all the petitioners and intervenor-petitioners in this action, should be allowed to file an additional brief to advance a unique argument (apparently one that is not joined in by any other

party). Furthermore, EELI has not provided any evidence to support its claim of standing, further undermining any justification for allowing it to raise a unique issue. However, should the Court grant EELI's request, EPA respectfully requests that the word limits for EPA's responsive brief due on March 28, 2016, be increased by 1300 words as well. In further support of this opposition, EPA states:

1. These consolidated petitions seek review of the Clean Power Plan Rule ("the Rule"). The Rule was promulgated by EPA under authority of section 111 of the Clean Air Act, 42 U.S.C. § 7411, and secures important reductions in carbon dioxide emissions from existing fossil-fuel-fired power plants. Thirty-nine petitions for review of the Rule have been filed and consolidated under lead case No. 15-1363.

2. On December 18, 2015, EELI filed a non-binding statement of issues listing 16 discrete issues that it intended to raise in this litigation. *See* Petitioners' Non-Binding Statement of Issues to Be Raised, No. 15-1398 (Dec. 18, 2015) (DN 1589589).

3. On January 28, 2016, following submission of contested briefing format proposals by the parties, the Court issued a briefing order that provided, *inter alia*, for: (1) no more than two briefs for petitioners, not to exceed 42,000 words, to be filed on February 19, 2016; (2) a joint brief for intervenors in support of petitioners, not to exceed 10,000 words, to be filed on February 23, 2016; and

(3) a brief for EPA, not to exceed 42,000 words, to be filed on March 28, 2016. *See* Order (January 28, 2016) (DN 1595922).

4. On February 19, 2016, petitioners submitted two joint, consolidated briefs. *See* Opening Brief of Petitioners on Core Legal Issues (Feb. 19, 2016) (DN 1599889) ("Core Legal Issues Brief"); Opening Brief of Petitioners on Procedural and Record-Based Issues (Feb. 19, 2016) (DN 1599898) ("Record-Based Issues Brief"). EELI is a signatory to the Core Legal Issues Brief but it does not appear on the signature block for the Record-Based Issues Brief.

5. On that same day, EELI lodged a proposed separate brief along with the Motion. *See* Supplement to Brief of Petitioners on Procedural and Record-Based Issues (Feb. 19, 2016) (DN 1599887). EELI characterized this proposed brief as a "supplement" to petitioners' Core Legal Issues Brief and Record-Based Issues Brief. *Id.* at 1, n.1. EELI represented in the Motion that it had been unable to secure the agreement of any of the petitioners or intervenor-petitioners to make room in their joint briefs for one of EELI's issues (presumably out of the 16 it had identified in its statement of issues), involving the question of alleged *ex parte* contacts between the agency and outside parties in the development of the proposed rule. Motion at 2. According to EELI, this at least in part is due to the fact that "other petitioners do not, for various reasons, support [EELI's] argument"

and, similarly, that "petitioner-intervenors decided they too could not support this argument." *Id.*

6. EELI's Motion should be denied from a case-management perspective alone. EELI joined in the briefing format proposed by petitioners and petitioner-intervenors, and that proposal included the issue that EELI now highlights in its Motion. *See* Proposed Briefing Format and Schedule of Petitioners and Petitioner-Intervenors, at B-3 (Jan. 27, 2016) (DN 1595492). Petitioners and intervenor-petitioners represented at that time that the issues on that list would be addressed in their proposed joint briefs and were part of the rationale for the word limits requested. *Id.* at 11. The Court's allocation of word limits and numbers of briefs was, at least in part, based on its consideration and evaluation of these representations. The appropriate time for EELI to have inquired and aired any concerns about its unique issue (including whether other parties disagreed with it or would be willing to devote briefing space to it) was *before* it signed onto petitioners' and intervenor-petitioners' joint briefing format proposal, not now.

7. A supplemental brief also is not justified by the mere fact that EELI was ultimately unable to negotiate space in petitioners' or intervenor-petitioners' joint briefing for EELI's unique issue. Every time the Court requires joint briefing its purpose is, in part, to encourage similarly-aligned parties to work together to prioritize among their issues and present the most efficient briefing to the Court.

The fact that EELI was apparently unable to convince other parties to devote space to its unique issue in either petitioners' or intervenor-petitioners' briefing simply suggests that this issue is, in the view of most parties on that side of the case, one of lower priority than the issues that were briefed (many or most of which also appear to be joined by EELI). Moreover, it is common for joint briefs to include some issues that are significant but that are raised on behalf of fewer than all parties. In that situation, individual parties simply indicate which issues they join and which issues they don't, and EELI certainly could have utilized a procedure like this had it otherwise been able to convince its fellow petitioners that its unique issue warranted space in the joint briefs.

8. Finally, and perhaps most significantly, EELI's request should also be denied due to the fact that it has not carried its burden of demonstrating standing.[1] Pursuant to this Court's rules and precedent, EELI bears the burden of proving its standing through affidavits or other evidence, no later than the filing of its opening brief. *See* D.C. Cir. R. 15(c)(2), 28(a)(7); *see also, e.g.*, *Sierra Club v. EPA*, 292

[1] EPA is not at this time moving to dismiss EELI's petition for review, although EPA notes that the same defects in EELI's demonstration of standing that warrant denial of the present motion would also justify dismissal of EELI's petition in its entirety. Should the Court deny EELI's present Motion, there likely would be little practical effect from a motion to dismiss since the remainder of EELI's issues appear to be joined by other Petitioners whose standing EPA does not contest. However, EPA reserves its right to seek dismissal of EELI's petition at a later date if EELI's present Motion is granted.

F.3d 895, 900-01 (D.C. Cir. 2002). There may be no need for the Court to examine EELI's standing as to claims raised jointly with other petitioners whose standing is uncontested, *see, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), but EELI is at least required to demonstrate its standing to raise the unique claim in its proposed supplemental brief. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) ("a plaintiff must demonstrate standing for each claim he seeks to press") (citation omitted).

9. EELI's proposed supplemental brief (DN 1599887) contains no discussion of the alleged basis for EELI's standing whatsoever, and while EELI is a signatory to the Petitioners' Core Legal Issues Brief, the very short standing discussion in that brief makes no specific mention of EELI. *See* Core Legal Issues Brief at 27. Accordingly, it appears that EELI's claim of standing rests entirely on the very general statements it made, unsupported by any affidavits or other evidence, in its docketing statement. *See* Agency Docketing Statement, No. 15-1398 (Dec. 18, 2015) (DN 1589587) ("Docketing Statement"). In that filing, EELI claimed it has standing in its own right because the rule allegedly would prevent EELI from continuing to "research and engage[] in advisement related to coal energy as an economically sound and environmentally safe method of energy generation." *Id.* at 2-3. EELI offered no explanation how EPA's Rule could possibly prevent it from engaging in research and advisement. EELI also claimed

that that it has standing to sue on behalf of its members, who the Rule will allegedly injure "by causing economic harm to property interests and frustrating investment-backed expectations." *Id.* at 3. EELI did not, however, identify any specific member or any specific injury to such a member that it was referring to. These very general and wholly conclusory statements fall far short of carrying EELI's burden to demonstrate its standing.

10. To sue on its own behalf, an organization such as EELI must meet the same test applicable to individuals. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). Thus, it must "show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Food & Water Watch v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (citation omitted). "An organization must allege more than a frustration of its purpose because frustration of an organization's objectives 'is the type of abstract concern that does not impart standing.'" *Id.* (citation omitted); *see also Havens Realty*, 455 U.S. at 379. To determine whether an organization has carried its burden of demonstrating standing in its own right, the Court conducts a two-part inquiry asking both whether the agency's action injured the organization's interests and "whether the organization used its resources to counteract that harm." *Food & Water Watch*, 808 F.3d at 919. In this case, EELI's conclusory Docketing Statement – unsupported by any evidence whatsoever – fails to prove either of

these two elements. In short, EELI has not identified (nor could it) any specific provision of the Rule that in fact prevents it in any way from continuing its research and advocacy on energy-related issues, and even if it had, it has not identified any efforts it has made to overcome such alleged impediments.

11. EELI similarly has not carried its burden of demonstrating its standing to sue on behalf of its members. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Here, the sum total of EELI's allegations on this point is that the "rule would injure members of EELI by causing economic harm to property interests and frustrating investment-backed expectations." Docketing Statement at 3. As noted above, however, EELI has not identified any specific member that it is referring to, let alone any specific property interest or investment of such a member that it believes to be harmed by the Rule. Indeed, in *Sierra Club v. EPA*, 292 F.3d 895, 901-02 (D.C. Cir. 2002) – the very case that gave rise to this Court's evidentiary requirements for standing now memorialized in Circuit Rules 15(c)(2) and 28(a)(7) – the Court specifically held that counsel's generalized statements about the

alleged interests of an organization's members was insufficient to support a claim of organizational standing, and in that case, counsel's statements were far *more* detailed than the single conclusory sentence offered by EELI on this issue in its Docketing Statement. *See, e.g., Sierra Club*, 292 F.3d at 901 (counsel's submission included lists of "28 street addresses, each purportedly that of a Sierra Club member" and a description of why those members would suffer injury from the challenged rule); *see also, e.g., Chamber of Commerce of the United States v. EPA*, 642 F.3d 192, 201-06 (D.C. Cir. 2011) (finding declarations discussing possible future harm to members too speculative to support a claim of associational standing). EELI thus lacks standing to raise the issues addressed in its proffered separate brief.

CONCLUSION

For all the foregoing reasons, EELI's Motion should be denied. However, should the Court grant EELI's Motion, in the interest of fairness the Court should allow a corresponding 1300-word expansion of EPA's responsive brief (i.e., increasing the word limit for EPA's brief from the present 42,000 words to 43,300 words).

Respectfully submitted,

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Dated: February 25, 2016

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Motion for Leave to File Separate Brief were today served, this 25th day of February, 2016, on all counsel of record through the Court's CM/ECF system.

/s/ Jon M. Lipshultz

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