ORAL ARGUMENT HELD ON DECEMBER 6, 2007
DECISION ISSUED ON FEBRUARY 8, 2008

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

STATE OF NEW JERSEY, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 05-1097 and consolidated cases

EPA'S RESPONSE TO TRIBAL MOVANTS' MOTION FOR COSTS OF LITIGATION [1/]

[1] Tribal Movants are the National Congress of American Indians, Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Jamestown S'Klallam Tribe, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Lower Elwha Klallam Tribe, Lummi Nation, Minnesota Chippewa Tribe, Nisqually Tribe and Swinomish Indian Tribal Community.

This Court determined, as the result of a purely statutory analysis, that the United States Environmental Protection Agency ("EPA") had no authority to delist coal- and oil- fired steam generating units ("power plants") from the hazardous air pollutant program created by section 112 of the Clean Air Act, 42 U.S.C. § 7412, without making findings under section 7412(c)(9) of that Act.[2/] *See New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Tribal Movants did not brief this legal issue, the *only* legal issue this Court resolved. Indeed, Tribal Movants did not even file a petition challenging EPA's delisting rule. Instead, Tribal Movants filed a petition for review of only an ancillary reconsideration proceeding.

EPA has settled attorney fee claims with environmental petitioners who pressed the claim concerning the scope of EPA's legal authority on which the Court ruled. Tribal Movants certainly benefitted from this ruling, but they did not raise this, or any other, successful claim. The Court did not reach, let alone resolve, the record-based claim concerning tribal fishing rights raised by Tribal Movants. Because that claims was not reached, Tribal Movants' legal arguments and theories concerning tribal fishing rights might still be raised and addressed by this Court in the context of a future challenge to subsequent EPA action, and it is not clear how the Court would

[2] Statutory references are to Title 42 of the United States code, unless otherwise indicated.

resolve those claims. An award of litigation costs is therefore inappropriate. Even if a claim for costs were deemed appropriate, the number of hours claimed is excessive.

BACKGROUND

I. The Three Rules Challenged in this Case

These consolidated cases challenge three EPA actions controlling mercury emissions from power plants. The first action ("the Delisting Rule") removed power plants from the list of sources whose emissions are regulated under CAA section 7412, based on a determination by EPA that it was not appropriate and necessary to regulate power plants under that section. 70 Fed. Reg. 15,994 (Mar. 29, 2005). The second action (the "Clean Air Mercury Rule" or "CAMR") established performance standards under section 7411 that limited mercury emissions from power plants. 70 Fed. Reg. 28,606 (May 18, 2005). The third action ("the Reconsideration Rule") was an ancillary reconsideration proceeding in which EPA made two substantive changes to CAMR, but no substantive change to the Delisting Rule. 71 Fed. Reg. 33,388 (June 9, 2006). More than 40 petitioners filed challenges to the three challenged rules. Petitioners filed seven opening briefs, including separate briefs filed by State Petitioners and Environmental Petitioners, Tribal Movants and various industry groups.

New Jersey and fourteen additional States and various environmental organizations challenged the Delisting Rule, arguing that EPA did not comply with the requirements of section 7412(c)(9) in delisting power plants. This Court agreed,

explaining that section 7412(c)(9) requires EPA to make specific findings before removing a source category listed under section 7412. *New Jersey v. EPA*, 517 F.3d 574, 582-83 (D.C. Cir. 2008). The Court further explained that once EPA originally determined that it was appropriate and necessary to regulate power plants under section 7412, the Agency had no authority to revise this determination without making the findings required under section 7412(c)(9). *Id.* Because EPA had not made the findings specified in section 7412(c)(9), the Court concluded that EPA's delisting of power plants violated the "plain text" of the statute. *Id.* at 582.

Having concluded that the Delisting Rule must be vacated, the Court concluded CAMR must be vacated as well. *Id.* at 583-84. The Court explained that, as applied to both new and existing power plants, the CAMR regulations were premised on the assumption that power-plants would not be regulated under section 7412. *Id.* The Court did not reach Tribal Movants' claims.

II. Tribal Movants Were Intervenors, not Petitioners, in the Delisting and CAMR Rule Cases

Tribal Movants do not fully explain the nature of their participation in these consolidated cases. Contrary to Tribal Movants' implication (*see* Tribal Fee Motion at 1), Tribal Movants elected *not* to file petitions for review of the Delisting Rule or CAMR and were not "petitioners" with respect to these two rules. Tribal Movants participated in the Delisting Rule and CAMR cases as intervenors. *See* Exhibit A (Motion Leave To Intervene) (filed on August 17, 2005 in Case No. 05-1162); Exhibit

B (Order granting Tribes' Motion, entered Dec. 8, 2005 in Case No. 05-1162). Tribal Movants are "petitioners" inasmuch as they filed a petition for review challenging the ancillary Reconsideration Rule. *See* Petition for Review filed June 23, 2006 in Case No. 06-1220. As petitioners in the Reconsideration Rule case, Tribal Movants submitted briefing addressing only the discrete issue of whether EPA was required to consider and comply with tribal treaty fishing rights.

Ultimately, the Court concluded that it was not necessary to resolve the challenges to the Reconsideration Rule, much less the treaty fishing rights issue raised by Tribal Movants. The Court vacated the Delisting Rule and CAMR based *solely* on State and Environmental Petitioners' argument that EPA had no authority to delist power plants without making findings under section 7412(c)(9). In its opinion, the Court did discuss or even reference Tribal Movants' petition for review of the Reconsideration Rule or the treaty fishing rights issue they raised.

ARGUMENT

Even prevailing litigants are ordinarily not entitled to attorneys' fees from the losing party. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 602 (2001) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975)). Congress has abrogated that rule by statute for certain situations, including fee awards under CAA section 7607(f). Under section 7607(f):

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees)

whenever it determines that such award is appropriate.

Id. Tribal Movants argue that they are entitled to reimbursement for costs and fees under CAA section 7607(f) because they challenged a regulation that was eventually overturned, even though it was overturned solely on grounds raised by other parties. Tribal Movants did not raise any successful arguments, however, and the issues they did address have yet to be resolved. An award of attorneys' fees is "appropriate" only where petitioners seeking reimbursement have: (1) attained some success on the merits; and (2) contributed substantially to the goals of the Clean Air Act in doing so. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682-84 (1983); *W. States Petroleum Ass'n v. EPA*, 87 F.3d 280, 286 (9th Cir. 1996) . Tribal Movants cannot satisfy either element of this test, thus an award of costs and fees would be improper here. Additionally, Tribal Movants are merely intervenors with respect to the Delisting Rule, and are not entitled to fees because they did not play a significant role in that aspect of the litigation. *See Wilder v. Bernstein*, 965 F.2d 1196, 1204 (2d Cir. 1992) (en banc).

I. As Intervenors With Respect to the Delisting Rule, Tribal Movants Are Not Entitled to Attorney Fees Because They Did Not Contribute to the Successful Claims Raised.

Tribal Movants participated in this case solely as intervenors with respect to the Delisting Rule. As intervenors, the nature of their participation was necessarily limited to "join[ing] issue on a matter that has been brought before the court by another party" and could not "expand the proceedings." "Otherwise, the time limitations for

filing a petition for review and a brief on the merits could easily be circumvented." *Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). In their role as intervenors here, Tribal Movants made no arguments with respect to the determinative issue in this case. By their own admission, Tribal Movants' merits briefs were limited to arguments that "EPA's actions were unlawful because the EPA failed to consider the effect of its actions on the Tribal Movants' treaty rights." Fee Motion at 4. *See also* Merits Br. of Tribal Movants at 22-44. Tribal Movants did state that they "agreed" with the ultimately successful arguments raised by other petitioners, but they added no substance to those arguments. Merits Br. of Tribal Movants at 23. Nor did Tribal Movants participate in oral argument, which focused exclusively on the section 7412 delisting issue. *See* Nov. 26, 2007 Order.

In analyzing an award of attorneys' fees under section 5 of the Voting Rights Act, this Court found that Congress did not intend an award of attorneys' fees for an intervenor to "be as nearly automatic as it is for a party prevailing in its own right." *Donnell v. United States*, 682 F.2d 240, 246 (D.C. Cir. 1982). In *Donnell*, the Court first looked to the legislative history of the Voting Rights Act fee provision and, after finding limited indications that intervenors *could* be awarded fees, the Court went on to look at the objective of the fee provision to generally encourage suits to protect civil rights. *Id.* Because the objective was to encourage "private attorneys general" to bring suits to vindicate the civil rights laws, the Court found that a claim for fees was

far less compelling when another party, in that case the Attorney General, was seeking to vindicate the same rights. *Id.*

The fee provision of the CAA, like its Voting Rights Act counterpart, gives no guidance with respect to the status of intervenors, as opposed to petitioners, seeking costs. *See* 42 U.S.C. § 7607(f). The legislative history of this provision provides little additional guidance, indicating only that a court may "in its discretion, award costs of litigation to a party bringing a suit under section[7607]." S. Rep. No. 95-127 at 99 (1977) *cited in Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 n.2 (1983) (discussing the legislative history of CAA section 7607(f)). As with the fee provision contained in section 5 of the Civil Rights Act, the policy purpose behind allowing an award of costs where "appropriate" under CAA section 7607(f) is "to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest." H.R. Rep. No. 95-294 at 337 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1416.

Given the similar policy goals behind the fee provisions in both the Voting Rights Act and the CAA, this Court should be similarly reluctant to award costs to intervenors who have failed to prevail in their own right. Petitions filed by State and Environmental Petitioners were sufficient to assure proper implementation and administration of the CAA. Tribal Movants' intervention in cases challenging the Delisting Rule provided no additional protection of rights established by the CAA.

Other Circuits, when determining whether intervenors are eligible for attorneys fees, demand that intervenors play a "'significant role in the litigation.'" *See Shaw v. Hunt*, 154 F.3d 161, 167-68 (4th Cir. 1998) (quoting *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1535 (9th Cir. 1985)); *Wilder,* 965 F.2d at 1204 (citing cases). Because Tribal Movants were not involved in the successful statutory challenge, they did not play a significant role in challenging the Delisting Rule. Accordingly, their motion for fees should be denied. *See Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 4 (D.C. Cir. 1982) (holding that intervenors, at a minimum, must establish "that their intervention added in any essential way to [petitioners'] stance on the issues involved.").

II. Tribal Movants' Treaty Rights Claim Remains Unresolved.

Tribal Movants claim "complete success on their claims," but support the position through a misleading characterization of relevant caselaw and an overly broad view of their own claims. This Court decided only that EPA improperly delisted power plants because the Agency failed to follow delisting procedures set out in section 7412(c)(9). The decision was based on the "plain text and structure" of that section and resulted in vacatur of CAMR. *New Jersey*, 517 F.3d at 583. The Reconsideration Rule (the only rule Tribal Movants directly challenged) was not addressed beyond listing changes made to CAMR through that rule. *Id.* at 580, n.2.

Tribal Movants argued that EPA failed to give appropriate consideration to their members' tribal treaty fishing rights. Merits Br. of Tribal Movants at 3. Though

Tribal Movants sought the *remedy* of vacatur of both the Delisting Rule and CAMR, their *claim* was distinct from that remedy. *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 213 (2005) (a claim is based on a claimants rights or a defendant's duties, and is entirely different from a remedy.). Their claim, a record-based challenge to CAMR based on treaty rights, was not resolved by the Court.

A court must evaluate the success or failure of each party's "distinctly different claims." *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983). "Claims" are described as "different claims for relief based on different facts and legal theories." *Id.* In this case Tribal Movants assert a claim based on the legal theory that EPA had acted in an arbitrary and capricious fashion in promulgating CAMR and the Delisting Rule because EPA failed to properly consider tribal treaty rights. Merits Br. of Tribal Movants at 22-44. The factual basis of their claim is the allegation that the EPA record does not reflect adequate consideration of treaty rights. *Id.* Tribal Movants' claim, therefore, was a record-based challenge founded on issues surrounding tribal treaty rights. Notably, they did not bring a claim based on the purely textual and legal analysis that ultimately swayed the Court and was the sole basis for its ruling.

This Circuit, when assessing fee requests, traditionally undertakes an "issue-by-issue assessment" of a petitioner's success, discounting the claim as it pertains to issues on which a "modicum of success" was not achieved. *Kennecott Corp. v. EPA*, 804 F.2d 763, 765 (D.C. Cir. 1986) (citing *Sierra Club v. EPA*, 769 F.2d 796, 801-02

(D.C. Cir. 1985)). As this Court has recognized, the fact that issues in a case may be related in the sense that they arise from the same set of regulations does *not* mean that they are inseparable for purposes of assessing entitlement to attorneys' fees. *Sierra Club v. EPA*, 769 F.2d at 803. Where, as here, the issues raised involve a particular substantive concern of a petitioner with respect to a particular aspect of an EPA regulation, and petitioners could be granted relief on each issue separately, the Court can analyze each issue separately. *Id.* at 803-06 (analyzing eight separate "issues" to determine whether a fee award is appropriate). In *Kennecott*, when resolving a CAA section 7607(f) fee claim, the Court assessed petitioners' three basic arguments, also characterized by the court as "claims." 804 F.2d at 765. One of those claims was a challenge to EPA's allegedly improper procedural process, another that EPA's eligibility test was inconsistent with the statute, and yet a third that EPA lacked statutory authority to treat certain pollutant streams. *Id.* Similarly, in this case claims were raised challenging EPA's statutory authority to delist power plants. Tribal Movants, however, did not raise those statutory claims, and they did not prevail with respect to their record-based claims.

Tribal Movants cite several cases in which petitioners were awarded fees even though the Court did not reach some issues briefed. *See Am. Petroleum Inst. v. EPA*, 72 F.3d 907, 911 (D.C. Cir. 1996); *Davis County Solid Waste Mgmt. and Energy Recovery Special Serv. Dist. v. EPA*, 169 F.3d 755, 760 n.8 (D.C. Cir. 1999). They cite other cases where

fees were awarded even though petitioners were unsuccessful with respect to some issues. *See Hensley*, 461 U.S. at 440; *Sierra Club*, 769 F.2d at 802; *Kennecott Corp.*, 804 F.2d at 765. In all of those cases, however, *those petitioners* prevailed on at least *some* of the claims they briefed. In this case, by contrast, Tribal Movants did not bring *any* successful claim and participated only as an intervenor with respect to the Delisting Rule. The only claim they actually briefed was not resolved by the Court. Thus the issue of whether EPA has to consider tribal treaty rights, and the extent of that consideration, remains a live issue to be potentially litigated in the context of some future EPA rulemaking.

In *American Petroleum Institute v. EPA*, 72 F.3d 907 (D.C. Cir. 1996), petitioners raised five grounds for the invalidity of the regulations at issue, and the Court based its decision on only one of petitioners' arguments. The Court awarded reasonable fees because it determined that petitioners had raised a single claim, and each of their five arguments was made in support of that single claim. *Id.* at 911. Here, by contrast, all of Tribal Movants' arguments are record-based challenges founded on treaty rights, and the Court did not reach *any* of those arguments. Thus, the Tribal Movants did not prevail with respect to *any* claim they asserted. Tribal Movants should not be permitted to piggyback on the success of other petitioners here. A fee award would not be appropriate, and this motion should be denied.

III. Tribal Movants Have Not Demonstrated that the Time Claimed is

Compensable.

Even if the Court determines that a fee award is appropriate, Tribal Movants seek fees for an exorbitant number of hours given their limited role in this case. There are several categories of tasks for which the claimed fees should be eliminated or substantially reduced should the Court determine that *any* fee award is appropriate. To make our assumptions clear, EPA has attached four charts (Exhibits C - F). In Exhibit C we duplicate Tribal Movants' billing records, categorize each billing entry into tasks (Pre-Petition, Opening Brief, Appendix, Reply Brief, Oral Argument, and Other), and set out EPA's concerns with each entry. Exhibit D sets out the hours Tribal Movants billed to each task and identifies a multiplier that EPA believes is appropriate, if fees are awarded. Exhibit E averages Tribal Movants' proposed rates. Exhibit F is EPA's final calculation of an adjusted fee award. Together, the exhibits show that a reasonable attorney fee award is no more than $64,793, compared to the $302,202.50 Tribal Movants seek.

A. Tribal Movants Billed An Excessive Number of Hours For The Tasks Performed.

Tribal Movants seek reimbursement for an exorbitant number of hours given their limited role in this case. As a record review case, this action involved no district court proceedings and no discovery. The Tribal Movants' principal role in this action was the preparation of a 9,791-word merits brief and a 4,984-word reply brief. Both briefs were considerably shorter than a standard-length appellate brief. *See* Fed. R.

App. Pro. 28.1(e)(2). Tribal Movants, at the direction of the Court, did not present at oral argument. Given the focused nature of the tasks at hand, Tribal Movants hours' are patently excessive. Tribal Movants seek fees for 996 hours of professional time, billed by seven attorneys and one paralegal. Given the vague nature of their time descriptions it is difficult to categorize these hours with precision, but it appears that in excess of 300 hours were spent drafting the 44 page opening brief, approximately 240 hours were spend drafting a 15-page reply brief, and roughly 120 hours were spent preparing for oral argument Tribal Movants did not present. *See* Exhibits C & D. This leaves well over 300 hours devoted to a variety of ancillary tasks. *Id.*

(1) Tribal Movants Claim Excessive Hours for Briefing and Oral Argument.

This Court has recognized its authority to limit fees in cases such as this. *See Environmental Defense Fund, Inc. v. Reilly*, 1 F.3d 1254, 1258-60 (D.C. Cir.1993) (reducing fee award to account for excessive time spent on certain tasks). In particular, this Court has characterized a claim for reimbursement of 79 hours for preparation of an opening brief as "reasonable" but, in the same case, found that spending 120 hours on reply was unreasonable, and cut the allowable time to 60 hours. *See Am. Petroleum Inst. v. EPA*, 72 F.3d at 917. The Court also held in the same case that 116.25 hours spent by one partner preparing for oral argument were properly reduced to 80 hours, given the partner's familiarity with the case. *Id.* In *Michigan v. EPA*, 254 F.3d 1087, 1093 (D.C. Cir. 2001), the D.C. found that 90 hours to draft a full length opening brief was

excessive, and cut the allowable time to 45 hours, but held that 20 hours for preparing the reply brief was reasonable. Even if this Court determines that fees are appropriate, it should discount Tribal Movants' hours similarly. Specifically, the 102 hours Tribal Movants devoted to standing and declaration issues is patently excessive given that standing was not challenged.[3/] *See* Ex. C. Those hours should be heavily discounted. The Court, consistent with its prior practice of awarding reimbursement of between 45 and 79 hours for an opening, full-length brief, and between 20 and 60 hours for a full-length reply, should grant fees on the lower end of that scale for Tribal Movants' significantly shorter briefs.

While EPA recognizes that every case is unique, at the very least these past published cases give a "ballpark" estimate of the types of hours the Court has found to be reasonable, an estimate far below the number of hours sought here. The Supreme Court in *Hensley*, 461 U.S. at 434, stated that hours that are "excessive, redundant, or otherwise unnecessary" should be excluded from fee awards. Tribal Movants seek reimbursement for a grossly excessive number of hours, and that time should be excluded or dramatically reduced. An 80% reduction with respect to Tribal

[3] Tribal Movants' simple standing argument comprised only two pages of their opening brief. In those pages they argued that treaty fishing rights were adversely affected by the challenged rules. Tribal Opening Br. at 14-15. A few hours of attorney time should have been sufficient on this point, and preparation of associated declarations was task that should not have involved significant attorney time.

Movants Opening Brief and Reply Brief is appropriate, given the huge number of hours Tribal Movants seek related to developing their standing arguments and declarations, and given this Court's prior decisions establishing reasonable time for briefing. This 80% reduction would allow 62.5 hours for the opening brief and 48.7 hours for the reply brief, levels consistent with this Court's precedent. *See* Exhibit D.

The parties jointly proposed to allow Tribal Movants 13 minutes of oral argument. *See* Nov. 15, 2007 letter to the Court. On November 26, 2007, 10 days before oral argument, the Court issued an Order limiting oral argument, indicating that Tribal Petitioners would not present any argument. *See* Nov. 26, 2007 Order. Given these circumstances, some oral argument preparation was appropriate, but Tribal Movants claim and exorbitant 120 hours. Allowable oral argument preparation should be reduced by 50%, from 120 hours to 60 hours. *See* Exhibit D. This 50% figure reflects an enhancement of the Court's 22% reduction in oral argument in *API*, and is consistent with the Court's 50% reduction to the opening brief in *Michigan* and to the reply brief in *API*. *See Kennecott Corp.*, 804 F.2d at 768 n.5.[4/]

It is also not appropriate for the United States to bear the costs of inefficient

[4] A similar 50% reduction in time allowed to produce an appendix is warranted, given that the 26 hours billed to compile the appendix is more than half the amount of time the Court found reasonable to draft and file the entire opening brief in *Michigan*. Additionally, EPA has already settled with prevailing parties who sought fees for compiling the very same Joint Appendix.

staffing practices. Seven attorneys billed time to tasks associated with this case. Having seven experienced attorneys learn the issues in the case necessarily involves more inefficiency and redundancy than if one or two attorneys litigated the case. *See, e.g.*, Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1301-02 (11th Cir.1988) ("Redundant hours generally occur where more than one attorney represents a client."). Tribal Movants' inefficient staffing practices are another reason to reduce allowable fees.

(2) Tribal Movants Have Failed to Adequately Distinguish Time Spent on This Case From Related Matters.

Tribal Movants claim 153.25 hours for actions taken prior to filing their petition in this case. In fact, approximately 32 hours were billed for preparing comments on the reconsideration rule between January 17, 2005 and January 10, 2006. The administrative reconsideration proceeding was not part of this litigation. EPA is immune from claims for attorneys' fees, except to the extent it has waived its immunity. *See Ruckelshaus*, 463 U.S. at 685. Because "the language of section 7607(f) requires awards only for 'costs of litigation,' then fees incurred in preparation of an administrative proceeding are excluded." *Michigan*, 254 F.3d at 1091 (quotation omitted). Time spent on administrative comments does not support a fee demand.

Tribal Movants' excessive billing practices prior to filing their petition are highlighted by fee claims related to drafting their *unopposed* intervention motion. Riyaz Kanji, a partner with almost fifteen years of experience, wrote the motion, spending

more than 40 hours on the drafting process. Kanji Decl. at 2. An attorney at a much lower pay grade should have been utilized for such a relatively simple motion, particularly an unopposed one, and the amount of time taken was exorbitant. For example, in *Michigan,* 254 F.3d at 1093, the Court adjusted the time allowed for drafting a petitioners' entire opening brief downward from 90 hours to 45 hours. It is incredible that Tribal Movants claim more than 40 hours of partner time for the simple task of drafting an unopposed intervention motion.[5/]

Tribal Movants are not entitled to compensation for the time they billed for actions taken unrelated to their petition, which was not filed until June 23, 2006. *See* June 23, 2006 Petition in Case No. 06-1220. Prior to June 23, 2006, Tribal Movants were acting purely as intervenors, and neither their motion nor supporting exhibits provide any basis for the Court or EPA to evaluate whether the time claimed before June 23, 2006, is fairly attributable to the issues resolved in favor of various Environmental and State petitioners in Case No. 05-1097. As a result, Tribal Movants have failed to carry their burden of proof to show that those hours were reasonably incurred in litigating the issues on which they argue that they prevailed, and Tribal

[5] An even more egregious example of inappropriate billing is Tribal Movants' attempt to recover fees related to 7.25 hours of time devoted to searching the EPA docket for Tribal Comments. *See* Tribal Attachment B, entry for 9/21/2006 and 9/22/2006.

Movants' claim as to those hours must be denied.[6]

(3) Tribal Movants' Time Descriptions Are Impermissibly Vague.

Claims may be "discounted" or "rejected" when poor documentation inhibits the court's ability to gauge the reasonableness of the time claimed. *Davis County*, 169 F.3d at 761; *Kennecott Corp*, 804 F.2d at 767. "To satisfy the burden of showing that the hours claimed were reasonably expended on a case, a petitioner must submit 'sufficiently detailed information about the hours logged and the work done,'" and it is usually not enough to provide only "broad summaries of the work done and the hours logged on a daily, rather than a per task, basis." *Am. Petroleum Inst.*, 72 F.3d at 915 (citation omitted); *see also Copeland v. Marshall*, 641 F.2d 880, 891-92 (D.C. Cir. 1980) (en banc). Accordingly, opaque work descriptions such as "telephone conference," "research," "prepare for oral argument," and "call re status" have been specifically identified by the Court as insufficient in past cases. *Davis County*, 169 F.3d at 761; *Am. Petroleum Inst.*, 72 F.3d at 917; *In re Donovan*, 877 F.2d 982, 994-95 (D.C. Cir. 1989); *Kennecott Corp.*, 804 F.2d at 767. The billing detail offered in support of Tribal Movants' fee claim is replete with similarly-vague descriptions of research, meetings, and other work performed. If fees are awarded at all, the hours should be heavily discounted. *See Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1324

[6] If pre-petition hours are allowed, the vague descriptions and excessive time spent would support a dramatic reduction for Tribal Movants' hourly claims.

(D.C. Cir. 1982).

Tribal Movants' billing records are rife with vague and cryptic descriptions that make impossible any review and analysis of their time spent related to particular issues. For example, between July 20 and July 29, 2005, Mr. Kanji spent 43 hours of attorney time reviewing documents from the docket, reviewing "relevant" articles, and reviewing "case materials," while providing almost no additional information regarding what documents he was reviewing, which issues those documents related to, or even how that review related to the case. Numerous additional billing entries wholly fail to state, or to make any reference to the subject researched, and fail to clarify the purpose of the time billed. Some examples are set forth in the margin.[7]

Tribal Movants have a heavy burden to explain the reasonableness of expending 996 hours of attorney time, amounting to almost 25 person-weeks of full-time effort, on their litigation of this case. *See Am. Petroleum Institute*, 72 F.3d at 916. Even after spending an immense number of hours on the basic set of tasks associated with this case, including approximately 102 hours on standing issues and declarations,

[7] Between July 24, 2006 and September 20, 2006, Tribal Movants seek reimbursement for billing records with the following entries "[r]eviewing Hg documents," "[r]eview document before conference call," "review Mercury emails & respond to same," "[r]eview documents from Rulemaking docket," "[r]eview & taking notes on documents in record," [r]eview & taking notes on record documents," and "[r]eview & taking notes on recorded materials." *See* Tribal Movants' Attachment B at 3-4. On 5/30/2007, 3 attorneys and 1 paralegal billed 26.5 hours in a single day for vaguely described "research and review" type tasks. *Id.* at 8.

211 hours on separate issues in the opening brief, 240 hours on reply, 120 hours preparing for an oral argument they did not present, 32.5 hours on administrative challenges on reconsideration, and 43 hours drafting an intervention motion – Tribal Movants still spent hundreds of additional hours on other various and sundry tasks – many of which were only vaguely defined. *See* Exhibit C (identifying vague descriptions). Tribal Movants should not be awarded fees related to the poorly defined tasks. *See United Slate Tile & Composition v. G & M Roofing*, 732 F.2d 495, 502, n.2 (6th Cir. 1984) (supporting documentation "must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended...."). The vague hourly entries serve as further justification for proposed reductions to time allowed for the opening brief, reply brief and oral argument. The vague entries, in conjunction with the excessive time taken to perform individual tasks, also serve as a justification to reduce the "other" tasks designated in EPA's Exhibit C by 80%.

CONCLUSION

For the reasons set forth above, no award of litigation costs to Tribal Movants is appropriate. Quite simply, the Court did not resolve any issue they presented. Even were that not the case, their fee claims are grossly excessive, and the Court should reduce them significantly.

Respectfully submitted,

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Date: April 8, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2011 a copy of EPA'S RESPONSE TO TRIBAL MOVANTS' MOTION FOR COSTS OF LITIGATION was served via this Court's ECF system and also served by first-class mail, postage prepaid, on the following:

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

STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

_____/

No. 05-1162, consolidated with Nos. 05-1164, 05-1167, 05-1175, 05-1183, 05-1189, 05-1263, 05-1264, 05-1267, 05-1270, 05-1271, 05-1273, 05-1275, 05-1277, and 05-1280.

MOTION OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AND INDIVIDUAL TREATY TRIBES FOR LEAVE TO INTERVENE

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Circuit Rule 15(d), the National Congress of American Indians ("NCAI") and the individual Treaty Tribes specified in Addendum A to this Motion respectfully move for leave to intervene as Petitioners in the above-captioned, consolidated cases.[1] As described below, the Tribal Movants possess a great stake in the proper disposition of this litigation. They seek to intervene to protect their fundamental and distinctive interest in the effective regulation of mercury emissions from electric utilities and in the concomitant restoration of healthy fisheries in their treaty-protected waters.

BACKGROUND

In two companion Rules, the United States Environmental Protection Agency ("EPA") has signaled a substantial retreat from its previously expressed commitment to regulating in a

[1] Established in 1944, NCAI is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. NCAI is dedicated to protecting the rights and improving the welfare of American Indians.

stringent manner mercury emissions from coal-fired electric utility steam generating units ("EGUs"). Pursuant to Section 112(n)(1)(A) of the Clean Air Act ("CAA" or "Act"), EPA had determined after extensive study that it was "appropriate and necessary" to regulate EGUs under Section 112 of the Act, and accordingly listed them as a Section 112(c) "source category," with the resulting requirement that emissions of hazardous air pollutants (principally mercury) from EGUs would be subject to significant reductions. 65 Fed. Reg. 79,825 (Dec. 20, 2000). EPA based this determination on its findings that "[m]ercury in the environment presents significant hazards to public health and the environment," 65 FR at 79830, that EGUs "are the largest domestic source of mercury emissions," *id.,* and that control options were available to effectively and feasibly reduce those emissions. *Id.* EPA further determined that Section 112 regulation was necessary because "implementation of other requirements under the CAA will not adequately address the serious public health and environmental hazards arising from [EGU] emissions." *Id.*

However, in the companion Rules that are now the subject of litigation in this Court, EPA has sought to reverse its determination that it is "appropriate and necessary" to regulate mercury emissions from EGUs under Section 112, and has purported to remove EGUs from the list of Section 112(c) source categories. *See* "Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List," 70 Fed. Reg. 15994 (March 29, 2005). EPA has instead sought to subject such emissions to a lax "cap-and-trade" system that promises far slower, and far less significant, reductions than would have resulted from proper adherence to the Section 112 regulatory scheme. "Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units,"

70 Fed. Reg. 28606 (May 18, 2005) (designated by EPA as the "Clean Air Mercury Rule" or "CAMR").

Petitioners State of New Jersey and eight other States filed a Petition for Review of the CAMR on May 18, 2005 (No. 05-1162). Additional States, along with environmental and industry groups, have subsequently filed Petitions for Review, with the last such Petitions being filed on July 18, 2005 (Nos. 05-1273, 05-1275, 05-1277 and 05-1280). By Order of this Court dated July 22, 2005, these cases have been consolidated under the above caption and case number.

INTERESTS OF TRIBAL MOVANTS

During the rule-making process, Tribes and Inter-Tribal Organizations submitted no fewer than 30 sets of comments, often extensive in nature, regarding EPA's proposed regulatory retrenchment on mercury emissions from EGUs. The reasons for this high level of Tribal interest are no mystery. As EPA has repeatedly stated, the primary pathway of human exposure to the methylmercury that can lead to irreversible neurological damage – particularly in children and developing fetuses – is through the consumption of fish. 70 Fed. Reg. at 16012; 65 Fed. Reg. at 79827. The methylmercury concentrations in the nations' waterways are presently such that the consumption of fish from those waters presents a significant threat to those who would eat them and, in the case of women of childbearing age, to the children they may one day produce. Indeed, "[a]s of 2003, 21 states and 1 tribe had issued mercury advisories covering *the entirety* of their lakes and/or rivers. In addition, 100% of Lakes Superior, Michigan, Huron and Erie are under mercury advisory." Catherine A. O'Neill, *Mercury, Risk and Justice*, 34 ELR 11070, 11071 (December 2004) (emphasis added). Those advisories warn individuals to sharply

restrict their consumption of fish from waters that once sustained thriving subsistence and commercial fisheries.

The Tribal Movants have fished the waters of this country since time immemorial. Their fishing activity has not only allowed them to sustain themselves, but has comprised a fundamental component of their cultures and religions – it is not an overstatement to say that in many instances it has been a principal feature defining the relationship between those Tribes and the world around them.

In a series of solemn treaties signed between the Movant Tribes and the United States in the eighteenth and nineteenth centuries, the Tribes ceded millions of acres of land but insisted on reserving the right to continue fishing from the waters so central to their way of life. *See, e.g,* Treaty of Point No Point, 12 Stat. 933; Treaty of Point Elliott, 12 Stat. 927; Treaty of Medicine Creek, 10 Stat 1132; 1842 Treaty with the Chippewa, 7 Stat. 591; 1837 Treaty with the Chippewa, 7 Stat. 536; 1836 Treaty of Washington, 7 Stat. 491. Those reserved treaty rights have been described as among the most precious that the Tribes possess. "'The right to resort to the fishing places in controversy . . . [was] not much less necessary to the existence of the Indians than the atmosphere they breathed.'" *Washington State Commercial Passenger Fishing Vessel Ass'n. v. Washington* ("*Fishing Vessel*"), 443 U.S. 658, 680 (1979) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)); *see also Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F.Supp. 784, 820 (D.Minn. 1994) ("[Tribal members] could not have survived if [their] members had not been allowed to hunt and fish off-reservation."), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd sub. nom. Minnesota v Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *United States v. Washington,* 384 F. Supp. 312, 407 (W.D. Wash. 1974) ("The right to fish for all species available in the waters from which, for so many ages, their ancestors derived

most of their subsistence is the single most highly cherished interest and concern of the present members of plaintiff tribes…. "), *aff'd,* 520 F.2d 676 (9th Cir. 1975).

However, the stark fact of mercury contamination has greatly diminished those reserved fishing rights. Huge swaths of treaty-protected waters are now effectively off-limits to the safe consumption of fish. In the upper Great Lakes States of Minnesota, Wisconsin and Michigan, for example, each and every one of the inland lakes, along with the adjoining Great Lakes, is blanketed by a mercury advisory. National Listing of Fish Advisories, Environmental Protection Agency (August 2004), http://www.epa.gov/waterscience/fish/advisories/index.html. Under such conditions, the guarantee of a meaningful right to take fish has been transformed into the right to take severely contaminated fish.

Effective regulation of mercury emissions from EGU's had promised to improve the situation significantly. Regulation of those emissions under Section 112 "was widely expected to require a 90% reduction in mercury emissions from [EGU]'s – from approximately 48 tons [per year] to 5 tons – to be achieved by 2007." *O'Neill, supra*, at 11070. A variety of studies have suggested that such reductions would lead to marked improvements in the mercury contaminant levels found in the nation's freshwater fisheries. *See, e.g,.* Comments of the Forest County Potawatomi Community, EPA Docket No. OAR-2002-0056 (April 27, 2004), at 20-21 (describing studies); Comments of the Fond du Lac Band of Lake Superior Chippewa, EPA Docket No. OAR-2002-0056 (March 8, 2004), at 3 (same). By contrast, the caps established by EPA under the CAMR are significantly higher – 38 tons per year in 2010 (or almost 8 times what was expected under Section 112 regulation), and 15 tons in 2018 (still 3 times higher than expected under Section 112 regulation, and a full decade later), with a large number of commentators having suggested that even those numbers will not be achieved under the trading

system proposed by the Agency. Moreover, EPA's cap-and-trade system does nothing to guard against the persistence and worsening of mercury "hotspots" in certain parts of the country, including those of great consequence to the Movant Tribes. Under the CAMR, for example, utility mercury emissions in Michigan – already a leading source of such emissions -- will in fact be 118 pounds *higher* in 2010 than they were in 2002. *See Motion for Leave to Intervene of the Michigan Department of Environmental Quality* in No. 05-1275 at 5 (filed August 9, 2005).

The Tribal Movants accordingly seek to intervene in this litigation to protect the health and welfare of their members and to vindicate their treaty-protected rights to continue taking fish, rights that the revised EPA approach to mercury regulation, inconsistent as it is with the mandates of the CAA, utterly fails to respect.

ARGUMENT

A. Movants Are Entitled to Intervene as a Matter of Right

"[I]ntervention in the court of appeals is governed by the same standards as in the district court." *Massachusetts School of Law v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (citing *Building and Construction Trades Dept. v. Reich,* 40 F.3d 1275, 1282-83 (D.C. Cir. 1994)). Accordingly, the factors prescribed by Rule 24 of the Federal Rules of Civil Procedure for district court intervention govern Movants' application here. This Court has summarized those factors as follows: "(1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties." *Fund For Animals, Inc. v. Norton,* 322 F.2d 728, 731 (D.C. Cir. 2003) (internal quotation marks and citations omitted). This Court has "further

held that, in addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." *Id.* at 731-32. Because Movants amply satisfy the Rule 24 factors here, and because they likewise possess Article III standing, they are entitled to intervene as of right in the consolidated cases.

1. The Motion to Intervene Is Timely.

Rule 15(d) of the Federal Rules of Appellate Procedure requires that a motion for leave to intervene be filed within 30 days after a Petition for Review of agency action is filed. Here, four of the consolidated Petitions for Review were filed on July 18, 2005 (Nos. 05-1273, 05-1275, 05-1277, 05-1280). This Motion is timely as it is being filed on August 17, 2005, within 30 days of those Petitions.

2. The Tribal Movants Have a Strong, Cognizable Interest in the Consolidated Cases.

Under Rule 24, "the question is not whether the applicable law assigns the prospective intervenor a cause of action . . .As the Rule's plain text indicates, intervenors of right need only an 'interest in the litigation – not a 'cause of action' or 'permission to sue.'" *Jones v. Prince George's County,* 348 F.3d 1014, 1017-1018 (D.C. Cir. 2003). What is required is a "significant protectable interest" in the subject matter of the action. *Donaldson v. United States,* 400 U.S. 517, 531 (1971). Here, Movants easily meet this test. They could indeed have filed a Petition for Review of the CAMC, and there is no question that they possess very clear, legally protectable interests in the outcome of this litigation.

First, as described above, the Tribal Movants here are fishing peoples. For centuries, they have relied on fish as a significant component of their diets, and their fishing activity has likewise comprised a central component of their cultures and religions. As comments submitted

by numerous Tribes and Tribal organizations to the EPA during the rulemaking process substantiate, many of these Tribes have continued their heavy reliance on fishing to this day – indeed, given their location and economic alternatives, many would have no choice but to do so even if they were otherwise inclined to abandon a way of life so important to them and their forbearers. *See, e.g.*. Comments of the National Tribal Environmental Council, EPA Docket No. OAR-2002-0056 (June 4, 2004); Comments of the Great Lakes Indian Fish & Wildlife Commission, EPA Docket No. OAR-2002-0056 (June 29, 2004); Comments of the Forest County Potawatomi Community, EPA Docket No. OAR-2002-0056 (April 27, 2004); Comments of the Fond du Lac Band of Lake Superior Chippewa, EPA Docket No. OAR-2002-0056 (March 8, 2004). Significant numbers of Tribal members accordingly consume quantities of fish far in excess of what the EPA posited as a "typical" consumption rate when it modeled the "appropriate" amount of mercury emissions from electric utilities, as the following example tellingly illustrates:

> [G]iven current levels of contamination in walleye, a commonly consumed species in the upper Great Lakes, a woman consuming fish at rates typical of the general U.S. population is currently exposed to [methylmercury] just at EPA's reference dose (RfD) – the level above which exposure is unsafe for humans. A woman consuming at rates typical of those in the Great Lakes states is exposed at levels over twice EPA's RfD. And a woman consuming at rates typical of Great Lakes Indian Fish and Wildlife Commission (GLIFWC) tribal fishers is currently exposed at more than 10 times EPA's threshold. Thus, while the status quo – which the rule looks to preserve – leaves many in this region unprotected, it utterly fails the fishing tribes and their members.

O'Neill, *supra,* at 11071. The Tribes have a significant interest in ensuring that EPA regulations that so woefully underestimate the health consequences to their members of inadequate mercury regulations do not survive judicial review.

Second, in striving to maintain a healthy reliance on their fisheries, the Movant Tribes seek to vindicate the solemn Treaty promises made to them by the United States. The courts

repeatedly have construed the Treaties to guarantee the Tribes a right to continue taking fish for both subsistence and commercial purposes. *See, e.g., Fishing Vessel,* 443 U.S. at 676 ("During the negotiations, the vital importance of fish to the Indians was repeatedly emphasized by both sides, and the [United States'] promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent") ; *United States v. Michigan*, 653 F.2d 277, 278 (6th Cir. 1981) ("The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty [of Washington] . . . continue to the present day as federally created and federally-protected rights. The protection of those rights is the solemn obligation of the federal government . . . ."). *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin,* 653 F. Supp. 1420, 1429 (W.D. Wisc. 1987) (The off-reservation usufructuary rights reserved by the Chippewa in the treaties of 1837 and 1842 continue to be effective today. Plaintiffs enjoy greater rights to hunt, fish, and gather in the ceded territory than do non-Indians. As the Court stated in *United States v. Winans,* [198 U.S. 371, 380 (1905)], to interpret reservations of usufructuary rights in treaties of cession to have reserved to Indians only those rights they would enjoy today without the treaty 'is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'").

As an agency of the United States government, EPA is bound to honor such treaty rights, but nowhere acknowledged them in determining that it is neither "appropriate" nor "necessary" to regulate mercury emissions from EGUs under the strict standards of Section 112 of the CAA. Nor did EPA acknowledge such rights in subjecting EGUs to a lax cap-and-trade system that virtually guarantees that the fish in treaty-protected waters will remain unsafe for consumption by tribal members for decades to come. Indeed, rather than acting to ensure the safety of the nation's freshwater fish supply, EPA now relies on the advisories warning consumers to sharply

restrict their consumption of such fish as an excuse for its failure to take appropriate regulatory action. *See, e.g.*, 70 Fed. Reg. at 16102. "A regulatory effort so lax that it must include such advice obviously works precisely contrary to a treaty guarantee to catch and consume fish." O'Neill, *supra,* at 11113. The Tribal Movants have a compelling interest in challenging regulatory action so blatantly inconsistent with their fundamental treaty rights.

Third, and relatedly, EPA's studied refusal to take Tribal treaty rights into account in charting its regulatory course represents a gross violation of the trust obligation owed by federal agencies towards the Tribes. "In carrying out [this] fiduciary duty, it is [an agency's] responsibility to ensure that Indian treaty rights are given full effect." *Northwest Sea Farms v. Army Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996); *see also* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited,* 1994 Utah L. Rev. 1471. Likewise, it represents a violation of Executive Order No. 13175, which requires federal agencies to engage in meaningful consultation with Tribes wherever those actions significantly affect Tribal interests, and EPA's own Indian Policy, first established in 1984 and reaffirmed in 2001, which likewise establishes a commitment to consultation and recognizes the Agency's trust responsibility towards the Tribes. EPA proposed and finalized the mercury delisting rule and the CAMR without consulting the Tribes, and without attempting to honor its trust responsibility towards those Tribes. The resulting regulations are deeply flawed in nature, and the Tribes again have a vital interest in ensuring that they do not survive judicial review.

3. Exclusion of the Tribal Movants From This Litigation Would Threaten Their Interests.

What has been said above readily disposes of the third prong of the Rule 24 test. EPA's lax cap-and-trade approach to mercury emissions from EGUs poses a grave threat to Tribal

interests. If this Court were to sustain that approach, the health and welfare of Tribal members would remain subject to significant risk, and their ability to exercise their right to take fish would continue to be greatly diminished. As a result, "the disposition of [this] action may as a practical matter impair or impede [Movants'] ability to protect [their] interest[s]," Fed.R.Civ.P. 24(a)(2), and the third Rule 24 factor is easily satisfied.

4. The Tribal Movants' Interests Are Not Adequately Represented by Existing Parties.

The fourth and final Rule 24 factor "'is satisfied if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal.' *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n.10 (1972). Citing *Trbovich,* we have described this requirement as 'not onerous.' *Dimond v. District of Columbia,* 792 F.2d 179, 192 (D.C.Cir.1986)." *Fund for Animals,* 322 F.3d at 735. Here, there is no question but that the Tribal Movants meet this standard. While the Tribes share a general agreement with the State and environmental Petitioners regarding the many fundamental flaws in EPA's revised approach to the regulation of EGU mercury emissions, no other party to the consolidated cases possesses the treaty fishing rights so precious to the Tribes, and no other party is in the same position to present arguments seeking to vindicate the Tribes' continued ability to exercise those rights in a meaningful and safe manner. The Tribal Movants undoubtedly have distinct interests in this litigation, and are entitled to intervene as of right to protect those interests.

5. The Tribal Movants Possess Article III Standing.

"To establish standing under Article III, a prospective intervenor -- like any party -- must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Fund For Animals,* 322 F.3d at 733; *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). As the above discussion makes clear, the Tribal Movants readily meet these requirements. The EPA's

decision to subject EGU mercury emissions to only a lax cap-and-trade system will, if sustained, cause the Movant Tribes to suffer concrete injury of a serious and imminent nature. Mercury contaminant levels in fish found in treaty-protected waters will, under the EPA's approach, remain high for decades to come, with grave consequences for the health and welfare of Tribal members who consume those fish and a corresponding diminishment in the value of treaty promises that guaranteed the Tribes the right to preserve their fishing way of life. A decision from this Court requiring the Agency to adhere to the mandates of the CAA and to subject EGU mercury emissions to stringent regulation under Section 112 of the CAA would provide significant relief from these injuries. Tribal Movants accordingly possess Article III standing.

B. Tribal Movants Also Satisfy the Criteria For Permissive Intervention.

In addition to satisfying the criteria for intervention as of right, Tribal Movants also meet the standard for permissive intervention under Rule 24(b)(2). That test authorizes permissive intervention where an applicant demonstrates that its claims have questions of law or fact in common with those of the main action. If so, the principal consideration in ruling on a Rule 24(b) motion is whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights. 7C Wright, Miller & Kane, Federal Practice and Procedure § 1913, at 379.

Here, the Tribal Movants' claims regarding the patent inadequacy of EPA's revised approach to EGU mercury emissions clearly share many questions of law and fact in common with those presented in the Petitions for Review. Moreover, the Tribes have moved for intervention in timely fashion, will adhere to whatever briefing schedule is established by this Court, and, consistent with this Court's Rules, will avoid duplication of the parties' arguments in

their briefing. Accordingly, no prejudice will accrue to the parties from the granting of this Motion.

CONCLUSION

For the foregoing reasons, the Tribal Movants respectfully request that this Court enter an Order granting them leave to intervene in the consolidated cases.

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Counsel for Proposed Intervenors National Congress of American Indians and Individual Treaty Tribes

ADDENDUM A
LIST OF PROPOSED INTERVENORS

National Congress of American Indians

Established in 1944, NCAI is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. NCAI is dedicated to protecting the rights and improving the welfare of American Indians

Little River Band of Ottawa Indians

Bay Mills Indian Community

Grand Traverse Band of Ottawa and Chippewa Indians

Jamestown S'Klallam Tribe

Lac Courte Oreilles Band of Lake Superior Chippewa Indians

Little Traverse Bay Bands of Odawa Indians

Lower Elwha Klallam Tribe

Lummi Nation

Minnesota Chippewa Tribe

Nisqually Tribe

Swinomish Indian Tribal Community

ADDENDUM B

RULE 28(a)(1)(A) CERTIFICATE OF INTERESTED PARTIES

Pursuant to Circuit Rules 27 and 28(a)(1)(A), Proposed Intervenors National Congress of American Indians and Individual Treaty Tribes submit the following list of parties, intervenors and amici who have appeared in this Court:

Parties:

Petitioners:

State of New Jersey (No. 05-1162)
State of California (No. 05-1162)
State of Connecticut (No. 05-1162)
State of Maine (No. 05-1162)
Commonwealth of Massachusetts (No. 05-1162)
State of New Hampshire (No. 05-1162)
State of New Mexico (No. 05-1162)
State of New York (No. 05-1162)
Commonwealth of Pennsylvania (No. 05-1162)
State of Vermont (No. 05-1162)
State of Wisconsin (No. 05-1162)
Ohio Environmental Council (No. 05-1164)
Natural Resources Council of Maine (No. 05-1164)
U.S. Public Interest Research Group (No. 05-1164)
Natural Resources Defense Council (No. 05-1167)
State of Minnesota (No. 05-1175)
State of Delaware (No. 05-1183)
State of Illinois (No. 05-1189)
Mayor and City Council of Baltimore (No. 05-1263)
Southern Montana Electric Generation and Transmission Cooperative, Inc. (No. 05-1264)
Chesapeake Bay Foundation (No. 05-1267)
Waterkeeper Alliance (No. 05-1267)
Environmental Defense (No. 05-1267)
National Wildlife Federation (No. 05-1267)
Sierra Club (No. 05-1267)
American Coal for Balanced Mercury Regulation (No. 05-1270)
Alabama Coal Association (No. 05-1270)
Coal Operators and Associates, Inc. (No. 05-1270)
Maryland Coal Association (No. 05-1270)
Ohio Coal Association (No. 05-1270)
Pennsylvania Coal Association (No. 05-1270)
Virginia Coal Association (No. 05-1270)

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 05-1162 September Term, 2005

State of New Jersey, et al., Petitioners
v.
Environmental Protection Agency, Respondent

O R D E R

On consideration of the motion(s) for leave to intervene filed by the following parties:

-
The Passamaquoddy Tribe
,
Penobscot Indian Nation
,
Aroostook Band of Micmac Indians
,
Houlton Band of Maliseet Indians
-
State Of Wyoming
-
National Congress of American Indians
,
Lac Courte Oreilles Band of Lake Superior Chippewa Indians
,
Little River Band of Ottawa Indians
,
Bay Mills Indian Community
,
Grand Traverse Band of Ottawa and Chippewa Indians
,
Jamestown S'Klallam Tribe
,
Little Traverse Bay Bands of Odawa Indians
,
Lower Elwha Klallam Tribe
,
Lummi Nation
,
Minnesota Chippewa Tribe
,
Nisqually Tribe
,
Swinomish Indian Tribe Community
-
The American Public Health Association
,
Physicians for Social Responsibility
,
American Nurses Association
,
American Academy of Pediatricians
-
State of Rhode Island
-
Michigan Department of Environmental Quality

90-5-2-3-17581

It is ORDERED that the aforesaid motion(s) is/are granted.

FOR THE COURT:
Mark J. Langer, Clerk

BY: Marianne McMain
Mary Anne McMain, Deputy Clerk

NForm 8 (Jan 1992)

EPA's Task Categorization and Concerns With Tribal Movant's Billing Entries

Date	Atty	Task	Hours	EPA Concerns	Tasks Categorization
7/6/2005	RK	Telephone conference with state atty Chris Ball and tribal atty Bill Brooks re case issues and follow-up emails	1	Not yet a petitioner, vague (What issues were discussed?)	Pre-Petition
7/11/2005	CF	Review and summarize GAO report on mercury; search news articles	1.75	Not yet a petitioner, vague and apparently not litigation related	Pre-Petition
7/12/2005	CF	Review IG report on mercury rule; research scientific studies on mercury effects; create mercury binder; search news articles	4.25	Not yet a petitioner, vague (What was the purpose of the review?)	Pre-Petition
7/13/2005	CF	Research & review mercury reports and news articles	2	Not yet a petitioner, vague	Pre-Petition
7/15/2005	CF	Review mercury reports and news articles; update binders	3.5	Not yet a petitioner, vague	Pre-Petition
7/18/2005	RK	Review of mercury reports and record materials	5.75	Not yet a petitioner, vague	Pre-Petition
7/19/2005 RK	RK	Review of D.C. Circuit rules re Intervener and amicus briefs; review of mercury docs and articles	8	Not yet a petitioner, vague	Intervention Brief, Pre-Petition
	CF	Research relevant mercury articles and administrative reports; search news articles	1	Not yet a petitioner, vague	Pre-Petition
7/20/2005	RK	Review of relevant mercury articles and submissions on administrative docket	7.5	Not yet a petitioner, vague (Which articles? For what purpose?)	Pre-Petition
7/21/2005	CF	Research EPA dockets; search mercury news articles	4.75	Not yet a petitioner, vague	Pre-Petition
7/22/2005	RK	Review case materials	8	Not yet a petitioner, vague (Which materials? For what purpose?)	Pre-Petition
7/25/2005	RK	Review of key strategy issues and mercury materials	8	Not yet a petitioner, vague	Pre-Petition
	CF	Review of news articles; create EPA docket binder	1.75	Not yet a petitioner	Pre-Petition
7/26/2005	RK	Review of mercury documents from docket	4	Not yet a petitioner, vague	Pre-Petition

	CF	Research PACER dockets; read EPA documents; research news articles	3	Not yet a petitioner, vague	Pre-Petition
7/28/2005	RK	Review of EPA notice accompanying preamble and complaint	7.5	Not yet a petitioner. Excessive time to review a notice.	Pre-Petition
7/29/2005	RK	Review of docket documents and EPA rule; teleconference with tribal atty Bill Brooks re coalition effort	8	Not yet a petitioner, vague (Which documents were reviewed? How long did that review take?)	Pre-Petition
8/10/2005	RK	Outline intervention motion; teleconference with firm attys re same; draft memo to WA tribes re intervention	2.5	Not yet a petitioner. Collectively, an excessive amount of time was taken to draft the intervention motion	Intervention Brief, Pre-Petition
8/11/2005	RK	Review and compile materials for intervention motion	6	Not yet a petitioner. Collectively, an excessive amount of time was taken to draft the intervention motion	Intervention Brief, Pre-Petition
8/12/2005	RK	Draft intervention motion and work on Tribal coalition	8.5	Not yet a petitioner. Collectively, an excessive amount of time was taken to draft the intervention motion	Intervention Brief, Pre-Petition
8/13/2005	RK	Draft intervention motion	10	Not yet a petitioner. Collectively, an excessive amount of time was taken to draft the intervention motion	Intervention Brief, Pre-Petition
8/15/2005	RK	Review and finalize intervention motion	8	Not yet a petitioner. Collectively, an excessive amount of time was taken to draft the intervention motion	Intervention Brief, Pre-Petition
11/8/2005	RK	Review of EPA reconsideration notices and supporting documents	4	Not yet a petitioner. Not entitled to fees for administrative proceedings.	Admin Proceeding, Pre-Petition
11/10/2005 CF	CF	Research reports on effects of Hg on reproductive success of fish, amount of Hg in fish due to utility emissions, fish consumption rates	2.75	Not yet a petitioner. Vague - for what purpose?	Pre-Petition
11/15/2005	CF	Research reports and articles on reproductive success of fish	1.25	Not yet a petitioner. Vague - for what purpose?	Pre-Petition
11/17/2005	CF	Research claims in EPA Notice for Reconsideration	2.25	Not yet a petitioner. Not entitled to fees for administrative proceedings.	Admin Proceeding, Pre-Petition
11/18/2005	CF	Read attorney Routel's Hg studies	1.5	Not yet a petitioner. Vague - for what purpose?	Admin Proceeding, Pre-Petition

12/16/2005	CF	Review and edit draft comments re reconsideration rule	1.25	Not yet a petitioner. Not entitled to fees for administrative proceedings.	Admin Proceeding, Pre-Petition
	RK	Review and edit draft comments and review of related reports	4.5	Not yet a petitioner. Not entitled to fees for administrative proceedings.	Admin Proceeding, Pre-Petition
12/19/2005	CF	Research studies in Persell (tribal biologist) letter and Burns documents, review and edit comments	7	Not yet a petitioner. Not entitled to fees for administrative proceedings.	Admin Proceeding, Pre-Petition
	RK	Detailed edits to and finalization of mercury comments; review of related reports; teleconference with Persell re same	9.5	Not yet a petitioner. Not entitled to fees for administrative proceedings.	Admin Proceeding, Pre-Petition
1/10/2006	CF	Review and organize reports from comments to EPA	2.5	Not yet a petitioner. Not entitled to fees for administrative proceedings.	Admin Proceeding, Pre-Petition
6/13/2006	CF	Telephone conference with RK, and Hg team (environmental groups) re petition for review and case schedule	1	Not yet a petitioner. Vague - for what purpose?	Pre-Petition
	RK	Telephone conference with environmental groups re case briefing strategy	1	Not yet a petitioner. Vague - for what purpose?	Pre-Petition
6/30/2006	AT	Review emails, EPA response on reconsideration pleadings; email communications with Routel and RK	1.75	Vague - for what purpose?	Other
7/24/2006	CF	Review Hg documents, conference call with RK, Routel and AT re organization of case efforts	4	Vague - which documents were reviewed and why?	Other
	AT	Review documents before conference call; participation in call re: briefing and scheduling w/ RK, CF, and Routel. Review motion to consolidate and editing; send edits to RK	2	Vague - impossible to determine the amout of time spent on each task.	Other
8/1/2006	RK	Review of rule 28 filings and edits to same	2.5	Excessive amount of time spend to edit a relatively short document drafted by someone else.	Other
	AT	Review and final edits to Docketing Statement of Issues; draft Certificate of Counsel & 26.1 Disclosure; email other attys	2.5	Vague - impossible to determine the amout of time spent on each task.	Other
8/7/2006	AT	Review States' Filings; Compare with Tribal Statement of Issues; draft email to RK re same	0.5		Other

8/15/2006	AT	Review Mercury emails & respond to same; review issues lists from Tribes/NCAI & other parties; draft explanation of request for separate briefing& length brief; email to Routel & incorporate her comments; forward to environmental groups	1.25	Vague - what emails were reviewed? What issue were involved? Impossible to differentiate between tasks.	Other
8/24/2006	AT	Review & comment re proposed EPA submission re: briefing; researching & drafting Tribal submission re: briefing; emailing EPA counsel, RK, Routel re same	4	Excessive amount of time spent on review.	Other
8/25/2006	AT	Revisions to AT draft re briefing and circulation to DOJ and co-petitioners	2.5	Vague.	Other
	CF	Preparation of Certificate of Service; prepare Tribal Petitioners' Request for Separate Standard Length Brief for filing	6	Vague. Impossible to differentiate between tasks. Excessive amount of time billed.	Other
9/7/2006	AT	Review doucments from Rulemaking docket & take notes on documents; reading & taking notes on Steubenville Study	6	Vague.	Opening Brief?
9/12/2006	AT	Review and taking notes on documents from the record; participating in conference call on Steubenville Study with environmental attorneys; drafting notes from conference call and distributing	7.75	Vague.	Opening Brief?
9/18/2006	AT	Review & taking notes on documents in record; emailing RK & Routel re: correspondence on EPA Stipulation	6.5	Vague.	Other
9/19/2006	AT	Review & taking notes on record documents; emailing Jonathan Lewis re: EPA Stipulation	7.25	Vague.	Other
9/20/2006	AT	Review & taking notes on recorded materials; reading UARG's reply re open Motion to Serve	3.75	Vague.	Other
9/21/2006	CF	Search EPA docket for Tribal Comments	1.5	Vague. Excessive time to search for clients' own comments.	Other
9/22/2006	CF	Search EPA docket for Tribal Comments	5.75	Vague. Excessive time to search for clients' own comments.	Other

9/26/2006	AT	Reviewing key documents from EPA Docket; reading Tribal comments and attachments to Tribal Comments	3	Vague.	Opening Brief?
11/13/2006	AT	Reviewing maps and identifying locations of NCAI members vis-à-vis mercury impacts	1.5		Opening Brief?
11/14/2006	AT	E-mail to RK re maps; email expert re creation of mercury impacts maps; email with Routel re standing issues; reviewing treaty rights caselaw	1.25		Opening Brief
11/17/2006	AT	Review documents from the record; review Culverts briefs to identify applicable habitat protection arguments; evaluate expert mapping needs and standing needs and; review with CA re standing	11.75	Vague. Impossible to differentiate between tasks. Excessive amount of time billed.	Opening Brief
	CA	Legal research on standing issues	1.5	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
11/20/2006	AT	Research re Midwestern treaty cases	4.5	Vague (for what purpose?).	Opening Brief?
	CA	Legal research on standing issues	3.5	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
11/21/2006	AT	Research treaty rights cases; teleconference with consultant C.O'Neill re possible outline of treaty arguments	6		Opening Brief
	CA	Legal research on standing issues	1	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
11/22/2006	AT	Review treaty rights cases; review record materials; teleconference with C'Oneill re treaty arguments; review mercury tribal impact maps with Routel	4		Opening Brief
	CA	Legal research on standing issues; draft brief insert	2.25	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
11/24/2006	CA	Draft insert for brief on standing doctrine; legal research re same	6.5	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
11/27/2006	AT	Research record materials and treaty rights caselaw; email CA and other attys on case re same	7.5		Opening Brief

	CA	Completedraft section of brief on standing law	1.25	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
11/30/2006	AT	Review and take notes on cases; email other attys, law professor, scientists and experts re case matter	6.25	Vague. What "case matter" was discussed? What "cases" were reviewed? Why was any of this relevant	Opening Brief
12/1/2006	AT	Discussion with PK re treaty theories; email mapping expert; review record materials	3		Opening Brief
12/1/2006	PK	Research re treaty theories for opening brief and discussion with AT re same	1.5		Opening Brief
12/4/2006	AT	Commence drafting of brief, review cases & research re same; email other attys re D.C. Circuit case (Swinomish)	7.75		Opening Brief
12/5/2006	AT	Continue draft of brief; research re same	8.25		Opening Brief
12/6/2006	AT	Continue draft of brief; research re same	9		Opening Brief
12/8/2006	AT	Continue draft of brief	10.25		Opening Brief
12/14/2006	PK	Review and analysis of draft brief	1		Opening Brief
12/16/2006	PK	Review and analysis of draft brief; email with RK re same	1.5		Opening Brief
12/18/2006	AT	Review and comment on Routel's section of draft brief	2.25		Opening Brief
12/19/2006	AT	Additional research and review of materials in order to revise brief; meeting with PK re same	6.75		Opening Brief
	PK	Meeting with AT re further revisions to the brief; telephone with RK re same; analysis and editing of draft brief	2.5		Opening Brief
12/21/2006	PK	Research statutory argument for inclusion in opening brief in response to PK comments	8.75		Opening Brief
12/21/2006	AT	Review background materials, discuss with AT issues re standing declarations from tribal leaders	3.75	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
12/26/2006	CA	Revise and research brief including discussions with CA re standing and John Persell (tribal biologist) re technical aspects of brief; review draft declarations	8.5	Vague. Excessive time spent on uncontested standing issues.	Opening Brief

	CA	Draft declarations re: standing, bluepring for tribes, NCAI declaration. Background research on each tribe for declarations; discussions with AT re same	6.75	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
12/28/2006	CA	Continue draft declarations re: standing, blueprint for tribes, NCAI declaration. Background research on each tribe for declarations	4	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
12/29/2006	CA	Review and complete draft declarations for each tribe; contacting tribes to obtain background information for declarations	5.75	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
1/27/2007	AT	Continue revisions to draft mercury opening brief; email John Persell re same; talk to CA re standing issues; read draft standing declarations	8	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
	CA	Review regulations, fish advisories by state, emails, call the tribal biologist, revise declaration, discuss declarations with AT	5.75	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
1/3/2007	AT	Continue revisions of draft mercury brief	4		Opening Brief
	CA	Draft cover memo to clients re declarations; edit U & A Tribes' declarations; emails with TW to format, begin draft atty declaration	5.5	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
1/5/2007	AT	Continue drafting/revision of Opening Brief	8.5		Opening Brief
	CA	Edits to Declarations for Tribes; review studies from AT relevant to standing arguments; emails/phone calls re same	2.5	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
1/8/2007	RK	Review of AT and Routel sections of Opening Brief	4		Opening Brief
	AT	Continue drafting/revising of mercury brief	7.25		Opening Brief
1/9/2007	RK	Review of and revisions to AT and Routel brief sections and incorporation of PK comments re same	12.5		Opening Brief
	LS	Review, edit, and cite-check Opening Brief	8.5	A paralegal, rather than an attorney, can cite-check.	Opening Brief
	AT	Continue draft of mercury brief	9.25		Opening Brief

1/10/2007	RK	Review of and revisions to Opening brief	14		Opening Brief
	CA	Review and make revisionsto declarations; draft atty declarations; compile documents for atty declarations	10	Vague. Excessive time spent on uncontested standing issues.	Opening Brief
	PK	Legal analysis of treaty rights and issue and meet with AT re same	1.25		Opening Brief
1/11/2007	CF	Prepare Opening brief for filing and review for consistency with rules	9		Opening Brief
	RK	Review of and revisions to brief	13.5		Opening Brief
1/25/2007	CF	Review, prepare, and file Opening Brief	7.25		Opening Brief
	RK	Review and finalize brief	10.5		Opening Brief
	AT	Review and edit cite checking changes; look up cites; organize files	3.75	An attorney already spent 8.5 hours, *inter alia* , cite checking this brief. Additional time spent cite checking is	Opening Brief
	CA	Review and do final revisions to declarations; emails to same	0.75		Opening Brief
4/10/2007	AT	Draft memo to RK re SCOTUS environmental decisions	0.25	Vague. Which decisions? How are they relevant to this action?	Other
4/11/2007	AT	Legal research re lower court opinions leading up to *Mass v. EPA* ; analysis of opinions' effect on mercury cases	5.25	Excessive time.	Other
5/3/2007	AT	Research caselaw and review background materials for reply to EPA	6	Vague. What "caselaw" and "background materials" were reviewed?	Reply Brief
5/7/2007	RK	Review of EPA brief and outline of response to same	5.5	Duplicitave with entry below.	Reply Brief
	AT	Review of EPA brief and discussion of same with PK	5.5	Duplicitave with entry above.	Reply Brief
5/8/2007	AT	Research record on census data issue; draft email to RK, et al., re waiver; discussion of statutory issues with PK	7	Vague. Impossible to differentiate between tasks. Excessive amount of time billed.	Reply Brief
	PK	First review of treaty rights section of EPA brief	0.75		Reply Brief

	JS	Review and discussion of United States' briefing position in Phase II of *U.S. v. Washington* as related to United States' (EPA's) position in mercury case	0.25		Reply Brief
5/9/2007	AT	Research and brainstorm reply brief issues	7.25	Vague. Research what? Brainstorm with whom?	Reply Brief
	PK	Discussion with AT re EPA brief and emails with RK and AT re same	0.25		Reply Brief
5/13/2007	PK	Review briefs re treaty and related issues	1	Vague. Review of which briefs?	Reply Brief
		Telephone conference with Environmental Petitioners, PK, RK, and C. O'Neill re reply brief issues; research issues raised on calls	3		Reply Brief
5/16/2007	AT	Research mercury reply brief issues	7.25	Vague. Which issues?	Reply Brief
	PK	Review email and attached memorandum from O'Neill re analysis of public health and related issues; email from AT re same	0.5		Reply Brief
5/21/2007	AT	Research mercury reply brief issues	7	Vague. Which issues?	Reply Brief
5/24/2007	RK	Review of AT memos re reply brief issues and of relevant cases	8	Vague. Which issues? Which chases?	Reply Brief
	AT	Work on reply brief research; review cases; email RK and C. O'Neill re same	5.75	Vague. Which cases? Impossible to tell how much time was spent on each task.	Reply Brief
5/29/2007	CF	Review Volume IV of the Mercury Report to Congress for reply brief issues	2		Reply Brief
	AT	Research reply brief issues	5.25	Vague. Which issues?	Reply Brief
	LS	Review US response brief re criticisms of Great Lakes Study; review Tribes' opening brief; begin research on percentiles	7.75		Reply Brief
5/30/2007	CF	Review Volume IV of the Mercury Report to Congress for reply brief issues	6	Vague	Reply Brief
	RK	Review of D.C. Circuit cases relevant to reply brief issues	6	Vague	Reply Brief
	AT	Work on researching reply brief and reviewing materials	6.5	Vague	Reply Brief
	LS	Legal research re use percentiles, including Zuni case	7		Reply Brief

5/31/2007	CF	Review Volume IV of the Mercury Report to Congress for reply brief issues	2.75	Vague	Reply Brief
	LS	Legal research re use of percentiles, including regulations; drafting memo re same	5	Vague	Reply Brief
6/1/2007	AT	Draft reply brief	10.5		Reply Brief
6/4/2007	AT	Research and draft reply brief	9		Reply Brief
6/5/2007	AT	Draft reply brief	11.75		Reply Brief
	PK	Review draft reply brief	1		Reply Brief
6/7/2007	CF	Review NAS studies	7.25	Vague. Why were these studies	Reply Brief
	LS	Continue research on post-hoc interpretations; research on consideration of matters outside agency record	5.5		Reply Brief
6/8/2007	LS	Consideration research on post-hoc interpretations; research on consideration of matters outside agency record	6		Reply Brief
	CF	Review NAS studies; draft memo for AT re same	3	Vague. Why were these studies relevant?	Reply Brief
6/9/2007	AT	Revisions to reply brief	6		Reply Brief
6/11/2007	CF	Review draft reply brief; create certiciate of service; review D.C. Circuit rules re reply content and filing issues	4.5		Reply Brief
	AT	Review and edit reply brief; research re same	3.75		Reply Brief
	RK	Review of and revisions to AT draft reply brief; teleconference with PK re brief	5		Reply Brief
6/12/2007	CF	Review and edit reply brief; edit certificate of service; create certificate of compliance	8		Reply Brief
	PK	Review and edit reply brief and email to AT and RK re same	5		Reply Brief
	LS	Cite-check (and review/edit) reply brief	6.5	A paralegal, rather than an attorney, can cite-check. 6.5 hours is an excessive amount of time to spend cite checking.	Reply Brief
6/13/2007	CF	Review and edit reply brief; edit certificate of service; create certificate of compliance	8.75		Reply Brief
	RK	Revisions to and drafting revised sections of reply brief	10		Reply Brief

	LS	Review and edit mercury reply brief (cite-checking)	6.75		Reply Brief
6/14/2007	RK	Final revision to reply brief	4.5		Reply Brief
6/21/2007	CF	Preparation of joint appendix materials	3		Appendix
	AT	Compilation of joint appendix materials	4.5		Appendix
6/25/2007	AT	Compilation of joint appendix	7		Appendix
6/26/2007	AT	Compilation of joint appendix	2		Appendix
6/27/2007	LS	Review and edit appendix contents and citations	4		Appendix
6/28/2007	AT	Review and finalize joint appendix	4		Appendix
7/9/2007	AT	Emails with environmental attys re joint appendix/final brief issues; review final briefs	0.75		Appendix
7/10/2007	AT	Review and address joint appendix issues	0.75		Appendix
7/12/2007	AT	Insert joint appendix cites into final briefs; email RK and CF re same	2.5		Reply Brief
7/17/2007	RK	Review of issues related to final brief	1.5	Vague. Which issues?	Reply Brief
7/18/2007	CF	Review and finalization of final briefs for filing	3.5		Reply Brief
9/5/2007	AT	Complete draft of 28(j) Letter	2		Other
9/11/2007	RK	Review of draft 28(j) Letter	0.5		Other
	AT	Revisions to 28(J) letter and email to RK	0.5		Other
9/19/2007	JS	Review Tribal brief and review record and appendices contents	1		Other
11/2/2007	AT	Research and review cases recently decided by oral argument panel judges	5.25		Oral Argument
		Telephone conference with environmental petitioners re allocation of argument time; discussion of same with RK and AT: teleconference with DOJ and LMTC re same	1.5		Oral Argument
11/5/2007	AT	Research cases decided by panel judges	2		Oral Argument

	JS	Emails with AT and RK re time for argument; review order setting argument with clerk's letter requesting proposed allocation of time; emails with AT re reviewing recent opinions of panel judges; review Tribal brief and EPA brief; outline Clean Air Act provisions and outline needed for argument	1.25		Oral Argument
11/9/2007	JS	Further review of arguments and possible questions at hearing	3.25		Oral Argument
11/12/2007	AT	Review materials to help with preparation for argument; email and review with JS	7		Oral Argument
	JS	Review EPA brief and note arguments and possible questions at hearing; review Tribal brief and note possible court questions; discussions with AT re oral argument; emails with RK and AT re Tuesday teleconference with environmental petitioners	6.25		Oral Argument
11/13/2007	AT	Teleconference with EPA atty re argument time; continue negotiations for argument time and emails with EPA atty re same; help JS prepare for oral argument	7.5		Oral Argument
	JS	Review draft DOJ letter to court re oral argument time; review of same with AT; emails with RK re same; review tribal briefs and note possible court questions	3.25		Oral Argument
11/14/2007	AT	Review materials in preparation for JS oral argument	3.5		Oral Argument

	JS	Review Tribal and EPA briefs and make notes for argument; emails from all counsel re oral argument time; read O'Neill memo re fish consumption studies, review EPA record re fish consumption studies, population analysis, and mercury hazards; review Tatel dissents in *Mass v. EPA* ; review AT memo re *Mass v. EPA; and Duke Power* cases; review AT email re ethyl and vinyl chloride cases	5.25		Oral Argument
11/15/2007	AT	E-mail with JS re argument issues; review materials for argument preparation	1		Oral Argument
	JS	Review state brief; review Clean Air Act; review emails from AT and draft Tribal briefs re various arguments and inconsistencies in record; review record re hg impacts and re fish consumption	3.5		Oral Argument
11/16/2007	JS	Meeting w/AT and teleconference with Environmental Petitioners and States re argument and moot arguments; eamils with AT re same and relevant treaty rights cases and re 112a and *Mass v. EPA;* review Clean Air Act cases; review State and Tribal briefs and cases citedre non-EGU mercury; discussion with AT re same; emails with AT and Auerbach (NK AG) re same	5.75		Oral Argument
11/17/2007	JS	Review 2004 Fed Reg re possible delisting	2	Vague. What purpose?	Oral Argument?
11/19/2007	JS	Review 2004 Fed Reg re possible delisting and proposed sec 112 or 111 rules; review 2005 Fed Reg re delisting, CAIR, and CAMR; meeting with AT re Tribal comments letters re delisting	6.75	Vague. What purpose?	Oral Argument?

11/20/2007	JS	Review O'Neill memo re "Ample Margin of Safety" provisions of Act; emails w/AT re Tribal comments on rule location of affected fishers; Review 2005 Fed Reg re delisting an CAMR; meeting w/AT re Chevron case and Clean Air Act std of review and interpretation of Sec 112 of Act; review Tribal comment letters re EPA use of census data; discussion w/AT re same and re teleconference w/environmental petitioners re issues for argument; meeting w/PK and emails with RK re Chevron std of review and re mooting; review electronic record and download key documents; review "Reconsideration Rule" and Fed Reg re same; meet w/AT moot argument dates and suggestions for argument; emaild with O'Neill, PK, RK, and AT re mooting; review EPA responses to comments	7.5		Oral Argument
11/20/2007	PK	Meeting with JS re oral argument strategy	0.5		Oral Argument
11/21/2007	JS	Review admin record, comment responses, and scientific articles & studies in preparation for oral argument	5.5		Oral Argument
11/22/2007	JS	Review admin record--responses to comments and scientific studies in preparation for oral argument	4.5		Oral Argument
11/23/2007	JS	Review admin record, including Tribal comment letters, in preparation for oral argument	6		Oral Argument
11/25/2007	JS	Review Tribal and EPA briefs and review cases cited and outline responses to arguments	7.5		Oral Argument

11/26/2007	JS	E-mail correspondence with AT re outline of EPA brief and oral argument; review EPA "sensitivity analysis" re cost" benefit; review environmental petitioners' briefs, EPA brief and AT outline of same; review Great Lakes treaties; draft possible questions from court and fwd to AT, RK, and O'Neill; review cases cited by EPA; review GLIFWC fish consumption study; review file notes re briefs and argument and outline points for oral argument	7		Oral Argument
11/27/2007	JS	Review cases cited in EPA brief; research whether GLIFWC study is part of admin record under Clean Air Act; research EPA responses to GLIFWC study in briefs and Fed Reg; outline argument; teleconference and email with environmental petitioners re oral argument order; emails to RK and AT re same; meeting with PK re same	5.25		Oral Argument
11/28/2007	AT	Participate in teleconference for environmental petitioner's moot; review cases discussed; review all with JS	5.5		Oral Argument
	JS	E-mail correspondence with eRK and AT re argument	0.25		Oral Argument
11/29/2007	JS	E-mail correspondence with environmental petitioners re oral argument order and preparation	0.5		Oral Argument
11/30/2007	JS	E-mail correspondence with environmental petitioners re moot argument and re EPA reaction to oral argument order	0.5		Oral Argument
12/5/2007	AT	E-mail correspondence with other attys and review briefs to help environmental attys prepare for argument; discussion of argument issues with environmental attorneys	4.5		Oral Argument
2/8/2008	AT	Review panel opinion; email other attys on case re draft email	1.25		Other

2/21/2008	AT	Review emails and draft versions of motion to expedite mandate; review and comment on draft motion	1		Other
2/25/2008	AT	Review and respond to emails re Motion to Expedite; review final motion	1		Other
3/4/2008	AT	Review and email new articles re EPA pressuring states to adopt weaker plans	0.5		Other
3/6/2008	AT	Review news items re EPA coercion of states; email JS and RK re same; Review EPA response to Motion to Expedite	0.5		Other
3/7/2008	AT	Review and adress issues related to Motion to Expedite; emails re same to tribal atty Emily Hutchinson, RK, and JS	0.5		Other
3/10/2008	AT	Review and edit Motion to Expedite; emails re same to RK and JS	2.25		Other
3/12/2008	AT	Preparation for and participation in teleconference re reply on Motion to Expedite; review comments on final draft of reply	1.75		Other
3/18/2008	AT	Review order re Motion for Expedited Mandate; emails with RK, clients, and other attys in case	0.75		Other
3/25/2008	AT	Review petitions for rehearing and rehearing *en banc* ; review and respond to email correspondence from other attys re same	3.75		Other
4/7/2008	AT	Discussion with PK re *en banc* petitions; research rules re same	1.5		Other
4/16/2008	AT	Review drafts of rehearing petition response; review and respond to emails from other counsel	3		Other
4/17/2008	RK	Review *en banc* response and AT edits and comments re same	2		Other
	AT	Telephone conference re opposition to *en banc* ; review and comment on drafts of opposition	3.5		Other

4/18/2008	AT	Review and comment on draft opposition to *en banc*	1		Other
4/20/2008	AT	Review and comment re draft opposition to *en banc* petition; email RK same	1.25		Other
4/21/2008	AT	Review and en banc draft and comments re same	1.25		Other
	AT	Discuss draft response with RK via email; review and comment on new drafts	2.5		Other
4/22/2008	AT	Telephone conferences re *en banc* response and review drafts of response	2.25		Other
10/23/2008	RK	Telephone conference with State and environmental groups re cert opp; review Epa and industry cert petitions	3.5		Other
12/2/2008	RK	Review of draft cert op and comments to Donahue, Weeks and Pew (env attys) re same	2		Other
11/2/2008	LS	Research case law re attorneys' fees under 307(f)	2.5		Other
11/3/2009	LS	Draft fee settlement proposal for submission to DOJ	1.5		Other
1/12/2010	LS	Draft follow-up letter re fee settlement proposal to DOJ	1		Other
4/16/2010	DG	Review Doj's 4/12/10 letter responding to our 12/15/09 and 1/19/2010 letters; read case cited in DOJ letter and begin case law research in preparation of response to same	3		Other
4/19/2010	DG	Continue research of case law re issues raised in DOJ 4/12/10 letter	3.5		Other
8/4/2010	DG	Continue research of case law re issues raised in DOJ letter and issues supporting fee request; draft outline of response letter and begin draft of same	5		Other
8/5/2010	DG	Finish 12-pate draft letter in response to 4/12/2010 DOJ letter re fees	5.5		Other
1/12/2011	DG	Begin draft motion for attorneys fees re Mercury litigation	5		Other

1/13/2011	DG	Continue draft motion for attorney fees re Mercury litigation; begin draft of fee and rate chart, atty bios and declarations; check for recent 307(f) and analogous cases	7.5		Other
1/14/2011	DG	Continue draft motion for attorney fees re Mercury litigation; proof/check fee and rate chart, revise declarations; confer w/RK and PK re same	4.5		Other
1/27/2011	DG	Finish draft motion for attorney fees and supporting documentation	3.5		Other
Total			**996**		

EPA's Proposed Hourly Calculation

Tasks	Pre-Petition	Opening Brief	Reply Brief	Appendix	Oral Argument	Other	Total
Hours Sought	153.25	312.5	243.5	26	120	140.75	**996**
EPA Multiplier	0%	0.2	0.2	0.5	0.5	0.2	
Appropriate Hours	0	62.5	48.7	13	60	28.15	**212.35**

* Note - Even if the Court were to determine that Tribal movants were entitled to some pre-petition hours, they would not be entitled to the 32.5 hours related to administrative proceedings.

* The 43 hours submitted for researching and drafting an intervention motion should be drastically discounted as well, if pre-petition hours were allowed.

* If pre-petition hours were allowed, they would need to be adusted downward due to vagueness and excess billing concerns.

* A .2 multipler brings petitioner's billing within the ballpark of hours previously allowed by this Court.

* A .2 multipler brings petitioner's billing within the ballpark of hours previously allowed by this Court.

* A .5 multipler accounts for billing inefficiency, and the fact that the US has settled with prevailing parties who also sought reimbursement for this task.

* A .5 multiplier accounts for the fact that Tribal Movants did not present oral argument, and the fact that they had aready spent extensive time briefing these topics.

* A .2 multiplier accounts for the vague nature of most of these billing records, and that many of these tasks were not necessary.

EPA's Proposed Rates Calculation

Attorney	Riyaz Kanji	Phillip Katzen	John Sledd	Laura Sagolla	Ann Tweedy	Cory Albright	David Giampetron	Courtney Flynn	Average Rate
Average Washington D.C. Hourly Rate Sought for Each Attorney	383.5	432.5	432.5	250	310	240	272.5	120	**305.125**

Calculation Verifying Accurate Proxy

Tribal Movants' Average Rate	Hours Sought by Tribal Movants	Hours * Rate	Amount Tribal Movants Request
305.125	996	303904.5	**$302,202.50**

* Note - this $303,904.5 total is $1,700 more than the total Tribal Movant's request, demonstrating that the "Average Rate" approach is slightly high, but a reasonable proxy to account for the variable billing rates of the eight professionals assigned to this matter.

EPA's Final Calculation

	Tribal Movants' Proposal	EPA's Calculated Appropriate Hours and Rates
Hours	**996**	**212.35**
Average Rates	**305.125**	**305.125**
Total	**$302,202.50**	**64793.29375**

* Note - Tribal Movant's Total Requested is slightly lower than their average hours multiplied by their average rates.

Actual Amount Requested	**$302,202.50**	**Appropriate Award, if Court Awards Fees**	**$64,793**