UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA by and through ARNOLD SCHWARZENEGGER, GOVERNOR, and the CALIFORNIA AIR RESOURCES BOARD, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND STEPHEN L. JOHNSON, ADMINISTRATOR, Respondents.	Docket No. 08-_____

MOTION FOR LEAVE TO INTERVENE AS PETITIONERS

The State of New York, Commonwealth of Massachusetts, States of Arizona, Connecticut, Delaware, Illinois, Maine, Maryland, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the Commonwealth of Pennsylvania Department of Environmental Protection (the "Proposed Intervenors") move to intervene in this action as party-petitioners pursuant to Fed. R. App. Proc. 15(d).

1. On January 2, 2008, the State of California ("California"), by and through Governor Arnold Schwarzenegger, and the California Air Resources Board ("CARB"), filed a Petition for Review with this Court seeking review of a final action by the United States Environmental Protection Agency ("EPA"), and its Administrator, Stephen L. Johnson. That final agency action denied California's request, under section 209(b) of the Clean Air Act

("CAA"), 42 U.S.C. § 7543(b), for a waiver of preemption for California's regulations to control greenhouse gas emissions from new motor vehicles. These regulations would require reductions in fleet-average greenhouse gas emissions, including carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), and hydrofluorocarbons (HFCs), for most new passenger motor vehicles sold in California, beginning with the 2009 model year. This final agency action was issued by EPA on December 19, 2007 (a copy of the decision is attached hereto as Exhibit A).

2. The Proposed Intervenors have a strong interest in reviewing EPA's decision because each of them has promulgated, or is contemplating promulgating, new motor vehicle greenhouse gas emissions regulations with standards identical to California's. These regulations are also preempted by EPA's December 19, 2007 decision.

BACKGROUND

Statutory Background: California's Authority to Set Emission Standards for Motor Vehicles.

3. The CAA authorizes EPA to regulate tailpipe emissions from new motor vehicles. 42 U.S.C. § 7521. Although CAA § 209(a), 42 U.S.C. § 7543(a), generally prohibits states from adopting their own emission standards for new motor vehicles, CAA § 209(b), 42 U.S.C. § 7543(b), grants California the authority to set its own emission standards because of that state's long-standing, severe air pollution problems, as well as its "pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation." Motor and Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1110-1111 (D.C. Cir.1979) (explaining reasons for California's unique status). Under CAA § 209(b), California must

request and be granted a waiver of preemption from EPA before it may enforce any emissions regulations.

4. In 1977, Congress added CAA § 177, 42 U.S.C. § 7507, which authorizes other states to adopt and enforce emission standards for new motor vehicles that are identical to those of California for which a waiver has been granted by EPA.

California's Adoption of Greenhouse Gas Emission Regulations and Request for Waiver

5. Recognizing that motor vehicles are the second largest source of greenhouse gas emissions in California, CARB approved regulations in September 2004 that limit the amount of greenhouse gases that may be emitted by light- and medium-duty passenger vehicles sold in California beginning in model year 2009. See, e.g., 2005 Cal. Regulatory Notice Reg. 1427 (Sept. 30, 2005) (noting 2004 amendments).

6. On December 21, 2005, pursuant to CAA § 209(b), California requested a waiver of preemption from EPA for California's greenhouse gas emission regulations.

7. By letter dated December 19, 2007 to Governor Arnold Schwarzenegger, Administrator Johnson denied California's request.

Proposed Intervenors' Adoption of Greenhouse Gas Emission Regulations Identical to California's, and Their Dependency on EPA's Granting of California's Request for Waiver

8. Pursuant to their authority under CAA § 177, 42 U.S.C. § 7507, many of the Proposed Intervenors have adopted greenhouse gas emissions regulations for motor vehicles that are identical to California's regulations. See Conn. Agencies Regs. § 22a-174-36b; Code of Maine Regulations, 06-096 CMR Ch. 127; Code of Md. Regs. 26.11.34; 310 Code of Mass.

Regs. 7.40; N.J. Admin. Code 7:27-29; Title 6 of the N.Y. Code of Rules and Regs. Part 218-8; Ore. Admin. Regs. 340-257-0100; 25 Pennsylvania Code §§ 126.411; R. I. Low Emission Vehicle Program, Air Pollution Control Reg. No. 37.; Vermont Air Pollution Control Regulations, Subchapter XI and Appendix F; Wash. Admin. Code Ch.173-423. Indeed, some of the Proposed Intervenors are required as a matter of state law to adopt California's emission standards. See, e.g., Conn. Gen. Stat. § 22a-174g; Mass. G. L. Ch. 111, § 142K; N.J. Stat. Ann. § 26:2C-8.15 et seq.; Rev. Code Wash. 70.120A; Md. Code Ann. Envir.§ 2-1102 (2007).

9. Proposed Intervenor New Mexico is in the process of promulgating the California regulations as its own. See 20.2.88 NMAC. Pursuant to Executive Order 2006-13, Proposed Intervenor Arizona is in the process of drafting rules adopting the California GHG regulation. Proposed Intervenors Delaware and Illinois are considering adoption of California's regulations.

10. However, because EPA's decision preempts California's regulations, Proposed Intervenors' regulations are also preempted unless EPA's decision is overturned.

The Proposed Intervenors Have a Direct and Substantial Interest in the Action Because of the Effects of Global Warming and the Need to Address it Immediately.

11. Like California, Proposed Intervenors recognize that motor vehicles are one of the most significant sources of the greenhouse gases that cause global warming. Global warming is already seriously and negatively impacting the public health, economies and environments of the Proposed Intervenors, and its effects are expected to worsen in the absence of effective abatement prompted by immediate governmental action.

12. For Proposed Intervenors, adopting California's motor vehicle greenhouse gas regulations is also part of larger state strategies to abate greenhouse gas emissions. For example,

several Northeastern states have agreed to stabilize and reduce carbon dioxide emissions from power plants. See <http://www.rggi.org/> (describing the Regional Greenhouse Gas Initiative). California and Proposed Intervenors Arizona, New Mexico, Oregon and Washington launched the Western Climate Initiative in February 2007 to develop regional strategies to address climate change. See <www.westernclimateinitiative.org> (describing the Western Climate Initiative). Proposed Intervenor Illinois is part of the Midwestern Regional Greenhouse Gas Reduction Accord. See <www.midwesterngovernors.org/govenergynov.htm> (describing Midwestern Regional Greenhouse Gas Reduction Accord).

13. In addition, other states have adopted statutes and/or regulations regulating carbon dioxide from power plants. See, e.g., Rev. Code Wash. 80.70 (establishing mitigation requirements for power plants). Twenty-two states, including several Proposed Intervenors, and the District of Columbia, have established Renewable Portfolio Standards, which require states and the District to increase the percentage of energy that they obtain from low-carbon energy sources such as solar, tidal and wind power, that promote far less or no global warming. See http://www.pewclimate.org/what_s_being_done/in_the_states/rps.cfm.

ARGUMENT

A. The Interests of the Proposed Intervenors Warrant a Grant of Intervention Under Fed. R. App. Pro. 15(d).

14. Fed. R. App. Pro. 15(d) requires that a party seeking to intervene must explain its interest in the proceeding and move to intervene within 30 days after the petition for review is filed. Intervention under Rule 15(d) is permitted where the intervenor has a direct and substantial interest in the outcome of the action. See, e.g., New Mexico Dep't of Human Services v. HCFA, 4 F.3d 882, 884 n.2 (10th Cir. 1993) (permitting intervention because intervenors had substantial and unique interest in outcome); Bales v. NLRB, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with "substantial interest in the outcome of the petition"); Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 744 (D.C. Cir. 1986) (allowing Rule 15(d) intervention because petitioners were "directly affected by application" of agency policy).

15. The Proposed Intervenors have a direct and manifest interest in the outcome of this case because the enforceability of their regulations depends on EPA granting California a waiver of preemption under CAA § 209(b). EPA's denial of California's waiver thus preempts Proposed Intervenors' regulations as well as California's.

16. The application of effective greenhouse gas emission regulations would, at a minimum, begin the process of reducing the greenhouse gas emissions that cause global warming. It is not necessary that the Proposed Intervenors show that the regulations would solve the problem all at once. Massachusetts v. EPA, 127 S.Ct. 1438, 1457, 1458-1459, 167 L.Ed.2d 248, 75 USLW 4149 (2007) ("Agencies, like legislatures, do not generally resolve massive

problems in one fell regulatory swoop.")

B. The Liberal Intervention Policies Underlying Fed. R. Civ. Pro. 24 Further Support Granting Intervention Here.

17. The intervention policies underlying Fed. R. Civ. Pro. 24 provide guidance in analyzing intervention under Rule 15(d), although the requirements of Rule 24 do not directly apply to motions to intervene in challenges to administrative actions in the federal appellate courts. See United States v. Bursey, 515 F.2d 1228, 1238 n. 24 (5th Cir. 1975) (policies underlying intervention in the district courts may be applicable in the appellate courts, but are not controlling).

18. Addressing intervention as of right, Fed. R. Civ. Pro. 24(a)(2) provides that:

> Upon timely application, anyone shall be permitted to intervene in an action: .... when the applicant claims an interest relating to the property or transaction which is the subject of the action and 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, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a) is construed liberally in favor of granting intervention. See United States v. City of Los Angeles, 288 F.3d 391, 397-98 (9th Cir. 2002); Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 818 (9th Cir. 2001); Fed. Savings & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993). The Proposed Intervenors easily meet Rule 24(a)(2)'s criteria.

19. The preemption of Proposed Intervenors' motor vehicle greenhouse gas regulations as a result of EPA's denial of California's waiver application plainly "impairs or impedes" their interest in enforcing those regulations. See Yniguez v. Arizona, 939 F.2d 727, 737 (9th Cir. 1991) ("the question ... is whether the district court's decision will result in practical

impairment" of the interests of the applicants for intervention") (emphasis in original); United States v. City of Los Angeles, 288 F.3d at 398 ("By allowing parties with a practical interest in the outcome of a particular case to intervene, we often simplify future litigation involving related issues") (citation omitted). The courts are especially sensitive to the needs of states to intervene in actions that implicate state laws and policy interests. See Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135 (1967) (allowing California to intervene as of right in an antitrust enforcement action to assert "California interests in a competitive system"). As a related matter, standing under the CAA is clear where a state sues on its own behalf to vindicate the administration of its air program. West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004); Massachusetts v. EPA, 127 S.Ct. 1438, at 1444-1445 (a state suing to protect its sovereign interests is entitled to special solicitude in a standing analysis under the CAA).

20. Fed. R. Civ. P. 24(b), which provides for permissive intervention, gives a federal court discretion to allow intervention when the proposed intervenor makes a timely application demonstrating that its "claim or defense and the main action have a question of law or fact in common." In exercising such discretion, courts "shall consider whether the intervention will unduly delay or prejudice the rights of the original parties." Id.; see also Citizens for an Orderly Energy Policy, Inc. v. Suffolk County, 101 F.R.D. 497, 502 (E.D.N.Y. 1984) (possibility of undue delay or prejudice is the "principal consideration").

21. As described above, EPA's denial of California's waiver application also preempts Proposed Intervenors' regulations because they cannot enforce their regulations without a waiver from EPA. See, e.g., Motor Vehicle Manufacturers Assoc. v. Jorling,17 F.3d 521, 534 (2nd Cir. 1994) (New York can adopt, but not enforce, California emissions standards without a

waiver from EPA).

C. California May Not Adequately Represent Proposed Intervenors' Interests

22. Unlike Fed. R. Civ. P. 24(a), Fed. R. App. Pro. Rule 15(d) does not, on its face, require an intervenor to show inadequate representation by the parties in the litigation. Nevertheless, Proposed Intervenors would satisfy this element of Rule 24(a). According to the Supreme Court, "[t]he requirement of the Rule 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).

23. As this Court stated in Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir.1983):

> This court has consistently followed Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972) in holding that the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests "may be" inadequate and that the burden of making this showing is minimal.

Id., at 528. See also Southwest Center for Biological Diversity, 268 F.3d at 822-23. Thus, the proposed intervenor need only show that the representation of its interest may be inadequate, not that representation will in fact be inadequate. See Diamond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986). Moreover, "[a] governmental party that enters a lawsuit solely to represent the interests of its citizens ... differs from other parties, public or private, that assert their own interests, even when these interests coincide." United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 992 n.21 (2d Cir. 1984) (emphasis added). Any doubts about intervention should be resolved in favor of it. See Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993).

24. Proposed Intervenors' authority to enforce their emissions regulations is derived from California as a result of that state's unique status under the Clean Air Act. California, however, may prosecute or settle this action in a manner that does not square with the interests of the Proposed Intervenors. This potential difference between the interests of the Proposed Intervenors and California is not theoretical. Some of the Proposed Intervenors have previously found themselves opposed to California in motor vehicle emissions regulations cases. See, e.g., Assoc. of Int'l Auto. Mfrs. v. Comm'r, Mass. Dep't of Env. Prot., 208 F.3d 1, 5, 7-8 (1st Cir. 2000) (when California repealed its "Zero Emissions Vehicle" (ZEV) program and entered into a Memoranda of Understanding (MOA) with auto manufacturers, Massachusetts could not adopt the MOA for its own regulatory program because the content of the MOA was not considered "standards" under CAA §§ 209, 177). Accordingly, the interests of the Proposed Intervenors may not be adequately represented by California.

D. Proposed Intervenors' Intervention Is Timely.

25. Fed. R. Civ. P. 15(d) provides in relevant part that a motion for intervention is timely if filed within 30 days after the petition for review is filed. This Motion for Leave to Intervene is being filed within this time period and is therefore timely.

26. Allowing the Proposed Intervenors to intervene to protect their own rights will also not unduly delay or prejudice the rights of any other party.

27. On January 2, 2008, the New York Attorney General's Office informed counsel for EPA of Proposed Intervenors' intent to file of this motion.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Proposed Intervenors respectfully request that this Court grant their motion to intervene as party-petitioners.

Dated: January 2, 2008

Respectfully submitted,

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