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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

STATE OF CALIFORNIA, *et al*. Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	Case No. 4:18-cv-03237-HSG **EPA'S OPPOSITION TO MOTION TO INTERVENE** Noticed Hearing Date: October 25, 2018 Time: 2:00pm Courtroom: 2, 4th Floor, 1301 Clay Street, Oakland, CA

Pursuant to Civil L.R. 7-3(b), Defendants the United States Environmental Protection Agency and Andrew R. Wheeler, in his official capacity as Acting Administrator of the United States Environmental Protection Agency (collectively, "EPA"), hereby oppose the motion to intervene filed by proposed plaintiff-intervenor Environmental Defense Fund ("EDF") (Dkt. No. 36) (hereinafter, the "Motion").

I. INTRODUCTION

In 1996, EPA issued Clean Air Act ("CAA" or "the Act") performance standards for emissions from new municipal solid waste landfills and emission guidelines for emissions from existing municipal solid waste landfills. *Final Rule*, 61 Fed. Reg. 9905 (Mar. 12, 1996). In 2016, EPA revised the new source performance standards, *Final Rule*, 81 Fed Reg. 59,332 (Aug. 29, 2016) (codified at 40 C.F.R. §§ 60.760-60.769), and issued revised emission guidelines, *Final Rule*, 81 Fed. Reg. 59,276 (Aug. 29, 2016) (codified at 40 C.F.R. §§ 60.30f-60.41f) (the "Emission Guidelines"). Under the Emission Guidelines, any state with one or more existing municipal solid waste landfills that commenced construction, modification, or reconstruction on or before July 17, 2014 was required to submit a plan to EPA by May 30, 2017 to implement the Emission Guidelines. 81 Fed. Reg. at 59,313 (codified at 40 C.F.R. § 60.30f(a)-(b)).

On May 31, 2018, Plaintiffs the State of California, by and through the Attorney General and the California Air Resources Board; the State of Illinois; the State of Maryland; the State of New Mexico; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; and the State of Vermont ("States"), brought a complaint alleging that EPA has failed to perform a nondiscretionary duty under its regulation, 40 C.F.R. § 60.27(b), to approve or disapprove "state plan submissions within four months of the submission deadline, that is, by September 30, 2017," and that California and New Mexico submitted plans. Pls.' Compl. ¶ 63 (Dkt. No. 1); *see also id.* ¶¶ 1, 4, 8, 24, 49. The States further allege that, pursuant to 40 C.F.R. § 60.27(c)-(d), EPA has a non-discretionary duty "to promulgate a federal plan for states that did not timely submit state plans within six months of the submission deadline, that is, by November 30, 2017." Pls.' Compl. ¶ 64; *see also id.* ¶¶ 1, 4, 8, 24. EPA moved to

dismiss the States' complaint for lack of subject matter jurisdiction and also moved to dismiss a portion of the complaint because the States fail to state a claim to the extent that they do not identify the states for which they allege EPA is required to a federal plan. EPA's Mot. to Dismiss (Dkt. No. 6-12).

On September 13, 2018, the Environmental Defense Fund ("EDF") moved to intervene the pending case as of right or, in the alternative, permissively (Dkt. No. 36). The Court should reject EDF's request. EDF fails to meet the standard for intervention as of right because its interests are adequately represented by the States and because the organization has not demonstrated that disposition of this action will impair or impede EDF's ability to protect its interests. The Court should deny permissive intervention by EDF for the same reasons.

II. STANDARD OF REVIEW

Federal Rule 24(a)(2) provides that, "[o]n timely motion, the court must permit anyone who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The analysis of a motion to intervene rests on four factors:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y v. United States Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc) (citing *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)). Proposed intervenors must satisfy all four criteria. "Failure to satisfy any one of the requirements is fatal to the application." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009) (citations omitted). The second prong of the intervention standard

requires not just any "interest," but rather a "legally protected interest." *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003). "[A] party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). Although intervention may be based on an interest that is contingent upon the outcome of the litigation, "the intervenor cannot rely on an interest that is wholly remote and speculative." *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010) (quoting *United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (9th Cir. 1995)).

III. ARGUMENT

EDF fails to meet the standard for intervention as of right because its interests are adequately represented by the States and because EDF has not demonstrated that disposition of this Action will impair or impede EDF's ability to protect its interests. For the same reasons, the Court should deny permissive intervention.

A. EDF's Interests Are Adequately Represented by the States.

A prospective intervenor bears the burden of demonstrating that the existing parties do not adequately represent its interests. *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (citations omitted). In determining adequacy of representation, courts consider:

> (1) whether the interest of a present party is such that it will undoubtedly make all the proposed intervenor's arguments;
> (2) whether the present party is capable and willing to make such arguments; and
> (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.

Id. at 838, *as amended on denial of reh'g* (May 30, 1996) (citing *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986)).

The burden of establishing inadequacy of representation "is not without teeth . . . ." *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006). In the Ninth Circuit, "[w]hen an applicant for

intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." *Arakaki*, 324 F.3d at 1086 (internal citations omitted).

Further, where, as here, states are acting on behalf of their constituencies, there is an assumption of adequacy. *Id.* "In the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Id.* (internal citations and quotation marks omitted).

EDF falls woefully short of making the compelling showing necessary to overcome the presumption of adequate representation. Here, the States describe nearly identical interests in EPA's implementation of the Emissions Guidelines as the allegedly "significant protectable interests" identified by EDF. EDF concedes that it "desire[ ] to ensure EPA takes nondiscretionary actions to approve state plans and promulgate federal plans to implement the . . . Emission Guidelines aligns with the [States'] interest in pursuing this litigation . . ." Mot. at 10. Section II.B of EDF's motion to intervene presents EDF's alleged "significantly protectable interests." Mot. at 6-9. EDF states that it is interested in implementation of the Emissions Guidelines because that "will benefit its members [ ] and failure to implement them" will harm EDF's members. *Id.* at 7. EDF's asserted interests in protecting its members' health and welfare are no different that the interests of the States in protecting their citizens.

For example, the States allege that "[m]ethane emissions from landfills harm [the State] Plaintiffs and their citizens by significantly contributing to air pollution that causes climate change." Compl. ¶ 31. The States also allege that "their citizens have experienced and will continue to experience injuries from climate change," including heat deaths and illnesses from prolonged heat waves, "increased incidence of ground-level ozone pollution," beach erosion, and "more frequent flooding from more severe rains and higher storm surges." *Id.* Indeed, like the States, EDF alleges that landfills are a source of methane emissions, that methane is a potent greenhouse gas, that "[c]ontrolling methane emissions from landfills helps forestall the serious detrimental impacts of climate change," and that EDF members are harmed by methane

emissions from landfills. Mot. at 7-8. EDF alleges that one of its members "lives in New Mexico and is threatened by forest fires that have become increasingly frequent and severe due to climate change" and another that "faces an uncertain future because of the impacts climate change has upon her family farm." *Id.* at 8-9. EDF's interest in limiting emission of greenhouse gases and lessening alleged impacts is identical to that of the States.

And the States allege that "[i]n addition to greenhouse gases, landfills emit nearly thirty different organic hazardous air pollutants," including "vinyl chloride, ethyl benzene, toluene, and benzene" which are "known to cause adverse health effects above a certain level of exposure, including heart attacks, asthma, and acute bronchitis leading to premature mortality." Compl. ¶ 36. Likewise, EDF alleges that landfills emit volatile organic compounds ("VOC") and hazardous air pollutants ("HAP") and that VOCs form ozone that "can lead to adverse respiratory and cardiovascular effects." Mot. at 7. EDF alleges that it has members living near regulated landfills that "face increased risks from HAPs and other harmful air pollutants contained in landfill emissions." *Id.* at 8.

EDF fails to demonstrate that its alleged interest in the health and welfare of its members differs in any way from the States' interests in protecting their citizens. Instead, EDF simply makes a conclusory statement that although states do represent the interest of their residents "broadly," that "EDF *may* seek to protect *more particularized interests* regarding its members' health and interest in the advancement of environmental protection." Mot. at 10-11 (emphasis added). EDF cannot rely on an assertion of some yet-to-materialize more particularized interest than is currently represented by the States. Conclusory and unsupported allegations should not be accepted by the Court. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001) (holding that the district court must "accept as true the *non-conclusory* allegations made in support of an intervention motion") (emphasis added). EDF fails to rebut the presumption that its interest in protecting its members' health and welfare is the same as that of the States. Thus, EDF fails to satisfy the first criterion of the test for intervention as of right and the Court must deny EDF's motion.

EDF does not dispute that the interests of the States are such that the States are "capable and willing to make such arguments," or that there are no necessary elements to the proceedings that the States would neglect. *Northwest Forest Res. Council*, 82 F.3d at 838. EDF does not address either of these factors that the Court must consider in evaluating adequacy of representation. As to whether the States will "undoubtedly make all [EDF's] arguments," EDF merely suggests that because of EDF's alleged subject matter expertise and history of involvement in Clean Air Act matters, it unlikely that the States will address the same arguments. Mot. at 11. It is noteworthy that the oppositions to EPA's motion to dismiss filed by the States and EDF demonstrate that the States are willing to advance the same arguments that EDF seeks to present to the Court here. *Compare* States' Opp. (Dkt. No. 48) at 10-11 *with* EDF's Proposed Opp. (Dkt. No. 47) at 10-11 (both arguing that *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544 (D.D.C. 2005), is contrary to EPA's argument); States' Opp. at 12 *with* EDF's Proposed Opp. at 12 (both challenging EPA's reliance on *Wildearth Guardians v. McCarthy*, 772 F.3d 1179 (9th Cir. 2014); States' Opp. at 13 *with* EDF's Proposed Opp. at 13-14 (both arguing that n.7 in *Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989), is dicta).

Contrary to EDF's suggestion, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983), did not incorporate the proposed-intervenor's expertise *apart from* plaintiffs as a factor in courts' analysis of adequacy of representation. Nor did the Ninth Circuit recognize the proposed intervenor's expertise as a stand-alone factor that would justify intervention despite the undisputed conclusion that the States are capable and willing to make all of EDF's potential arguments and that there is no element of the proceedings that the States would neglect. The situation in *Sagebrush Rebellion* was unique and distinguishable from the circumstances here. *See United States v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002) (describing *Sagebrush Rebellion* as a "special case"). *Sagebrush Rebellion* involved a challenge to the legality of actions taken by former Secretary of the Interior, Cecil D. Andrus. 713 F.2d at 528. After a change in administrations, Sagebrush Rebellion brought the action against the new Secretary, James Watt. Sagebrush Rebellion was represented by the Mountain States Legal Foundation. Watt was the previous head of the Foundation. This led the appellant to refer to the

matter as *Watt v. Watt*. *Id.* The district court denied the Audubon Society's motion to intervene as of right. In reversing the district court's denial of intervention as of right, the Ninth Circuit noted that "[i]n addition to having expertise apart from that of the Secretary, the intervenor offers a perspective which differs materially from that of the present parties to this litigation." *Id.* at 528-29. The Ninth Circuit's observation that Secretary Watt and the Audubon Society have different perspectives and expertise did not mean that a party has a right to intevene anytime that it can assert that its perspective or expertise is different from existing parties. Rather, the Ninth Circuit concluded that the mandatory elements of Rule 24 were satisfied.

Even if EDF had accurately characterized the holding of *Sagebrush Rebellion*, EDF has not established that its expertise and perspective regarding landfill issues or its technical expertise is different or better than that of the States (including, for example, the California Air Resources Board). Further, EDF's emphasis on its purported "extensive scientific research" and "technical expertise," Mot. at 10-11, in support of its motion is misplaced in this litigation. This is not a challenge to the underlying rule regulating certain municipal solid waste landfills, and so the parties will not be litigating the merits of the agency's decision. Rather, Plaintiffs allege only that EPA has failed take specified actions by certain dates. If the case proceeds beyond the motion to dismiss phase, the sole remaining issue will be the deadline by which the agency must take action – an issue for which EDF does not claim any special interest or expertise.

Moreover, EDF confuses its alleged expertise with its interests in the pending litigation. The organization states that its long history of involvement in issues relating to municipal landfills, its technical expertise, and its advocacy work are "not adequately represented by the States." Mot. at 10-12.[1] While these *qualifications* might support EDF's participation in the

[1] In Section II.A of its motion, EDF argues that its "significant protectable interests" are interests in protecting its members' health and welfare, but not its history of involvement in the landfill regulation, advocacy, or its technical expertise. Mot. at 6-9; *see In re eBay Seller Antitrust Litig.*, No. 07-01882, 2008 WL 4412278, at *1 (N.D. Cal. Sept. 25, 2008) (stating that "the intervenor applicant must be in a situation where disposition of the litigation may, as a practical matter, impair or impede the '*significantly protectable*' interest") (emphasis added).

litigation as an *amicus curiae*, they are not interests in the litigation that justify intervention as of right. EPA does not oppose EDF's participation in this litigation as an *amicus curiae*.

B. Disposition of This Action Will Not Impair or Impede EDF's Ability to Protect Its Interests.

Conclusory statements do not support intervention. *See Sw. Ctr. for Biological Diversity*, 268 F.3d at 819 (holding that the district court must "accept as true the *non-conclusory* allegations made in support of an intervention motion"). EDF makes two conclusory and general claims about the impact of disposition of this action on EDF's and its members' interests. Neither claim demonstrates that EDF's (or its members') interests will be impaired if it is denied intervention.

First, EDF alleges that an adverse judgment *may* impair its pursuit of "its own independent claims." Mot. at 10. However, EDF offers no explanation of the nature of this impairment. Merely asserting that impairment is possible from an adverse decision, without further explanation, does not demonstrate potential impairment.

Second, EDF alleges that if the parties were to enter into a settlement agreement or consent decree, such a resolution "could significantly alter and impair EDF's ability to bring future claims." Mot. at 10. Again, EDF offers no explanation of how the disposition of this claim could affect unspecified future claims. EDF fails to explain how its alleged interest in protecting the general health and welfare of its members will in any way be impaired or impeded by disposition of this case. Conclusory statements such as this are insufficient to demonstrate practical impairment of interests.

Considering the factual circumstances and relief requested and available in this matter, EDF fails to meet the required third and fourth prongs of the applicable four-part test under Fed. R. Civ. P. 24(a)(2). On that basis, the Court should deny EDF's motion to intervene as of right.

IV. THE COURT SHOULD DENY PERMISSIVE INTERVENTION BY EDF

In the alternative to intervention as of right, EDF seeks permissive intervention under Rule 24(b)(1). That rule provides that "[o]n timely motion, the court may permit anyone to

intervene who . . . (B) has a claim or defense that shares with the main action a common question of law or fact." The "timeliness element for permissive intervention is analyzed more strictly than it is for intervention as of right." *United States v. Blaine Cty., Montana*, 37 F. App'x 276, 278 (9th Cir. 2002). "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Southern Calif. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998)). Courts consider a number of factors in deciding whether to permit intervention, including:

> the nature and extent of the intervenors' interest, . . . the legal position they seek to advance, and its probable relation to the merits of the case[,] whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Perry v. Schwarzenegger, 630 F.3d 898, 905-906 (9th Cir. 2011) (quoting *Spangler v. Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)).

EPA does not dispute that EDF shares a common claim with the States. But the timeliness of EDF's motion is contingent upon how the Court addresses case management. The initial case management conference is scheduled for October 2, 2018. Because of the awkward timing of EDF's motion – after EPA moved to dismiss, but before the initial case management conference – how EDF's intervention might impact or potentially prejudice EPA is uncertain until the Court addresses how it will handle EPA's pending motion to dismiss in light of EDF's potential intervention.

Even if the Court finds that EDF satisfies the threshold requirements for permissive intervention, the Court should deny permissive intervention. *Donnelly v. Glickman*, 159 F.3d at 412 (court has discretion to deny intervention even if the threshold requirements are met). EDF seeks the same relief as the States, EDF has not demonstrated that its interests in the matter are inadequately represented by the States, and EDF has not demonstrated that its continued

interest in the Emission Guidelines will be practically impaired or impeded by disposition of this matter. *See, e.g.*, *United States v. California*, No. 2:18-cv-490, 2018 WL 2563641, at *3 (E.D. Cal. June 4, 2018) (stating that even if the threshold requirements are met, "the Court may again 'evaluate whether the movant's 'interests are adequately represented by existing parties.'") (internal quotations omitted) (quoting *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989), *aff'd sub nom.*, *Venegas v. Mitchell*, 495 U.S. 82 (1990)).

V. CONCLUSION

For the foregoing reasons, EDF has not satisfied the standards set forth in Federal Rule of Civil Procedure 24 for intervention as a matter of right or for permissive intervention. EPA does not oppose EDF's participation in matter as an *amicus curiae*.

Date: September 27, 2018

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