

United States District Court, D. Vermont.  
GREEN MOUNTAIN CHRYSLER-PLYMOUTH-DODGE-JEEP, et al., Plaintiffs,  
Association of International Automobile Manufacturers, Plaintiff,

v.

Thomas W. TORTI, Secretary of the Vermont Agency of Natural Resources, et al.,  
Defendants.

Case Nos. 2:05-CV-302, and 2:05-CV-304.

February 21, 2006.

Memorandum in Support of Motion of Conservation Law Foundation, Sierra Club,  
Natural Resources Defense Council, Environmental Defense and Vermont Public  
Interest Research Group to Intervene as Party Defendants

The Conservation Law Foundation, Sierra Club, Natural Resources Defense Council, Environmental Defense and Vermont Public Interest Research Group ("Applicants") hereby move to intervene as party defendants pursuant to Rule 24 of the Federal Rules of Civil Procedure, in support of the Defendants Thomas W. Torti, Jeffrey Wennberg and Richard Valentinetti ("Defendants"). As described below, Applicants satisfy the requirements for both intervention as of right and permissive intervention under Rule 24.

#### BACKGROUND

This case involves regulations promulgated by the Vermont Department of Environmental Conservation ("DEC"), under the specific authority of <section> 177 of the Clean Air Act, 42 U.S.C. <section> 7507, to limit motor vehicle emissions of greenhouse gasses (the "DEC regulations"). Section 177 allows states other than California to opt-in to California's more stringent motor vehicle emission program. Plaintiff automobile manufacturers and dealers nonetheless challenge this clear statutory authority on various grounds, including preemption, commerce clause and antitrust claims.

This case is of national significance, as Vermont is the first of nine states to have adopted California's greenhouse gas emission standards for new motor vehicles (the "GHG emission standards") pursuant to the clear authority of <section> 177. (See list of adopting states in Attachment A.) Applicants are national and regional nonprofit advocacy organizations that have been significantly involved in the statutory and regulatory processes leading to the adoption/promulgation of these greenhouse gas emissions standards in California and in Vermont, and the other eight states adopting the California standards under <section> 177. Each of the Applicants has significant expertise on the issues presented, and is working on behalf of their members to address the problem of global warming and promote the passage of similar regulations in other states.

Conservation Law Foundation ("CLF") is a non-profit, member-driven environmental advocacy organization dedicated to protecting the people, environment and communities of New England. CLF has, as part of its long standing sustainable transportation and air quality campaigns, advocated for adoption of California's clean car emission standards in its home states of New England, and in upwind states that contribute to poor air quality across the Northeast. CLF also has more than 1,000 members in Vermont, and thousands of members across the Northeast who are users of the natural resources directly impacted by the diverse effects of global warming.

Environmental Defense ("ED") has over 400,000 members nationally, with more than 1,234 active members in Vermont, and specializes in the development of innovative, scientifically sound, market-based solutions to environmental problems. Through its Climate and Air Program, ED works extensively on the international, national and state levels to address the causes and effects of global warming. Environmental Defense supported the adoption of automotive greenhouse gas emissions standards in California as part of its State Climate Action Project. When Vermont initiated state rule-making processes to adopt this California program, Environmental Defense provided detailed comments to the Vermont Agency of Natural Resources in favor of the proposed rule.

Sierra Club is a national nonprofit environmental organization with approximately 700,000 members nationwide, including thousands of members in Vermont. One of Sierra Club's major programs is its national Global Warming and Energy Campaign to promote solutions to global warming using current and cutting-edge technologies, and securing promulgation of the GHG emission standards was among the top priorities of this Campaign.

Natural Resources Defense Council ("NRDC") has approximately 551,650 members nationally, with 3,541 members in Vermont, and uses law, science, and the support of its members and the public to ensure a safe and healthy environment for all living things. One of NRDC's top priorities is to reduce air pollution that endangers public health and welfare, including the air pollution that is causing global warming.

Vermont Public Interest Group ("VPIRG") works to promote and protect the health of Vermont's environment, people, and locally-based economy, and bring the voice of citizens to public policy debates that shape the future of Vermont. VPIRG's programs share the common objectives of building a broad constituency to protect Vermont's air, water, and land by bringing together environmentalists, the agriculture community, consumers, businesses, and others who have an interest in protecting the environment of Vermont. VPIRG currently has over 20,000 members. VPIRG was actively involved in the adoption of the DEC regulations including attending public meetings, educating members and the public, and submitting written comments.

## I. APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Applicants satisfy the four-part test for intervention as a matter of right under Rule 24(a). To intervene as of right the applicant must: (1) timely file an application; (2) show an interest in the action; (3) demonstrate that the interest may be impaired by the disposition of the action; and (4) show that the interest is not protected adequately by parties to the action. In re: Bank of New York Derivative litigation, 320 F.3d 291, 300 (2d Cir. 2003) (quoting *New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992)). In assessing these factors, Rule 24 should be construed liberally in favor of intervention. *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F. 3d 1080, 1081 (8th Cir. 1999), citing *U.S. v. Union Electric Co.*, 64 F. 3d 1152, 1158 (8th Cir. 1995), *Stupak- Thrall v. Glickman*, 226 F. 3d 467, 472 (6th Cir. 2000). Applicants satisfy this four-part test.

### A. Applicants Have A Significant Interest In The Subject Matter Of This Litigation.

Rule 24(a)(2) requires that an intervenor have an interest that is related "to the property or transaction which is the subject of the action." This prong does not require "specific legal or equitable interest," but rather "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *United States ex rel. Carmona v. Ward*, 416 F.Supp. 276, 279 (S.D.N.Y. 1976) (quoting *Nuesse v. Camp*, 385 F.2d 694,700 (D.C. Cir. 1967)). Applicants have a vital interest in the DEC regulations and in the environmental resources that the regulations aim to protect. In addition, Applicants Sierra Club, NRDC and ED were granted intervenor status as of right in the related pending legal challenges in California.

#### 1. Applicants Were Directly Involved in the Enactment of the Regulatory Program at Issue in this Case.

Public interest organizations have a sufficient interest to intervene as of right "in actions involving legislation or regulations previously supported by the organization." *Commack Self-Service Kosher Meats, Inc. v. Rabbi Schulem Rubin*, 170 F.R.D. 93, 102 (E.D.N.Y. 1996) (citing *Jones v. Butz*, 374 F. Supp. 1284, 1287 (S.D.N.Y. 1974)). Thus, public interest groups that "took an active role" in drafting a law have "a clear interest in the continuing constitutional viability of that law." *Herdman v. Town of Angelica*, 163 F.R.D. 180, 187 (W.D.N.Y. 1995); see also *New York Public Interest Research Group v. Regents of the University of the State of New York*, 516 F.2d 350, 352 (2d Cir. 1975) (pharmacists' organization and individual pharmacists had a right to intervene in an action brought by consumers to challenge a statewide regulation prohibiting the advertising of the price of prescription drugs); *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991) (remanding to the District

Court with instructions to allow intervention in an action challenging the constitutionality of a governing state regulation to an environmental group that had party status in an administrative permitting proceeding); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) (environmental group allowed to intervene as of right in suit challenging designation of conservation area to protect its interest in habitat protection).

Applicants' staff and members engaged in extensive advocacy efforts to secure passage of the DEC regulations, including testifying at legislative and administrative hearings that preceded the DEC regulations; submitting numerous comments on the regulations and educating the public about the importance of the law and regulations through media and other means. Applicants also participated extensively in the legislative and administrative processes that led to adopting the GHG emission standards in California and the eight other states adopting the same regulations. The viability of these regulations in other states is entirely dependent on the result of this litigation. Thus, Applicants have demonstrated a significant interest in the subject matter of this action based their work in those other states as well as Vermont.

## 2. Applicants' Members Use and Enjoy the Resources Protected By the DEC Regulations.

The DEC regulations seek to protect public health and a host of environmental resources from the impacts of greenhouse gas emissions. The Vermont DEC specifically identifies the transportation sector as the single largest contributor to greenhouse gases in the state, and the need to address these emissions as part of a regional effort to reduce air pollution from motor vehicles. See, e.g. Vermont Dep't of Env'tl. Conservation, Proposed Rule: Cover Sheet, available at <http://www.anr.state.vt.us/air/htm/ProposedAmendments.htm#cars>; Vermont Dep't of Env'tl. Conservation, Summary of Comments and Responses, available at <http://www.anr.state.vt.us/air/htm/ProposedAmendments.htm#cars>. The DEC acknowledges that the regulations were posed for their pollution controlling effect, will deliver significant health benefits (acknowledging the link between transportation emissions, including greenhouse gases, and the rising prevalence of lung disease), and that global warming and climate change will have negative environmental, and economic impacts. Examples of these impacts include losses to Vermont's tourism and skiing industries, as well as its world famous maple sugar industry. See Summary of Comments and Responses at comments 1, 2, 3, 7 and 8.

Applicants are actively campaigning to protect public health from global warming and other environmental threats. Applicants' members actively use and enjoy Vermont's natural and aquatic resources, including its forests, rivers and lakes, for aesthetic, recreational and commercial interests, and share an interest in clean air, for health, aesthetic and environmental quality

reasons. See, e.g., *Mausolf v. Babbitt*, 85 F.3d 1295, 1302-3 (8th Cir. 1996) (environmental group entitled to intervene as of right to insure the group's conservation interests are adequately represented). Applicants therefore have a significant interest in the subject matter of this action.

#### B. Applicants' Interests May Be Impaired As A Result of This Litigation.

This lawsuit threatens to undo the results of Applicants' advocacy efforts, and allow the continued impacts to public health and natural resources that the DEC regulations seek to prevent. These threats to Applicants' interests are sufficient to meet the third prong of Rule 24(a)'s test for intervention of right - i.e., that the applicant "demonstrate that the interest may be impaired by the disposition of the action" (emphasis added). Rule 24(a)(2) does not require that the applicant's interests be legally impaired; rather, it is enough that "the disposition of this action may, as a practical matter, impair or impede" applicants' interests. *Herdman*, 163 F.R.D. at 188 (quoting *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994)); see also *Natural Res. Defense Council v. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978) ("the court is not limited to consequences of a strictly legal nature"), *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." (citing Fed. R. Civ. P. 24, Advisory Committee Note to 1966 Amendments)).

There is no question that the disposition of this case has the potential to impair Applicants' interests in several respects. First, if the court enjoins the DEC regulations or holds that the State of Vermont has no authority to regulate greenhouse gas emissions from motor vehicles, Applicants' efforts to urge Vermont to enact the DEC regulations would be nullified. Their considerable investment in this process, including countless hours of staff and volunteer time and effort, and considerable financial resources, would be lost. See *Herdman*, 163 F.R.D. at 189 (finding intervenor's interest would be "unquestionably impaired by a ruling" that the law supported by the applicant for intervention is unconstitutional); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (finding impairment where action could lead to reversal of earlier administrative process actively supported by applicants for intervention); *Sagebrush Rebellion*, 713 F.2d at 528 (court held there "can be no serious dispute" regarding impairment of interest where lawsuit sought to invalidate regulatory measure that intervenor-applicants had supported). Further, Applicants have no other means of guarding against impairment of their interests short of intervention in this suit. See *New York Public Interest Research Group*, 516 F.2d at 352 (holding that the contention that applicants may protect their interests after an adverse decision in the instant case "ignores the possible stare decisis effect of an adverse decision").

Second, this lawsuit threatens harm to Applicants' interest in protecting public health and the preservation of natural resources that the global warming regulations aim to protect. See, e.g., *Mausolf*, 85 F.3d at 1302-3 (allowing intervention as of right to insure the group's conservation interests are adequately represented); *Sagebrush Rebellion*, 713 F.2d at 528 (impairment prong satisfied where "[a]n adverse decision in this Suit would impair the [applicants'] interest" in habitat preservation). As the challenged DEC regulations acknowledge, greenhouse gas emissions threaten the public health and have negative environmental and economic impacts. Those threats impair Applicants' interest in those resources within the meaning of Rule 24(a).

### C. Applicants' Interests Are Not Adequately Represented by Defendant

In addition, Defendants will not adequately represent the Applicants' interests. Determining whether an existing party, including a state government, will adequately represent a party's interests requires balancing the interest, impairment and inadequacy of representation components of Rule 24(a)(2). For example, "[a] showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation." *U.S. v. Hooker Chemicals & Plastics Corp.*, 749 F. 2d 968, 983 (2d Cir.1984).

Courts have allowed intervention where a party is a government entity when a private party has challenged the validity of a government regulation. In *New York Public Interest Research Group* intervenors were allowed to join the State defendants in defending the validity of a regulation, given the likelihood that they would make a more vigorous presentation on certain issues in the case in light of their own perspectives and interests. *New York Public Interest Research Group*, 516 F.2d at 352; see also *Sagebrush Rebellion*, 713 F.2d at 528. In *Herdman*, *supra*, the court stated that where parties moved to intervene on the side of a government entity defending the legality of its actions or the validity of its laws or regulations, it should examine both "(1) whether the government entity has demonstrated the motivation to litigate vigorously and to present all colorable contentions, and (2) the capacity of that entity to defend its own interests and those of the prospective intervenor." *Herdman*, 163 F.R.D. at 190. Both courts declined to impose a higher burden of showing inadequacy of representation by the governmental entity. Other courts have reached, however, differing interpretations of the burden of inadequacy that must be demonstrated. In *Hooker Chemicals* the court held that in an enforcement action by a governmental entity suing as *parens patriae*, a strong showing of inadequate representation should be required to intervene on the side of the government. *Hooker Chemicals*, 749 F. 2d 987. In a more recent case following *Hooker Chemicals*, the court stated that an applicant should "effectively demonstrate that its interest is different from

that of the State and that its interest will not be represented by the State." Commack Self-Service Kosher Meats, Inc. v. Rubin, 170 F.R.D. 93, 103 (E.D.N.Y. 1996), quoting Hooker Chemicals, supra at 984-85.

An important factor running through these cases is whether the governmental entity objected to intervention on the grounds that it would provide adequate representation, or did not object, acknowledging the additional perspectives and interests and arguments the intervenors would bring to defending its actions. See, e.g., New York Public Interest Research Group, 516 F.2d at 352 (State defendants acknowledged that the intervenors should be allowed to make their own arguments given the possibility their interests may differ); Herdman, 163 F.R.D. at 189; c.f. Hooker Chemicals, 749 F. 2d 987 (intervention opposed by the federal and city parties); Commack Self-Service Kosher Meats, Inc., 170 F.R.D. 99 (state opposed intervention).

Here, the State of Vermont supports intervention by Applicants for similar reasons as did the government in Herdman and New York Public Interest Research Group. The Applicants' have the expertise to advance additional and different arguments than the defendants, whose perspective on some issues could differ substantially. The State of Vermont does not share the Applicants' expertise in a number of issues that may arise in the case, and the Applicants will likely offer different perspectives on these issues as well. For example, the Applicants are likely to offer additional expertise and different perspectives concerning: (1) the legal and evidentiary bases for the GHG emission standards and pending legal challenges in California (in which Applicants Sierra Club, NRDC and ED were granted intervenor status as of right); (2) the scientific issues concerning the impact of global warming and related issues potentially implicated by the Plaintiffs' claims; (3) the interests of Applicants' members living outside Vermont; and (4) issues specific, and exclusive, to the Applicants' interests in conservation.

Applicants also have a strong interest in protecting resources outside Vermont on the national level. Greenhouse emissions and global warming threaten environmental impacts far beyond Vermont's borders-- impacts of vital concern to the Applicants and their members. Because the federal government has refused to regulate greenhouse gas emissions from motor vehicles, the only way for other states to regulate their own vehicle greenhouse gas emissions is by adopting California's standards, as specifically authorized under section 177 of the Clean Air Act. The ability of other states to enact such controls is entirely dependent on the result of this litigation. Applicants will bring these broader interests to this case.

The State must, instead, base its representation on the interests of its citizens. A number of courts have found that government does not adequately represent the unique interests of nonprofit organizations under Rule 24(a) because the government must represent the perspective of all of its citizens.

See *Trbovich*, 404 U.S. at 538-39 (finding intervention appropriate because government's duty to represent both broad interests of the public and narrower interests of proposed intervenor were "related, but not identical"); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (permitting timber industry to intervene in case brought against government by environmental groups because "[t]he government must represent the broad public interest, not just the economic concerns of the timber industry"); *Mausolf*, 85 F.3d at 1302- 3 (same). In this case, the State must weigh conservation interests of its citizens with industry interests, budgetary concerns, economic considerations, and efficient transportation. Thus, in addition to Applicants' national perspective which Defendants do not share, Applicants' conservation interests differ markedly from Defendant's. Applicants have therefore demonstrated that their interests will not be adequately represented by the State defendants.

#### D. This Motion To Intervene Is Timely.

Whether a motion to intervene is timely depends primarily on (1) how long the applicant had notice of the interest before making the motion to intervene; (2) the prejudice to the other parties; (3) prejudice to the applicants if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness. *Pitney Bowes, Inc.*, 25 F.3d at 70. Applicants are requesting to intervene at the earliest possible stage after receiving notice of this litigation. The complaint was filed on November 18, 2005; Defendants have not filed an answer; no substantive motions have been filed or orders issued. Thus, the proposed intervention will not prejudice the other parties, nor will it cause any delay in the proceedings. See, e.g., *Herdman*, 163 F.R.D. at 185 (motion to intervene was timely when it was filed ten weeks after the original action was filed and no dates for oral argument had been set); 7C *Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure*, <section> 1916 & N. 13 (2d ed. 1986) (application for intervention made before parties have joined the issues in the pleadings is "clearly timely"). Moreover, applicants have demonstrated above their clear interests in these proceedings and the potential prejudice to those interests if not allowed to intervene. Accordingly, the motion to intervene is timely.

#### II. ALTERNATIVELY, THIS COURT SHOULD GRANT APPLICANTS PERMISSIVE INTERVENTION.

Applicants are also entitled to intervene under the doctrine of permissive intervention. Under Rule 24(b), factors to be considered in determining whether to allow permissive intervention are whether intervention will unduly delay or prejudice adjudication of the rights of the original parties, whether the applicant will benefit by the intervention, the nature and extent of the applicant's interests, and whether the interests are adequately represented by other parties. *U.S. Postal Service v. Brennan*, 579 F.2d 188, 191-192 (2d Cir. 1978) An additional factor is whether the party seeking intervention will

significantly contribute to the full development of factual issues, and to the just and equitable adjudication of legal questions presented. *Id.* Like intervention of right, permissive intervention is to be granted liberally. *Washington State Bldg. and Const. Trades Council*, 684 F.2d 627, 630 (9th Cir. 1982)("Rule 24 has traditionally has received a liberal construction in favor of applicants for intervention.")

Applicants meet the prerequisites for permissive intervention. As described above, this application is timely and will not prejudice the rights of the existing parties. Additionally, the nature and extent of Applicants' demonstrated interests, and the interests and issues that likely will not be adequately represented by other parties, are set forth above. Applicants have also demonstrated numerous ways they can contribute to the full development of factual and legal issues that may be presented in this case.

Finally, the Court's jurisdiction over the present case is based on the federal question raised by the plaintiffs' complaint, and this Court has supplemental jurisdiction over Applicants pursuant to 28 U.S.C. 1367(a), which provides such jurisdiction for "the intervention of additional parties." Accordingly, Applicants should be granted permission to intervene under Rule 24(b)(2) if intervention as of right is denied.

#### CONCLUSION

For the foregoing reasons, the Court should grant Applicants' motion for intervention as of right or, in the alternative, permissive intervention.

Appendix not available.

Motions, Pleadings and Filings (Back to top)

. 2006 WL 1521865 (Trial Motion, Memorandum and Affidavit) Reply of Intervenors to Plaintiffs' Conditional Opposition (Apr. 4, 2006)Original Image of this Document (PDF)

. 2006 WL 1203225 (Trial Motion, Memorandum and Affidavit) Defendants' Reply to Plaintiffs' Memorandum in Opposition to Motion to Stay Cases (Mar. 13, 2006)Original Image of this Document (PDF)

. 2006 WL 812029 (Trial Pleading) Defendants' Answer to Complaint Filed by Green Mountain Chrysler-Plymouth- Dodge-Jeep, et al. (Feb. 24, 2006)Original Image of this Document (PDF)

. 2006 WL 812016 (Trial Motion, Memorandum and Affidavit) Memorandum in Opposition to Motion to Stay Cases (Feb. 23, 2006)Original Image of this

Document (PDF)

. 2006 WL 812014 (Trial Motion, Memorandum and Affidavit) Defendants'  
Memorandum in Support of Motion to Stay Cases (Feb. 9, 2006)Original Image of  
this Document (PDF)

. 2:05cv00302 (Docket) (Nov. 18, 2005)

. 2:05cv00304 (Docket) (Nov. 18, 2005)

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