IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

SIERRA CLUB **PLAINTIFF**

v. **NO. 4:14-CV-00643 JLH**

GINA MCCARTHY,
Administrator,
United States Environmental Protection Agency **DEFENDANT**

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY THE STATE OF ARKANSAS

Comes now, the State of Arkansas, by and through Leslie Rutledge, Attorney General, and the undersigned Assistant Attorney General, for its Memorandum in Support of Motion to Intervene, does hereby state and allege the following:

I. Facts

The Clean Air Act ("CAA") requires the State to submit an implementation plan to address visibility protection for class I Federal areas. 42 U.S.C. § 7491. Mandatory class I Federal areas include 156 national parks and wilderness areas for which the Secretary of the Interior has determined

visibility is an important value. In Arkansas, the Upper Buffalo and Caney Creek Wilderness Areas have been designated as class I Federal areas.

Congress directed the Environmental Protection Agency ("EPA") to promulgate regulations requiring states to make progress toward attaining the national visibility goal, including requiring amended State Implementation Plans ("SIPs") with emissions limits on certain sources of air pollutants that cause or contribute to visibility impairments in class I Federal areas. 42 U.S.C. § 7491(b). EPA required that the SIPs be submitted no later than December 17, 2007. 40 C.F.R. § 51.308.

The Arkansas Department of Environmental Quality ("ADEQ") submitted its SIP for regional haze on September 22, 2008. ADEQ also provided additional information as requested by EPA in 2010 and 2011. Nearly five (5) years after submittal of the SIP, EPA finally issued a decision which partially approved and partially disapproved the plan. 77 Fed. Reg. 14604 (March 12, 2012).

The Sierra Club filed a complaint on August 8, 2014, in San Francisco, California, seeking to compel the EPA to issue a Federal Implementation Plan ("FIP") to address the deficiencies identified in its March 12, 2012 disapproval of Arkansas' SIP. The Sierra Club purports to bring suit on its own behalf and that of its members that use class I Federal areas in Arkansas. Sierra Club's action was transferred to a federal district court in

Little Rock, Arkansas, and, on February 11, 2015, the EPA lodged a revised proposed consent decree to settle the action.

The Proposed Consent Decree (Document 30) requires EPA to promulgate a proposed FIP by March 6, 2015 and a final FIP by December 15, 2015. This timeline for promulgation was established without input from the State. The proposed consent decree was submitted to public comment under Docket ID No. EPA-HQ-OGC-2015-0162. Arkansas Attorney General Leslie Rutledge submitted comments on the proposed consent decree on April 20, 2015. See Motion to Intervene by the State of Arkansas, Exhibit 1.

The State and the parties to the litigation agree that the primary issue in this matter is the proposed deadline for the final FIP. See *Plaintiff Sierra Club's Response in Opposition to Nucor's Motion to Intervene* (Document 34) and *EPA's Opposition to Nucor's Motion to Intervene* (Document 35). The proposed deadline curtails the ability of EPA to consider public comments on the proposed FIP. The short timeframe also effectively denies the State the ability to submit a revised SIP.

II. Argument

The State is entitled to intervene because of its interest in the administration of the regional haze program under the CAA and because of the impact of promulgation of a FIP for regional haze will have on utility ratepayers within its borders.

a. The State has Standing to Intervene

A party seeking to intervene in a lawsuit "must establish Article III standing in addition to the requirements of Rule 24." *United States v. Metropolitan St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009). To demonstrate standing, the party must show: 1) injury in fact; 2) causation; and 3) redressability. *Curry v. Regents of Univ. of Minnesota*, 167 F.3d 420, 422 (8th Cir. 1999). The State is has been injured by the agreement between EPA and the Sierra Club to set a deadline of December 15, 2015, for finalization of a FIP or an approvable SIP. This deadline denies the State a meaningful opportunity to assist EPA in developing the FIP or to submit an approvable SIP. The harm caused by this agreement can be redressed by allowing the State to intervene in this case and represent its own interests before the Court.

The December 15, 2015 deadline for promulgation of a final FIP will not allow the EPA, the State and other interested parties adequate time to develop and appropriate FIP or approvable SIP. This deadline is a mere five (5) months from the end of the public comment period on the draft FIP and the timeline of this case shows that EPA cannot craft an appropriate rule in such a short period of time. But, even if EPA wanted to extend this deadline, the consent decree would be enforceable by the Sierra Club and there would be no room for compromise.

The proposed deadline effectively eliminates the possibility that the State can submit an approvable SIP. Under Arkansas law, SIPs must be adopted as a regulation by the Arkansas Pollution Control and Ecology Commission ("PCE Commission"). Ark. Code Ann. § 8-4-318(b). All regulations adopted by the PCE Commission, must be submitted for public notice and comment. Ark. Code Ann. § 8-4-202. Recent changes in Arkansas law also require proposed regulations to be reviewed and approved by the Governor and the Arkansas General Assembly. Governor's Executive Order 15-02 and Issue No. 1 of 2014. The time period necessary for development and submittal of a revised SIP is much longer than the time allowed under the proposed consent decree. Thus, the State is essentially denied the opportunity to submit a revised SIP.

Additionally, the FIP issued by the EPA may result in increased costs for utilities. These increased costs may ultimately pass through to consumers as rate increases without the benefit of any improvement in utility service. The State has a recognized interest in protecting consumers from unnecessary rate increases. The State, through the Consumer Utility Rate Advocacy Division ("CURAD") of the Attorney General's office represents Arkansas ratepayers in front of the Arkansas Public Service Commission ("PSC") and the Federal Energy Regulatory Commission ("FERC"). CURAD acts on behalf of Arkansas consumers when utilities petition the PSC for rate increases. Ark. Code Ann. § 23-4-301 *et seq.*

Allowing intervention will grant the State the opportunity to represent the interests of its citizens and fulfill its role in implementation of the Clean Air Act. The United States Supreme Court has long recognized that States "are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). Arkansas seeks intervention as a sovereign State with the duty to protect its cooperative role in implementing the Clean Air Act and the interests of its utility ratepayers.

The parties will likely cite to an unpublished, per curiam decision of the United States Court of Appeals for the D.C. Circuit, which has not precedential value before this court. See *National Parks Conservation Ass'n., et al v. EPA*, 548 Fed.Appx. 621 (D.C. Cir. 2013). In a case with very similar facts, the D.C. Circuit declined to grant intervention to the State of Arizona to challenge a consent decree entered into by the EPA and various environmental organizations. The Circuit Court found that Arizona's claims were not ripe and the state would not be harmed until EPA promulgated the FIP.

However, Eighth Circuit precedent is inconsistent with this holding. In *EPA v. City of Green Forest*, 921 F.3d 1394 (8th Cir. 1990), the Circuit Court allowed intervention to citizens that filed objections to a proposed consent decree during the public comment period. *Id.* at 1402, citing *United States v. Ketchikan Pulp Co.*, 430 F.Supp. 83, 85 (D. Alaska 1977)("holding that 'once intervenors have been given the opportunity to object to the decree they have

had an appropriate day in court and a judgment on consent may be entered.'"). In a recent case with very similar facts to the present litigation, the Eighth Circuit reversed a decision by a district court to deny a motion to intervene filed by a power company that would be bound under an obligation by EPA to complete a FIP for Minnesota. See *Nat'l. Parks Conservation Ass'n. v. United States EPA*, 759 F.3d 969 (8th Cir. 2014). If the Eighth Circuit recognizes the right of a regulated entity to intervene in a case with the same facts, the State should likewise be allowed to intervene as the regulator that will implement any FIP promulgated under the proposed Consent Decree. Thus, the State has standing to intervene in this litigation and the motion should be granted.

b. The State is Entitled to Intervention of Right

Fed. R. Civ. P. 24(a)(2) "provides that a party seeking mandatory intervention must establish that: (1) it has recognized interest in the subject matter of the litigation; (2) the interest might be impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties. *South Dakota ex rel Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003). The State has interest in litigation that results in a deadline for promulgation of the FIP. The State's interest has already been impaired by the lodging of the proposed consent decree. The existing parties cannot and, indeed have not, protected the State's interest in the matter.

The Sierra Club and the EPA cannot protect the interests of the State and its utility ratepayers. Indeed, the act of entering into a Consent Decree and setting a deadline for a final FIP, without any consultation with the State as to the terms of the agreement, shows that the existing parties have no desire to protect the interests of the State.

In her comment letter, Attorney General Rutledge raised the issue of Sierra Club's standing to bring this action. See Motion to Intervene by the State of Arkansas, Exhibit 1. In its Answer, the EPA denied that the Sierra Club had standing to bring the suit, but the agency never filed a motion raising this issue. The Attorney General argued in her letter that by agreeing to the Proposed Consent Decree, EPA attempts an impermissible waiver of the standing requirements. The State is entitled to intervene to raise the standing issues and other matters that directly affect the interests of the State.

As discussed in section II(a) above, the State has a recognized interest in protecting its utility ratepayers. This interest could be impaired by the outcome of this litigation and the existing parties cannot adequately protect that interest. Thus, the State is entitled to intervention of right.

c. The State is Entitled to Permissive Intervention

The State is also entitled to permissive intervention in this suit because the proceedings involve a statute the State administers and the proposed Consent Decree will likely lead to requirements under that statute that will

be binding on the State. Fed R. Civ. P. 24(b)(2)(a) provides: "On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency...." Additionally, Fed R. Civ. P. 24(b)(2)(a) provides: "On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:... (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order."

The Clean Air Act ("CAA") is administered jointly by the EPA and the States through the concept of "cooperative federalism." 42 U.S.C. § 7402(c); *Luminant Generation Co. v. U.S. E.P.A.*, 675 F.3d 917, 921 (5th Cir. 2012) (The CAA is an "experiment in cooperative federalism."); *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012) (The CAA uses a cooperative-federalism approach to regulate air quality.); *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C.Cir. 2001) (The CAA establishes an intergovernmental partnership to regulate air quality in the United States.); *Envtl. Def. Fund, Inc. v. E.P.A.*, 82 F.3d 451, 468-69 (D.C. Cir.1996) (The CAA was adopted as one part of a larger regulatory program through which federal and state governments work together to control air pollution.)

The CAA requires the State to submit an implementation plan to address visibility protection for class I Federal areas. 42 U.S.C. § 7491. EPA required that the implementation plan be submitted no later than December

17, 2007. 40 C.F.R. § 51.308. The State timely submitted its implementation plan and, nearly five (5) years later, EPA finally issued a decision which partially approved and partially disapproved the plan. 77 Fed. Reg. 14604 (March 12, 2012). The CAA requires the EPA to issue a FIP if it disapproves part of a State's plan. The Sierra Club initiated this action to compel the EPA to issue the regional haze for Arkansas.

The EPA has issued a draft FIP but this litigation concerns an enforceable deadline for completing the FIP process. (Document 30). The proposed Consent Decree contains a proposed date of December 15, 2015, for finalization of the FIP. If entered, that date becomes binding on the EPA and, by extension, the State of Arkansas. In fact, EPA recognizes the importance of this deadline in their opposition to a Motion to Intervene filed by Nucor Steel-Arkansas and Nucor-Yamato Steel Company (collectively, "Nucor"). (Document 35, page 8) ("Likewise, the proposed Consent Decree in this case provides only *dates certain* by which EPA *will* propose and take final action on a FIP in the absence of an approved SIP.") (emphasis added).

As the EPA's draft FIP specifically states, "We believe...it is preferable for states to take the lead in implementing the Regional Haze requirements as envisioned by the CAA." 80 Fed. Reg. 18944, 18945 (April 8, 2015). As joint administrators of the provisions of the CAA and the regional haze requirements, the State is entitled to permissive intervention to protect the interests of its citizens.

EPA extended the deadline for submitting public comments to July 15, 2015. 80 Fed. Reg. 24, 872 (May 1, 2015). As currently set, the public comment period will end a mere five (5) months before the deadline set by the proposed consent decree to promulgate a final rule. As the timeline in this matter shows, EPA cannot meet this deadline and adequately review the public comments. The agency took nearly five (5) years to make a final decision on the original SIP submittal. An earlier proposed consent decree was revised because EPA could not meet the original deadline for issuing a draft FIP. (Document 28). In fact, EPA missed the second agreed-upon deadline for a draft FIP. The revised proposed consent decree required the proposed FIP to be published by March 6, 2015. (Document 30). The proposed FIP was not submitted for public comment until April 8, 2015 – over one (1) month behind schedule. 80 Fed. Reg. 18944 (April 8, 2015).

It is very likely that the public comments on the draft FIP will raise new technical issues that cannot be adequately addressed within five (5) months. And, as stated repeatedly by EPA, the agency is still open to working with the State to develop an approvable SIP. Indeed, after the formal submittal of the SIP and even after the disapproval of the SIP, ADEQ continued to provide information as requested by EPA. Thus, while Arkansas has not yet

submitted a revised SIP, the State has not ignored the need to comply with regional haze regulations.[1]

If the proposed consent decree is entered, the State will not have the time or flexibility to work with EPA to craft an approvable SIP. Even if EPA is willing to work through issues raised in public comments, the proposed consent decree compels that a final FIP or approvable SIP be issued by December 15, 2015. Despite any good intentions by EPA to work with the State, the Sierra Club can, and most likely will, seek to judicially enforce this deadline. Thus, the process of developing an appropriate FIP or SIP for regional haze is short-circuited by a litigation-driven deadline.

d. Intervention will not Delay or Prejudice the Proceedings

Intervention by the State will not unduly delay or prejudice the parties. EPA filed its Answer on October 15, 2014. (Document 17). On October 30, 2014, the EPA was granted to motion for change of venue. (Document 23). The Court issued a Scheduling Order on November 5, 2014. (Document 25). Just over a month later, on December 22, 2014, EPA filed its first Notice of Lodging of the Proposed Consent Decree. (Document 28). The parties submitted an amended Proposed Consent Decree on February 11, 2015 (Document 30), which went out for public comment and is not substantially

[1] Additionally, the State recently submitted its Five-Year Regional Haze Progress Report, which showed that visibility impairment in the state is decreasing more rapidly than the Reasonable Progress goals. See http://www.adeq.state.ar.us/air/planning/#regionalHaze, last accessed on June 11, 2015.

changed from the version that was filed in December 2014, except for the date to issue a draft FIP.

Given this short timeframe, it is very unlikely that the parties have conducted any discovery or expended much effort beyond determining deadlines for the promulgation of the FIP. Thus, intervention at this time would not unduly delay the proceedings or prejudice the original parties' rights.

Additionally, a FIP that is not adequately developed will likely be challenged by parties that comment on the proposed rule. This will lead to further delays that would frustrate the stated interests of the Sierra Club. The State's intervention in this matter is not guaranteed to lead to extended litigation that will impair the parties; the State merely seeks to protect its interest by challenging the current deadline set by the parties

III. Conclusion

Based on the foregoing arguments, the State is entitled to intervene in this matter. The State respectfully requests that the Court grant its Motion to Intervene and leave to file its Answer in Intervention.

Respectfully submitted,

LESLIE RUTLEDGE
ATTORNEY GENERAL

By: 

JAMIE L. EWING, #2004141
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201-2610
(501) 682-7383 (direct dial)
(501) 682 – 3895 (fax)
jamie.ewing@arkansasag.gov

ATTORNEYS FOR THE STATE

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

Attorneys for Plaintiff

Richard H. Mays
Richard Mays Law Firm, PLLC
115 South Third Street
Heber Springs, AR 72543

Tony G. Mendoza
Sierra Club
85 Second St., Suite 200
San Francisco, CA 94105

Attorneys for Defendant

Leslie M. Hill
Erica M. Zilioli
U.S. Department of Justice – Environmental Enforcement
Environmental and Natural Resources Division
Post Office Box 7611
Washington, D.C. 20044-7611

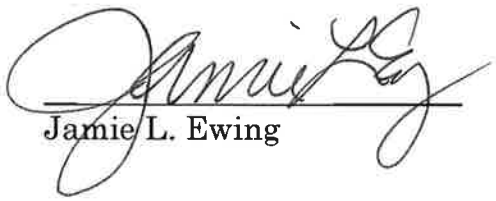
Attorneys for Nucor Steel-Arkansas and Nucor-Yamato Steel Company

Mark H. Allison
Dover Dixon Horne PLLC
425 West Capitol Avenue
Suite 3700
Little Rock, AR 72201-3645

David R. Taggart
Bradley, Murchison, Kelly & Shea
Louisiana Tower
401 Edwards Street, Suite 1000
Shreveport, LA 71101-5529

Attorneys for Balanced Energy Arkansas

Charles R. Nestrud
Chisenhall, Nestrud & Julian, P.A.
Regions Center
400 West Capitol Avenue, Suite 2840
Little Rock, AR 72201-3415



Jamie L. Ewing