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**

MOTION TO INTERVENE BY THE STATE OF ARKANSAS

COMES NOW, the State of Arkansas ("the State"), by and through Leslie Rutledge, Attorney General, and the undersigned Assistant Attorney General, and for its Motion to Intervene, does hereby state and allege the following:

1. The State is entitled to intervene because of its interest in the administration of the regional haze program under the Clean Air Act and the impact of the promulgation of a Federal Implementation Plan ("FIP") for regional haze on utility ratepayers within its borders.

2. On August 8, 2014, the Sierra Club filed a complaint in San Francisco, California seeking to compel the Environmental Protection Agency ("EPA" or "Agency") to issue an FIP to address the deficiencies the Agency identified in its March 12, 2012 disapproval of the State's implementation plan under the regional

haze rules. EPA filed its Answer to the Complaint on October 15, 2014. Sierra Club's action was transferred to a federal district court in Little Rock, Arkansas.

3. EPA lodged a proposed consent decree on December 22, 2014 (Document 28), which imposed a February 17, 2015 deadline for the proposed FIP to be submitted to public comment. EPA determined it could not meet that deadline and the parties agreed to an extension of the deadline until March 6, 2015.

4. On February 11, 2015, the EPA lodged a revised proposed consent decree to include the new March 6, 2015 deadline for promulgation of the proposed FIP. (Document 30). The proposed consent decree was submitted to public comment under Docket ID No. EPA-HQ-OGC-2015-0162.

5. The proposed consent decree requires EPA to issue a final FIP no later than December 15, 2015. (Document 30).

6. On April 8, 2015, EPA published the proposed FIP for public comment. 80 Fed. Reg. 18,944 (Apr. 8, 2015). The current deadline for submitting public comments is July 15, 2015. 80 Fed. Reg. 24, 872 (May 1, 2015).

7. The public comment period ends a mere five (5) months before the deadline for promulgation of a final rule. The history of this litigation shows that five (5) months are not long enough for EPA to adequately review the highly technical comments that will be filed regarding the proposed rule.

8. Arkansas Attorney General Leslie Rutledge submitted a public comment to EPA regarding the proposed consent decree on April 20, 2015. General Rutledge's public comment letter is attached hereto as Exhibit 1.

9. The State is entitled to intervention of right pursuant to Fed. R. Civ. P. 24(a)(2) because this matter involves the promulgation of a federal regulation under a timeline that would be binding upon the State without the State's input in setting the deadline.

10. Likewise, this deadline does not allow the State time to submit a revised SIP as required under State law for the promulgation of administrative regulations. See Ark. Code Ann. § 8-4-318(b); Governor's Executive Order 15-02; and Issue No. 1 of 2014.

11. The State of Arkansas has a duty to act on behalf of Arkansas consumers when utilities petition for increased rates. See Ark. Code Ann. § 23-4-301 *et seq*. The measures currently proposed in the FIP are very likely to result in increased rates to Arkansas consumers. While the proposed consent decree does not mandate the content of the FIP, the December 15, 2015 deadline – a mere five (5) months after the public comment period closes – does not give EPA enough time to adequately assess any proposed alternative measures that may protect Arkansas consumers.

12. The State has an interest in the impact this regulation would have upon its citizens and only the State can adequately protect its interests and that of its citizens. Through the proposed Consent Decree, the existing parties have shown that they cannot, and will not, adequately protect the interests of the State.

13. If the Court finds that the State is not entitled to intervention of right, the State respectfully submits that it is entitled to permissive intervention under

Fed. R. Civ. P. 24(b), which permits a state governmental officer to intervene if a party's claim or defense is based on a statute administered by the agency or any regulation or agreement made under the statute.

14. The State and EPA jointly administer the Clean Air Act. 42 U.S.C. § 7402(c).

15. This action pertains to State and Federal Implementation Plans required to address visibility protection for class I Federal areas under 42 U.S.C. § 7491.

16. The Proposed Consent Decree is an agreement under this statute and would result in the promulgation of a regulation under the statute that is binding on the State. Once finalized, the State will be required to implement the FIP.

17. The State has standing to intervene in this case. The artificial deadline contained in the proposed consent decree will rush EPA into making a decision without adequate time to work with the State to address concerns about the proposed FIP, resulting in no meaningful changes to the proposed FIP and the State would be forced to implement a regulation that would impact its utility consumers. This harm can be redressed by allowing the State to intervene in the litigation to represent its own interests, including but not limited to revised schedules for promulgation of a final FIP or revised SIP.

18. Likewise, the State's motion is timely. The State's interests in this matter where harmed when the parties agreed to the December 15, 2015 deadline. EPA published the revised proposed consent decree on February 11, 2015. The

revised consent decree proposed a new date for promulgation of a proposed rule (which EPA missed by over a month), but did not revise the proposed date for a final rule.

19. The parties are not harmed by the State's intervention. Given the timeline of this litigation, it is very unlikely that either party expended resources in discovery or other pre-trial matters. Also, the State's intervention does not necessarily mean that the matter will go to trial. Intervention simply allows the State to protect its interests under state and federal law.

20. The State's proposed Answer in Intervention is attached hereto as Exhibit 2.

WHEREFORE, the above premises considered, the State of Arkansas respectfully requests that this Honorable Court:

A) Issue an Order granting the State of Arkansas' Motion to Intervene; and

B) Grant all other relief which may be just and appropriate.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

By: _____

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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:

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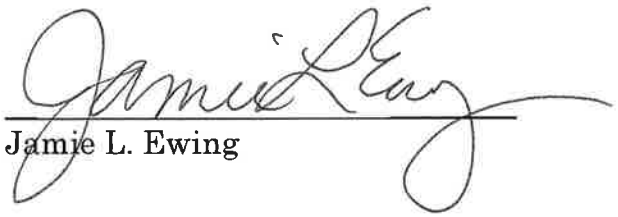

Jamie L. Ewing

THE ATTORNEY GENERAL
STATE OF ARKANSAS
LESLIE RUTLEDGE

April 20, 2015

Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mailcode 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460-0001

Attention: Docket ID No. EPA-HQ-OGC-2015-0162; comments submitted electronically

To Whom It May Concern:

Please accept these comments regarding the proposed Consent Decree in the matter of *Sierra Club v. McCarthy*, No. 4:14-cv-00643-JLH (E.D. Ark.). I request that this decree be withdrawn by either the Department of Justice ("DOJ") or the Environmental Protection Agency ("EPA" or "Agency"). As described in my comments below, the decree is improper and inconsistent with the Clean Air Act, 42 U.S.C. 7401 *et seq*. First and foremost, the Sierra Club lacks standing to bring this suit. Further, standing cannot be waived by the parties through a Consent Decree. Additionally, the decree would undermine the cooperative relationship between the State and the EPA in implementing regional haze regulations.

The origin of this matter begins on September 28, 2007, when the Arkansas Pollution Control and Ecology Commission ("PCE" or "Commission") adopted changes to PCE Regulation No. 19, Regulations of Arkansas Plan of Implementation for Air Pollution Control, to address federal requirements regarding regional haze (or visibility). The amendments to Reg. 19 were submitted by the Arkansas Department of Environmental Quality ("ADEQ") as the State Implementation Plan ("SIP") for regional haze, as required by 40 C.F.R. § 51.308(d). Nearly five (5) years later, the EPA finally issued a decision on Arkansas's SIP which partially approved and partially disapproved the plan. 77 Fed. Reg. 14604 (March 12, 2012).

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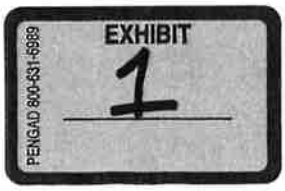


On August 8, 2014, the Sierra Club filed a complaint in San Francisco, California seeking to compel the EPA to issue a Federal Implementation Plan ("FIP") to address the deficiencies the Agency identified in its March 12, 2012 disapproval. Sierra Club's action was transferred to a federal district court in Little Rock, Arkansas, and, on February 11, 2015, the EPA lodged a proposed consent decree to settle the action. The proposed consent decree was submitted to public comment under Docket ID No. EPA-HQ-OGC-2015-0162.

The Sierra Club purports to bring suit on its own behalf and that of its members, including members in Arkansas and members that use Class I federal areas in Arkansas. As a threshold matter, the Sierra Club must establish that it has standing to invoke the jurisdiction of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1192). The Sierra Club, as an association, is permitted to bring suit on behalf of its members when:

> (1) Its individual members have standing in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) the relief sought does not require the participation of individual members. *Families for Asbestos Compliance Testing and Safety v. City of St. Louis*, 638 F.Supp.2d 1117, 1121 (E.D. Mo. 2009) (citing *Lewis v. Casey*, 518 U.S. 343, 349 n. 1 (1996)).

Thus, the Sierra Club must meet the "irreducible constitutional minimum" requirement for standing for its individual members. *Id.* In order to meet part (1) of the association's standing, the individual members must meet the following three criteria:

> (1) they have suffered an "injury in fact;" (2) the injury is "fairly traceable" to the challenged conduct of the defendant; and (3) the injury will likely be redressed through the relief sought in the complaint. *Id.* (citing *Lujan*).

In its Complaint, the Sierra Club argues that its members' use and enjoyment of Class I federal areas in Arkansas are adversely affected by visibility impairments. I dispute whether the Sierra Club has met the first requirement of the *Lujan* test, but even if it has, it has not met elements (2) and (3). Sierra Club has not, and cannot, establish that this "injury" is "fairly traceable" to the EPA's failure to promulgate a FIP within two years of disapproval of the SIP or that promulgation of a FIP will redress the injury. As such, the individual members of the Sierra Club do not have standing in their own right. The individual member's standing is an essential part of the association's standing, the criteria of which is established in *Families for Asbestos Compliance Testing*.

Nothing in the record before the Court establishes standing on the part of the Sierra Club or its members. In fact, the only information in the record directly contradicts the Sierra Club's assertion. In its Answer, Defendant EPA specifically denies that Plaintiff Sierra Club has standing to bring the suit. See Answer, Paragraph 9. Thus, through the proposed Consent Decree, the EPA is attempting to waive the issue of standing. Such waiver is impermissible. "The question of standing 'is jurisdictional and not subject to waiver.'" *Families for Asbestos Compliance Testing and Safety v. City of St. Louis*, 638 F.Supp.2d 1117, 1121 (E.D. Mo. 2009) (citing *Lewis v. Casey*, 518 U.S. 343, 349 n. 1 (1996)). The court can raise the issue of standing *sua sponte*. *Delorme v. United States*, 354 F.3d 810 (8th Cir. 2004).

It is inappropriate for the EPA to make decisions for the State of Arkansas because of pressure exerted by a California organization that cannot establish that it has the legal right to seek the jurisdiction of the court. Therefore, I urge the EPA to reconsider entering into this Consent Decree when the Sierra Club clearly has not met its burden to establish standing of either itself or its members.

On April 8, 2015, the EPA issued a draft FIP for Arkansas regarding regional haze. The agency may consider any comments on the proposed consent decree to be moot now that the FIP process has begun. However, that is not the case. The proposed consent decree also contains a proposed date of December 15, 2015, for finalization of the FIP. If entered, this date becomes binding on the EPA and, by extension, the State of Arkansas. At the same time, 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 Clean Air Act." 80 Fed. Reg. 18944, 18945 (April 8, 2015). By accepting a deadline dictated by the Sierra Club, the EPA will be pressured by special interests and likely cannot devote the necessary resources and consideration to working with the State to develop an approvable SIP.

Not only do I direct my comments toward compliance with federal environmental laws, but also from my duty to protect consumers from unreasonable and unnecessary utility rate increases. The Consumer Utility Rate Advocacy Division ("CURAD") of my 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. It is likely that this FIP will result in significant compliance costs for utilities that will result in a pass-through to consumers as rate increases.

Based on the foregoing reasons, I request that the EPA reconsider the prudence and legality of entering into the proposed consent decree. The tenets of

cooperative federalism which underpin the Clean Air Act would dictate that the EPA must give first priority to the interests of the State, not an outside association without standing to invoke the jurisdiction of the court.

Sincerely,

Leslie Rutledge
Attorney General

cc: Sen. Tom Cotton
Sen. John Boozman
Rep. Rick Crawford
Rep. French Hill
Rep. Steve Womack
Rep. Bruce Westerman

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

SIERRA CLUB **PLAINTIFF**

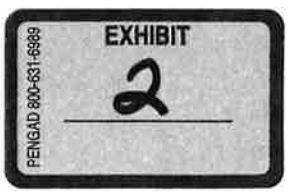
v. **NO. 4:14-CV-00643 JLH**

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

ANSWER IN INTERVENTION BY THE STATE OF ARKANSAS

COMES NOW, Intervenor, the State of Arkansas ("the State"), by and through Leslie Rutledge, Attorney General, and the undersigned Assistant Attorney General, and for its Answer in Intervention states as follows:

1. The State admits that, effective April 2012, EPA disapproved in part revisions to the States' state implementation plan ("SIP") for regional haze and interstate transport. The State admits that it has not corrected the deficient plan. The remaining allegations in Paragraph 1 of Plaintiff's Complaint are recitation of law to which no response is required. To the extent that the remaining allegations are deemed to contain allegations of fact, the State denies the same.



2. The State admits that this action arises under the Clean Air Act, 42 U.S.C. § 7401 *et seq*. The State admits that this Court has jurisdiction over this action pursuant to 42 U.S.C. § 7604, 28 U.S.C. § 1331, and 28 U.S.C. § 1361. The remaining allegations in Paragraph 2 of Plaintiff's Complaint are recitation of law, to which no response is required. To the extent that those allegations are found to be an allegation of fact, the State denies the same. The State denies that Plaintiff has standing to bring this action.

3. The State is without sufficient information to either admit or deny the allegations contained in Paragraph 3 of Plaintiff's Compliant, and therefore denies the allegations.

4. The allegations in Paragraph 4 of Plaintiff's Compliant are recitation of law to which no response is required. To the extent that the allegations are deemed to contain allegations of fact, the State denies the same. Venue has been changed since Plaintiff's Complaint was filed. The State does not object to venue in this Court, the United States District Court of the Eastern District of Arkansas, Western Division.

5. The State is without sufficient information to either admit or deny the allegations contained in Paragraph 5 of Plaintiff's Compliant and, therefore, denies the allegations.

6. The State is without sufficient information to either admit or deny the allegations contained in Paragraph 6 of Plaintiff's Compliant and, therefore, denies the allegations. Venue has been changed since Plaintiff's Complaint

was filed. The State does not object to venue in this Court, the United States District Court of the Eastern District of Arkansas, Western Division.

7. The State admits that Plaintiff Sierra Club is a not-for-profit corporation organized and existing under the laws of California, with its principal place of business located in San Francisco, California. The State is without sufficient information to either admit or deny the remaining allegations contained in Paragraph 7 of Plaintiff's Complaint and, therefore, denies those allegations.

8. The State admits that the Clean Air Act requires regional haze plans to remedy and protect against human-caused visibility impairment in specified national parks, wilderness areas, wildlife refuges, and other areas, referred to as class I Federal areas. The State is without sufficient information to either admit or deny any additional allegations in Paragraph 8 of Plaintiff's Compliant and, therefore, denies those allegations.

9. The State denies these allegations in Paragraph 9 of Plaintiff's Compliant.

10. The State admits that Defendant Gina McCarthy is the Administrator of the United States Environmental Protection Agency and is charged with implementing and enforcing the Clean Air Act. The State admits that Defendant is sued in her official capacity. The remaining allegation in Paragraph 10 of Plaintiff's Complaint is a recitation of law to which no response is required.

11. The State admits that haze is caused by air pollution that absorbs light and reduces visibility. The State admits that air pollution that causes haze comes from a variety of sources, but is without sufficient information to admit or deny the remaining allegations in Paragraph 11 of Plaintiff's Complaint and, therefore, denies them.

12. The State admits the allegations in Paragraph 12 of Plaintiff's Compliant.

13. The allegations in Paragraph 13 of Plaintiff's Compliant are a recitation of law to which no response is required. To the extent that Paragraph 13 is deemed to contain an allegation of fact, the State denies the same.

14. The State denies the allegations in Paragraph 14 of Plaintiff's Compliant.

15. The allegations in Paragraph 15 of Plaintiff's Compliant are a recitation of law to which no response is required. To the extent that Paragraph 15 of Plaintiff's Compliant is deemed to contain an allegation of fact, the State denies the same.

16. The State admits the allegations contained in Paragraph 16 of Plaintiff's Complaint.

17. The State admits the allegations contained in Paragraph 17 of Plaintiff's Complaint.

18. The State admits EPA's disapproval decision took effect on April 11, 2012. The remaining allegations in Paragraph 18 of Plaintiff's Compliant are a recitation of law to which no response is required. To the extent that the

remaining allegations in Paragraph 18 of Plaintiff's Compliant are deemed to contain an allegation of fact, the State denies the same.

19. The State admits the allegations contained in Paragraph 19 of Plaintiff's Compliant.

20. The State hereby incorporates its responses to Paragraphs 1-19 of Plaintiff's Compliant above.

21. The allegations in Paragraph 21 of Plaintiff's Compliant are recitations of law to which no response is required.

22. The State admits the allegations in Paragraph 22 of Plaintiff's Complaint.

23. The allegations contained in Paragraph 23 of Plaintiff's Complaint are recitations of law to which no response is required. To the extent that the allegations are deemed to contain allegations of fact, the State denies the same.

24. The allegations in Paragraph 24 of Plaintiff's Compliant constitute conclusions of law, to which no response is required.

25. The allegations in Paragraph 25 of Plaintiff's Compliant constitute conclusions of law, to which no response is required. The State denies the remaining allegations in Paragraph 25 of Plaintiff's Compliant.

26. The allegations in Paragraph 26 of Plaintiff's Compliant constitute conclusions of law, to which no response is required. To the extent a response is required, the State denies the allegations in Paragraph 26 of Plaintiff's Compliant.

27. The allegations in Paragraph 27 of Plaintiff's Compliant constitute Plaintiff's characterization of relief requested, to which no response is required. To the extent a response is required, the State denies the allegations and denies that Plaintiff is entitled to any relief.

28. The State denies each and every allegation in the complaint not specifically admitted.

29. The State pleads affirmatively that Plaintiff does not have Article III standing to assert the claims set forth in the Complaint, and thus the Court is without subject matter over the Complaint.

30. The State pleads affirmatively that the Complaint does not state facts upon which relief may be granted and thus the Complaint must be dismissed.

31. The State reserves the right to file such amended answers, counterclaims, cross-claims, and third-party claims as necessary, and to assert all additional defenses, including affirmative defenses, pending further discovery in this matter.

WHEREFORE, above premises considered, the State of Arkansas, by and through Leslie Rutledge, Attorney General and the undersigned Assistant Attorney General, respectfully requests that this Honorable Court:

(1) Abstain from entering the Consent Decree lodged in this docket; and

(2) Grant all other relief that may be just and appropriate.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

By: /s/ Jamie L. Ewing

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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:

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