

No. 06-0142

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR ENERGY AND ECONOMIC DEVELOPMENT,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On a Petition for Review of an Amended Final Rule of the
United States Environmental Protection Agency

MOTION TO INTERVENE AND TO SUSPEND THE TIME LIMIT FOR
INTERVENTION FOR THE STATES OF ARIZONA, NEW MEXICO,
UTAH, AND WYOMING IN SUPPORT OF RESPONDENT

STATE OF ARIZONA
Terry Goddard, Attorney General
Joseph P. Mikitish, Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-8500

[Other Attorneys General Listed Inside]

Dated: February 27, 2007

STATE OF NEW MEXICO

Gary King, Attorney General

Stephen Farris, Division Director, Assistant
Attorney General

Bill Grantham, Special Assistant Attorney General

P.O. Box 26110

Santa Fe, New Mexico 87502

(505) 827-6000

STATE OF UTAH

Mark Shurtleff, Attorney General

Fred Nelson, Assistant Attorney General

P.O. Box 142320

Salt Lake City, Utah 84114

(801) 366-0260

STATE OF WYOMING

Patrick J. Crank, Attorney General

Jay A. Jerde, Deputy Attorney General

123 Capitol Building

Cheyenne, Wyoming 82002

(307) 777-6946

The States of Arizona, New Mexico, and Utah (“the States”) move to intervene in this case pursuant to Federal Rule of Appellate Procedure (“FRAP”) 15(d). Intervention is appropriate in this case both as a matter of right and as a matter of permission. The States move the Court to suspend the time limit for intervention pursuant to FRAP 2 and Circuit Rule 2.

Counsel for the Respondent has indicated that the Respondent takes no position on this motion and therefore does not object. Counsel for the States has been unable to reach the attorneys for the Petitioner to determine whether the Petitioner will take a position on this Motion.

I. Timing of This Motion

Motions to intervene typically must be filed within thirty days after the petition for review is filed. FRAP 15(d). This Court, however, may suspend the requirements of the Rules “in the interest of expediting decisions or for other good cause.” Circuit Rule 2; FRAP 2. In this case, there is good cause to suspend the thirty-day time limit for intervention.

As described more fully below, the States have strong interests at stake in this case. Unfortunately, the States were unable to complete the internal governmental approval processes for joining the case within the thirty-day timeframe. Although the Petition was filed on December 12, 2006, the Court has granted the Petitioner's motion to extend the time to file initial submissions in the

case for sixty days. *See* Clerk's Order (Dec. 27, 2006). Pursuant to the Order, the initial submissions are not due until March 12, 2007 - approximately two weeks after the filing of this Motion to Intervene.

II. Nature of The Case

In this case, the Petitioner, Center for Energy and Economic Development ("CEED") challenges the Environmental Protection Agency's ("EPA") October 13, 2006, amendments to its regional haze rule ("Rule Amendments"). The EPA adopted the Rule Amendments to address this Court's rulings in *American Corn Growers Association v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), and *Center for Energy and Economic Development ("CEED") v. EPA*, 398 F.3d 653 (D.C. Cir. 2005), which vacated and remanded portions of the regional haze rule, 40 C.F.R. §§ 51.308 and 51.309. *See* 71 Fed. Reg. 60612 (October 13, 2006).

The regional haze rule implemented the Clean Air Act's, mandates to prevent future and to remedy existing impairment of visibility at national parks and wilderness areas. 42 U.S.C. § 7491. Under the Act, Congress both required and empowered the States to combat visibility impairment. For example, Congress required EPA to provide guidelines to govern the States' implementation of visibility protections. These guidelines were to form the basis for States to develop implementation plans with emission limits, schedules of compliance, and other

measures necessary to make reasonable progress toward attaining the national visibility goal. 42 U.S.C. § 7491(b)(2).

Congress also authorized States to require certain existing stationary sources to retrofit their plants to reduce emissions that directly cause or contribute to visibility impairment. 42 U.S.C. § 7491(b)(2)(A). States may use alternatives to Best Available Retrofit Technology (“BART”) so long as those alternatives are sufficient to achieve actual progress in improving visibility. *CEED*, 398 F. 3d at 660.

Congress also authorized EPA to create regional transport visibility commissions made up of the States and other entities interested in national parks and wilderness areas affected by visibility impairment. 42 U.S.C. § 7492. Those transport commissions were specifically tasked with assessing scientific and technical information on visibility impairment and with issuing reports to EPA on the tools necessary to address visibility-impairing emissions, including recommendations for any regulations needed to implement long-range strategies. 42 U.S.C. § 7492(d)(2). Congress expressly established a transport commission to address visibility at the Grand Canyon. 42 U.S.C. § 7492(f).

The Rule Amendments challenged in this case address the strategies that the Grand Canyon Visibility Transport Commission (“GCVTC”) and its successor organization, the Western Regional Air Partnership (“WRAP”), recommended.

Specifically, the Rule Amendments change the requirements for emission trading programs that substitute for BART determinations and also revise the framework within which Western States and Tribes must implement the recommendations of the GCVTC and the WRAP.

III. The States Have the Right to Intervene.

Applicants who meet the following requirements can intervene in an action as a matter of right: (A) the applicant has an interest in the subject of the action, (B) the disposition of the action may impair or impede the applicant's ability to protect that interest, and (C) the applicant's interest is not adequately represented by existing parties. *See* Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 24(a).

A. States Have Significant Interests at Stake in This Challenge to the Rule Amendments.

The Rule Amendments help to implement the Clean Air Act's protections for some of our most valuable national treasures--our national parks and wilderness areas. The States have a substantial interest in ensuring the well-being of these renowned scenic vistas, which include the Grand Canyon, Zion National Park, the Petrified National Forest, Bryce Canyon, and the San Pedro Wilderness Area. In addition to providing unparalleled natural values and recreational opportunities for the States' citizens, these great symbols of the American West draw literally millions of visitors from around the world each year, bringing significant economic resources to the States.

Each of the States was a party to the GCVTC, which spent years crafting a comprehensive regional strategy to address visibility impairment and to meet the goals established by the Clean Air Act. The States continue to participate in the WRAP to address the national visibility goals. Each of the States has dedicated substantial resources of time, money, and personnel to developing and implementing the strategies in its respective jurisdictions, and each has a strong interest in protecting its ability to act regionally to address visibility impairment.

In 1999, EPA agreed that the extensive work of the GCVTC and the WRAP would make “reasonable progress” towards meeting the national air quality visibility goal established under the Clean Air Act and would provide Western States with an alternative method for meeting their regional haze obligations. 64 Fed. Reg. 35714, 35749 (July 1, 1999). Western States could implement the more typical “command and control” style program set forth in 40 C.F.R. § 51.308, or they could implement the GCVTC’s recommendations as adopted in 40 C.F.R. § 51.309. *Id.* at 35749–35750. EPA emphasized that the option in section 51.309 was a voluntary program and that States were not precluded from developing their own regional haze control strategies. *Id.* Section 51.309 simply gave States the opportunity to utilize the GCVTC’s extensive work and its program as an expedited process for demonstrating compliance with the national goal. *Id.* Each of the States joined in the 309 approach.

EPA's finding that 40 C.F.R. § 51.309 satisfied the "reasonable progress" requirement was contingent upon the development of an "Annex" to the GCVTC Final Report that would further delineate the provisions of the emissions-trading alternative to BART. *Id.* Western States and Tribes, through the WRAP, submitted such an Annex on September 29, 2000. In June 2003, EPA amended its regulations to incorporate the Annex provisions. 68 Fed. Reg. 33764 (June 3, 2003). The amended regulation allows Western States to implement a backstop emissions trading program for sulfur dioxide emissions if current regulatory programs do not sufficiently reduce emissions from stationary sources. Under the program adopted by EPA, an eligible State can voluntarily elect to participate in the trading program as an alternative to the BART requirements. The Annex's incorporation into the regional haze rule preserved the availability of the rest of the comprehensive visibility recommendations of the GCVTC and the WRAP contained in 40 C.F.R. § 51.309. *Id.* at 33765.

In *American Corn Growers* and *CEED*, this Court remanded portions of the regional haze rule to address how states assess BART, in particular the visibility impairment that may be attributed to individual sources and the visibility improvements that may be attributed to the applicable control technologies. In response EPA adopted the Rule Amendments to revise the framework for emissions trading programs serving as alternatives to BART, including the

program that the Western States and Tribes developed under 40 C.F.R. § 51.309. These revisions included regulations concerning the sources subject to BART, the BART determination, the types of scientific models that can be used, the States' discretion to consider cumulative visibility impacts, the role of BART guidelines for determining presumptive emission standards, the universe of emission sources to be covered, and the comparison of the alternative programs with BART.

The Rule Amendments also set forth the minimum elements of an emissions trading program. These included provisions for penalties and emissions monitoring. Finally, the Rule Amendments address the support for the WRAP program, the requirement that the WRAP program demonstrate reasonable progress toward the national visibility goal, geographic enhancements for the program, and tribal inclusion in the WRAP program. The States have vital interests in each of these issues.

B. The Challenge to the Rule Amendments Will Affect the States' Interests in Protecting Visibility.

Because of the procedural posture of the case, it is impossible to know which provisions of the Rule Amendments are being challenged. But because the States were heavily involved in developing the WRAP program and regional haze rules and they have the primary responsibility for implementing the programs to protect visibility, any challenge to the Rule Amendments would affect the States' interests.

As noted in the preamble to the Rule Amendments, comments that Utah submitted emphasize the States' particular interest and involvement in developing 40 C.F.R. § 51.309: "In fact, Section 309 has always been, and continues to be, a state driven regulation." 71 Fed. Reg. at 60625.

Challenges to the Rule Amendments could affect the essential framework for implementing the regional program the GCVTC and the WRAP developed, the manner in which the States develop alternatives to a BART program, the elements of state or regional emissions trading programs, and the elements of the WRAP program itself.

Each of these challenges would potentially damage the States' ability to protect visibility in their national parks and wilderness areas.

C. The Existing Parties Do Not Adequately Represent the States' Interests.

The Clean Air Act imposes the heaviest burden for addressing regional haze problems on the States. Under the Act, Congress required the States to adopt implementation plans with emission limits, schedules of compliance, and other measures necessary to make reasonable progress toward attaining the national goal of eliminating visibility impairments. Congress mandated the establishment of the GCVTC to facilitate Western interests in adopting a comprehensive regional solution to regional haze. And Congress gave States authority to address BART within their comprehensive plans.

Although EPA is a party to this case, it does not have the same interests or obligations as the States do under the Clean Air Act. EPA was given the responsibility for developing scientific reports, providing guidelines for achieving the national goals, and ensuring that States were living up to their obligations. EPA was not, however, charged with developing and implementing the necessary strategies, emission limits, schedules of compliance, BART requirements, and other measures necessary for meeting the national visibility goal. Those responsibilities were reserved to the States. The Court must therefore allow the States to intervene because EPA cannot adequately represent their interests in the case.

II. If The Court Does Not Grant The States Intervention As of Right, It Should Grant Them Permissive Intervention.

Even if the Court finds that the States could be deemed as not having the right to intervene, it should grant them permission to intervene in this case. Permissive intervention is appropriate when an applicant's claim or defense and the main action have a question of law or fact in common. *See* Fed. R. Civ. P. 24(b). When a party to an action bases a claim or defense upon a statute or regulation that a state governmental officer or agency administers, the officer or agency may be permitted to intervene. *Id.*

In this case, the Rule Amendments at issue in the main case affect the States interests. As noted above, the States interests in protecting visibility are numerous

and substantial. In addition, the States are the legal entities that largely implement the Clean Air Act's requirements and the Rule Amendments.

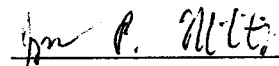
Finally, the States participation will not delay this action. As noted, the Court has extended the time for the initial filings until March 12, 2007 and the time for submitting dispositive motions until March 26, 2007. Clerk's Order (Dec. 27, 2006). The States involvement will not require the Court to alter those deadlines.

The Court should grant the States permission to intervene in this case because of their interests in the subject matter of the case, their legal obligations under the Clean Air Act, and the fact that their intervention will not delay this action.

Conclusion

Because the States meet the standards both for intervention as a matter of right and for permissive intervention, the Court should grant this motion.

Respectfully Submitted,


STATE OF ARIZONA

Terry Goddard
Attorney General
Joseph P. Mikitish
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8500

CERTIFICATE OF MAILING

I, Joseph P. Mikitish, Certify that on this 27th day of February 2007, that true and correct copies of the attached Motion To Intervene And To Suspend The Time Limit For Intervention For The States Of Arizona, New Mexico, Utah, and Wyoming In Support Of Respondent were served by first class mail, postage prepaid, and electronic mail on each of the following:

STATE OF NEW MEXICO

Gary King, Attorney General

Stephen Farris, Division Director, Assistant Attorney General

Bill Grantham, Special Assistant Attorney General

P.O. Box 26110

Santa Fe, New Mexico 87502

STATE OF UTAH

Mark Shurtleff, Attorney General

Fred Nelson, Assistant Attorney General

P.O. Box 142320

Salt Lake City, Utah 84114

STATE OF WYOMING

Patrick J. Crank, Attorney General

Jay A. Jerde, Deputy Attorney General

123 Capitol Building

Cheyenne, Wyoming 82002

Paul M. Seby

McKenna Long & Aldridge LLP

1875 Lawrence Street, Suite 200

Denver, CO 80202

Attorney for Petitioner

Pamela S. Tonglao

U.S. Department of Justice

Environment and Natural Resources

P.O. Box 23986

L'Enfant Plaza Station

Washington DC 20026-3986

Attorney for Respondent