UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEC L., *et al.*, Plaintiffs, v. LISA P. JACKSON, *et al.*, Defendants.	)	Civil Action No. 1:11-cv-02235 (RLW)

RESPONSE BY PROPOSED INTERVENOR-DEFENDANT NATIONAL ASSOCIATION OF MANUFACTURERS TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO PROPOSED DEFENDANTS-INTERVENORS DELTA CONSTRUCTION COMPANY INC., ET AL.'S MOTION TO INTERVENE

Pursuant to this Court's order of March 22, proposed Intervenor-Defendant the National Association of Manufacturers ("NAM") hereby submits this response to the new arguments regarding the NAM's motion to intervene that Plaintiffs included for the first time in their Memorandum in Opposition to Proposed Defendants-Intervenors' Motion to Intervene, Dkt # 154 (filed Mar. 16, 2012) ("Pls. Opp."). Plaintiffs' new arguments in no way diminish the NAM's right to intervention.

INTRODUCTION

It is well established in this Circuit that "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). The NAM explained at length why it is entitled to intervene as of right in this case on behalf of its members under Rule 24(a). *See* Motion to Intervene by National Association of Manufacturers, Dkt. # 65 (filed Oct. 31, 2011) ("NAM Int. Mtn"). Moreover, under *Roeder*, "[r]equiring standing of someone who seeks to intervene as a defendant runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction." 333 F.3d at 233. But even if the NAM must establish standing to intervene, it meets all the requirements of Article III standing: (1) there is a "concrete and imminent" injury, (2) that is "fairly traceable to the regulatory action … that the [Plaintiff] seeks in the underlying lawsuit" and (3) "it is likely that a decision favorable to" the NAM will prevent that injury. *Fund for Animals v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003).

A. Plaintiffs' Requested Relief Would Injure The NAM's Members

Plaintiffs claim that, even if they prevail, the NAM will suffer no injury because Plaintiffs seek only a declaration of the Federal Defendants' trust obligations, an accounting of the trust asset, "and then a plan for reducing carbon dioxide emissions and restoring our nation's energy balance." Pls. Op. at 1. According to Plaintiffs, "the Federal Defendants would have

complete discretion to determine how to meet their legal obligation to reduce carbon dioxide emissions." *Id.* at 2. This description is simply wrong. Plaintiffs do not seek to compel an agency merely to initiate a proceeding that may, or may not, lead to regulatory actions against the would-be intervenors. Instead, they seek to compel agencies to adopt plans that, according to Plaintiffs themselves, would inescapably mandate significant and immediate emissions reductions that can be achieved only by regulating would-be intervenor's members.

Plaintiffs request an order requiring Defendants to issue a "Climate Recovery Plan" that would cap U.S. carbon dioxide ("CO_2") emissions at September 2011 levels and require a six percent annual reduction in CO_2 emissions. Plaintiffs' Motion for Preliminary Injunction and Memorandum of Points and Authorities in Support Thereof, Dkt. # 24 (filed Sept. 28, 2011) ("PI Mtn."). They insist that this can be done only by "[s]topping, or at least greatly curtailing, the activities that discharge greenhouse gases [("GHGs")] into the air, primarily burning fossil fuels." First Amended Complaint for Declaratory and Injunctive Relief, Dkt # 4 (filed July 27, 2011) ("FAC"). The testimony of Plaintiffs' declarant, Arjun Makhijani, Ph.D., is replete with claims that Plaintiffs' requested relief can be accomplished only through the virtual elimination of the use of fossil fuels from the American economy. *See* Declaration of Dr. Arjun Makhijani, Dkt # 45 (filed Sept. 28, 2011) ("Makhijani Decl.").

Thus, the entire purpose of Plaintiffs' requested "Climate Recovery Plan" is to directly regulate the production and use of fossil fuels, and the resulting CO_2 emissions, from third parties such as the NAM's members. FAC at ¶¶ 53, 55, 57 (Defendants allegedly violated their public trust duties "by permitting … the extraction of coal, coal-bed methane, oil, oil shale and natural gas, and oil, coal and electric infrastructure and transmission facilities on public land"); Makhijani Decl. ¶¶ 2.a, 7, 8, 84 (eliminating or drastically reducing fossil fuel combustion is

necessary to reduce CO_2 emissions). Indeed, in the very same pleading in which they assert that any injury the NAM would suffer from this suit is "tenuous" and "conjectural," Pls. Op. at 8, Plaintiffs state that the Defendants must "take *immediate extraordinary action* to protect… [the] atmosphere," and "reduce carbon emissions *right away*." *Id.* at 4-5 (emphasis added). To be clear, it is not Defendants' greenhouse gas emissions that Plaintiffs fundamentally seek to curb, but those emitted by the NAM's member companies. If, as Plaintiffs assert, 80% of increased GHG emissions are caused by fossil fuel use, PI Mtn at 1, Defendants could not possibly implement a plan in less than 12 months to reduce GHG emissions by 6% each year without dramatically impacting the production and use of fossil fuel by the NAM's members.

This case thus does not involve the kind of contingencies at issue in *Center for Biological Diversity v. EPA*, 274 F.R.D. 305 (D.D.C. 2011). There, the plaintiffs only requested that EPA issue an "endangerment finding"—not to compel specific regulation or controls on emissions—under the Clean Air Act regarding aircraft engine emissions. *Id.* at 306-07. The court denied intervention by trade associations, finding that they would only be harmed by the issuance of future regulations that were "contingent upon an affirmative endangerment finding by EPA, an outcome that will turn not on any order of this Court." *Id.* at 310. Here, by contrast, to provide Plaintiffs the relief they seek, the Recovery Plan *must* implement "a near-total elimination of fossil fuels." Makhijani Decl. ¶ 8. An order by this Court compelling Defendants to adopt and implement such a plan would inescapably and directly harm all of the NAM's members that produce or depend on fossil fuels.[1] The assertion that the "requested injunctive relief does not

[1] The harm from the remedy Plaintiffs seek in this lawsuit is even more direct than the harms deemed sufficient to establish standing in *Fund for Animals*. In that case, the defendant agency's action would not operate directly on the intervenor, but rather would dissuade third parties not before the Court from engaging in certain activities, which in turn would harm the intervenor. *See* Reply of Proposed Defendants-Intervenors Delta Construction Co. Inc, Dkt # 156 (filed Mar. 23, 2012) at 9. Here, the burden of the relief Plaintiffs seek falls directly on the NAM's members.

require any specific action either by or against [the NAM] or [its] members," Pls. Op. at 12 (emphasis deleted), does not and cannot change that fact.

B. Plaintiffs seek to escape this obvious truth through a series of meritless arguments.

In an effort to show that the NAM's injuries are contingent, Plaintiffs suggest that the Defendants would have "complete discretion to determine how to meet their legal obligation to reduce carbon dioxide emissions," Pls. Op. at 2, and that the NAM can express its views on any measures Defendants propose in order to meet that legal obligation, *id.* at 15. This claim is both inapposite and irrelevant. First, the dramatic scope of Plaintiffs' requested relief leaves little if any room for any action by the Defendants that avoids serious and irreparable harm to the NAM's members. Thus, the mere ordering of a Climate Recovery Plan pursuing the goals Plaintiffs seek by its very nature will harm the NAM's members at that time, and later efforts by Defendants to define the scope or specific course of action—even if Defendants possessed unfettered discretion—cannot alleviate such harm. Second, Plaintiffs do not merely ask this Court to order the Defendants to craft a Climate Recovery Plan. They specifically ask the Court to oversee its implementation. *Id.* at 23; FAC, Prayer for Relief ¶ 5 (Court will "[r]etain jurisdiction over this action for purposes of enforcing and effectuating this Court's order."). Thus, Plaintiffs ask this Court, not the Defendants, to ensure that the measures mandated in a Climate Recovery Plan will sufficiently regulate fossil fuel production and usage to reduce CO_2 emissions by 6 % per year. Given the continuing oversight role Plaintiffs request the Court to have over the implementation of the Climate Recovery Plan, the NAM is entitled to participate in such a process as a party directly impacted by such a plan.

Plaintiffs also suggest that the NAM must provide evidence of injury directly from its *members*. Pls. Opp. at 8, n.6. But an intervenor's standing is "self-evident" where, as here, it is

"an object of the action" sought. *Fund for Animals*, 322 F.3d at 733-34 (internal quotation marks omitted). In all events, Plaintiffs fail to mention the NAM's declaration, which establishes more than "a 'substantial probability'" that NAM's members will be injured. *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). Indeed, Plaintiffs do not refute Dr. Moutray's testimony that the NAM's members include fossil fuel producers and users that will suffer as a result of the Plaintiffs' requested reduction or elimination of fossil fuels. *See* Declaration of Dr. Chad Moutray of the National Association of Manufacturers in Support of Motion for Intervention, Dkt # 66 (filed Oct. 31, 2011) ("Moutray Decl.") at ¶¶ 10, 18, 19, 21-23. As Dr. Moutray explained, the relief Plaintiffs seek will "immediately harm" and permanently impact "the NAM's members that are oil, coal and natural gas producers, petroleum refiners, and petrochemical producers, and to those manufacturing companies that make the tools and components critical to such industries." *Id. at* ¶ 17.

Finally, Plaintiffs attempt to skirt the obvious economic and competitive harms to the NAM's members by re-framing lawful business operations as unprotected "interests in emitting greenhouse gases at present levels" and demanding evidence of a "permit, contract, lease, or other authorization" allowing the NAM's members to operate. Pls. Opp. at 9. But legally protected interests are not restricted to this narrow list. In fact, "economic harm resulting from government action that *changes* market conditions . . . is routinely recognized as sufficiently concrete to constitute an injury-in-fact," *Center for Biological Diversity*, 274 F.R.D. at 310 (emphasis added). And this type of harm suffices to establish Rule 24(a)'s legal interest requirement. *See Environmental Defense v. Leavitt*, 329 F. Supp. 2d 55, 66 n.7. Here, Plaintiffs seek to change—drastically and immediately—the market conditions under which the NAM's members currently operate. It is precisely because that is the central purpose of this lawsuit that

the NAM has standing and a legally protected interest justifying its intervention.

C. The Remainder Of Plaintiffs' Opposition Merely Repeats Prior Arguments

Plaintiffs' Opposition purports to "incorporate all arguments in the standing section and arguments in other sections relying on D.C. Circuit law into their opposition to the NAM's Motion to Intervene." Pls. Opp. at 6 n. 3. The arguments in those "other sections" either do not apply to the NAM or merely repeat Plaintiffs' prior arguments on standing.

First, Plaintiffs have already conceded that the NAM's motion to intervene was timely. *See* Memorandum of Points and Authorities in Opposition to Motion to Intervene of National Association of Manufacturer [sic], Dkt # 102 (filed Nov. 14, 2011) at 1. Second, Plaintiffs' arguments that the NAM lacks a legally protected interest, that injuries to the NAM's members are speculative, that Plaintiffs are not seeking to regulate any particular industry, *id.* at 19, and that the NAM's members could reverse this Court's order through "the administrative rulemaking or permitting process," *see* Pls. Opp. at 17-22, are all rebutted above and in the NAM's prior briefing on intervention.

Third, the interests of the NAM's members are different from those of the Defendants, and thus not adequately represented. S*ee* NAM Int. Mtn. at 11. Plaintiffs claim that, since the NAM and Defendants seek the "same outcome," the NAM may not intervene, Pls. Opp. at 23, but this is the wrong legal standard. The case relied upon by the Plaintiffs, *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967), discussed the standard for class action representation. It then went on to *reject* such a "same outcome" standard for use in intervention. *Id.* ("The present suit is not a class action."). The *Nuesse* court granted the applicant's motion for intervention because he "invokes the same legal theory as the [plaintiff] but his interest is different." *Id.*

Indeed, the general rule is that the government does *not* adequately represent intervenor interests. *Fund for Animals*, 322 F.3d at 736 ("[W]e have often concluded that governmental

entities do not adequately represent the interests of aspiring intervenors."). This is because "a shared general agreement" on outcome "does not necessarily ensure agreement in all particular respects" of the legal and factual matters. *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). The interests of private parties are generally "more narrow and focused than EPA's, being concerned primarily with the regulation that affects *their* industry." *Id.*; *see also Dimond v. Dist. of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (government entities are "charged by law with representing the public interest of its citizens" while private parties are "seeking to protect a more narrow and 'parochial' financial interest not shared by the citizens"). *Accord, Center for Biological Diversity v. U.S. Fish and Wildlife Service*, No. 11-05108 JSW (N.D. Cal. Mar. 22, 2012) (Order granting Croplife America's motion to intervene (Dkt. No. 27) at 4, citing *NRDC v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983)). Given the divergence in interests regarding GHG regulations and frequent legal clashes between the NAM and Defendant EPA, Moultray Decl. ¶¶25, 26,[2] any claim that the NAM is adequately represented by the Defendants is groundless.

Finally, there is no material difference in the legal standards for permissive intervention between the D.C. Circuit and the Ninth Circuit. *Compare Equal Employment Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (three part test for intervention under Fed. R. Civ. P. 24(b)(1)) *with Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996) (using the same test). Accordingly, the NAM stands on its arguments in the alternative for permissive intervention. NAM Int. Mtn. at 12-13.

CONCLUSION

For the foregoing reasons, the NAM respectfully requests that the Court grant its motion.

[2] These differences in interests are evident when comparing the motions to dismiss and briefing in opposition to the Plaintiffs' motion for a preliminary injunction submitted by the Defendants and the NAM, which see each party pursuing different legal arguments. This is hardly surprising given that the NAM has frequently criticized Defendant EPA's GHG regulations and often opposed them in court. Moutray Decl. ¶¶25, 26.

Dated: March 26, 2012

Respectfully submitted,

/s/ David T. Buente Jr.
David T. Buente, Jr. (Bar No. 429503)
dbuente@sidley.com
Joseph R. Guerra (Bar No. 418532)
jguerra@sidley.com
Roger R. Martella Jr. (Bar No. 976771)
rmartella@sidley.com
James R. Wedeking (Bar No. 500033)
jwedeking@sidley.com

SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)
ATTORNEYS FOR PROPOSED INTERVENOR-DEFENDANT THE NATIONAL ASSOCIATION OF MANUFACTURERS

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2012, a copy of the foregoing Response By Proposed Intervenor-Defendant National Association Of Manufacturers To Plaintiffs' Memorandum In Opposition To Proposed Defendants-Intervenors Delta Construction Company Inc., Et Al.'s Motion To Intervene was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ David T. Buente Jr.
James R. Wedeking