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National Association of Manufacturers, et al.
(Complete List of Parties Represented Listed on Signature Page)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

SIERRA CLUB, AMERICAN LUNG ASSOCIATION, ENVIRONMENTAL DEFENSE FUND, and NATURAL RESOURCES DEFENSE COUNCIL

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; GINA McCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

Defendants.

Case No. 4:13-cv-02809-YGR

REPLY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS BY PROPOSED DEFENDANT-INTERVENORS NATIONAL ASSOCIATION OF MANUFACTURERS, ET AL.

Date: October 15, 2013
Time: 2:00 PM
Place: Courtroom 5, Second Floor
Judge: Hon. Yvonne Gonzalez Rogers

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MISCELLANEOUS

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Agency	U.S. Environmental Protection Agency
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
EPA	U.S. Environmental Protection Agency
Integrated Review Plan	Integrated Review Plan for the Ozone National Ambient Air Quality Standards
NAAQS	National Ambient Air Quality Standards
PA	Policy Assessment
REA	Risk and Exposure Assessment

ARGUMENT

I. This Suit Threatens to Impair Proposed Defendant-Intervenors' Economic Interests in Any Final Standard Resulting From EPA's Review.

Plaintiffs' complaint lays out the broad scope of this lawsuit in no uncertain terms, declaring that "[t]his is an action to compel the Administrator of the EPA to fulfill [her] non-discretionary duty to review and *adopt* overdue national ambient air quality standards for ozone pollution." Compl. ¶ 6 (emphasis added). Plaintiffs also allege that the existing ozone national ambient air quality standards ("NAAQS") are "inadequate to protect public health and welfare," a claim that, if established as true, could support revision of the NAAQS. *Id.* ¶ 33. Moreover, even in Plaintiffs' Opposition to Proposed Defendant-Intervenors' Motion to Intervene ("Plaintiffs' Response" or "Pls.' Resp."), which largely disavows the Complaint's claims regarding the substantive adequacy of the existing ozone NAAQS, Plaintiffs still do not completely abandon their request that this Court order the U.S. Environmental Protection Agency ("EPA" or "the Agency") to revise the NAAQS, stating that "[h]ere, the only issue in dispute is whether EPA is in breach of its mandatory duty to *promulgate ozone air quality standards* according to the statutory timetable." Pls.' Resp. at 4 (emphasis added). These statements collectively indicate that Plaintiffs envision that this lawsuit will lead to Court-ordered substantive rulemaking proceedings that they believe will result in new, more stringent ozone NAAQS, which would harm Proposed Defendant-Intervenors' economic interests.

Despite the language from the Complaint cited above, Plaintiffs' Response generally walks away from Plaintiffs' earlier claims regarding the adequacy of the existing ozone NAAQS. *See, e.g.*, Pls.' Resp. at 1 ("Plaintiffs do not, and cannot, ask for the imposition of particular ozone air quality standards."); *id.* at 3 (Plaintiffs "acknowledge that the content of [the NAAQS] are not the subject of this lawsuit"); *id.* at 8 ("[T]his lawsuit concerns whether EPA has failed to perform a mandatory duty to review the ozone air quality standards, and whether a firm rulemaking deadline should be ordered. It does not address the content of those particular standards."). Proposed Defendant-Intervenors agree with Plaintiffs that the Complaint's claims that go beyond EPA's duty to review the existing NAAQS are not properly before this Court,

since "only the D.C. Circuit Court of Appeals has jurisdiction over such questions" as "the adequacy of the current ozone air quality standards, the need for new standards, and the substantive content of those standards." *Id.* at 12 (citing Clean Air Act ("CAA") § 307(b)(1), 42 U.S.C. § 7607(b)(1) (2013)). Accordingly, all of the parties and Proposed Defendant-Intervenors agree that any final remedial order from this Court should only address the timetable for EPA's *review* of the existing ozone NAAQS and may not set deadlines for EPA's promulgation of any revised standards that the Administrator may deem appropriate.

Nevertheless, because this suit encompasses claims to compel rulemaking on the need for new NAAQS, Proposed Defendant-Intervenors' economic interests may be impaired by the resolution of Plaintiffs' claims. Although EPA cites a Second Circuit decision, *American Lung Association v. Reilly*, 962 F.2d 258 (2d Cir. 1992), *aff'ing* 141 F.R.D. 19 (E.D.N.Y. 1992), to assert that Proposed Defendant-Intervenors should be denied intervention as of right, that case does not control here. As an initial matter, the Second Circuit's decision is not binding on this Court, and the Ninth Circuit has not yet addressed regulated entities' right to intervene in a lawsuit to compel rulemaking on review of a NAAQS.

On the merits, *American Lung Association* was wrong in asserting that the regulated community's interest in any subsequent NAAQS rulemaking was "purely contingent and speculative." 141 F.R.D. at 22. Because the outcome of any court-ordered rulemaking in this case could be more stringent standards, Proposed Defendant-Intervenors' interests are directly impacted by the resolution of this case. These interests are no more speculative than the asserted effects of EPA's inaction on Plaintiffs' "health, recreational, aesthetic, and environmental interests," which Plaintiffs cite to support their standing and which are based upon the "double contingency" that (1) EPA's review of the ozone NAAQS is overdue and (2) that review will find that the current NAAQS are inadequate.[1] *See* Compl. ¶ 16. In light of the regulated community's substantial interest in the NAAQS, courts have long recognized that industry

[1] Accordingly, to the extent that Proposed Defendant-Intervenors' interests in the NAAQS review rulemaking are too speculative to support intervention, Plaintiffs' asserted injuries are likewise too speculative to establish their standing to bring this suit.

representatives have Article III standing to challenge these standards before they are implemented by the states (and hence, before specific industries know for certain whether they will be subjected to new requirements as a result of a NAAQS). *See, e.g.*, *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972) (industry challenge to secondary NAAQS for sulfur oxides); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) (industry challenge to NAAQS for lead); *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981) (industry challenge to NAAQS for ozone); *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001). Likewise, Proposed Defendant-Intervenors have a significant protectable interest in this case because the resulting review of the NAAQS could lead to the adoption of more stringent standards.

Indeed, a recent decision in the Ninth Circuit illustrates the importance of including industry representatives as intervenors to defend their interests in litigation and settlement agreements between federal agencies and environmental groups governing administrative rulemaking, rather than forcing industry to wait and participate only in any subsequent court-ordered rulemaking. *Conservation Nw. v. Sherman*, 715 F.3d 1181 (9th Cir. 2013). In *Conservation Northwest*, the district court approved a settlement agreement between the plaintiff environmental groups and the defendant federal agencies which required substantive amendments to the challenged rule without statutorily mandated public participation procedures. *Id.* at 1184-85 (district court found that because entry of consent decree was "a judicial act, not an agency act," general statutory requirements applicable to rulemaking did not apply to actions required therein). The industry intervenor appealed, arguing that a court may not enter a consent decree that effectively amends agency rules without subjecting those changes to public participation procedures required by statute. *Id.* at 1185. The Ninth Circuit agreed with the industry intervenor and held that the lower court abused its discretion by approving a consent decree that "allows for substantial, permanent amendments" to agency rules without subjecting them to statutory procedures. *Id.* at 1189. Had the industry been denied intervention in that case, the district court's abuse of discretion would not have been challenged by the parties to the

settlement agreement. Similarly, industry participation in the present case is imperative to ensure that any settlement between Plaintiffs and EPA does not impair Proposed Defendant-Intervenors' ability to protect their economic interests, particularly where the parties may revert to seeking a settlement that covers issues not properly before this Court.

II. Proposed Defendant-Intervenors Have a Procedural Interest in the Schedule for Review of the Ozone NAAQS That Is Not Adequately Represented by EPA.

Proposed Defendant-Intervenors have a significant protectable interest in any remedial order or settlement arising from this lawsuit establishing a timetable for EPA's review of the existing ozone NAAQS. The deadline requested by Plaintiffs directly threatens that interest: it would deprive Proposed Defendant-Intervenors of a meaningful opportunity to ensure a rulemaking process that provides adequate time for interested parties to fully analyze EPA's proposal and develop relevant comments, and it would limit EPA's ability to fully review and respond to those comments. Notwithstanding the arguments of the other parties, EPA simply cannot represent Proposed Defendant-Intervenors' interests as regulated industries in this matter. *See, e.g.*, *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) ("EPA is broadly concerned with implementation and enforcement of the settlement agreement," while regulated entities are "more narrowly focused on the proceedings that may affect their industries.").

A. Proposed Defendant-Intervenors Have a Significant Protectable Interest in Participating in Review of the Ozone NAAQS.

As Plaintiffs acknowledge in their Response, the CAA provides Proposed Defendant-Intervenors a legally protected right to participate meaningfully in the rulemaking process. Section 307 requires EPA to "ensure a *reasonable* period for public participation" in any rulemaking under the CAA. CAA § 307(h), 42 U.S.C. § 7607(h) (2013) (emphasis added). Plaintiffs assert this very interest themselves to demonstrate that they are harmed by EPA's inaction, stating that the Agency's failure to review the ozone NAAQS by the statutory deadline "deprive[s] Plaintiffs and their members of procedural rights and protections to which they would otherwise be entitled, including, but not limited to, the right to *comment on* . . . EPA

action retaining or revising" the NAAQS. Compl. ¶ 17 (emphasis added). Historically, the regulated community has been among the most active participants in NAAQS rulemakings, *see, e.g.*, Declaration of Howard J. Feldman in Support of Mot. to Intervene by Proposed Defendant Intervenors ¶ 8 August 16, 2013, Doc. No. 11, and Proposed Defendant-Intervenors are already participating extensively in EPA's ongoing review of the ozone NAAQS, *see id.* ¶ 9. Accordingly, EPA's schedule for review of the NAAQS affects Proposed Defendant-Intervenors' statutorily recognized procedural interests just as strongly as it affects Plaintiffs' interests.

Indeed, this Court has recognized the importance of the regulated community's interest in having adequate time to prepare and review data supporting EPA's proposed rulemaking action and to comment on that proposed action. In *Environmental Defense Fund v. Reilly*, this Court granted industry intervenors' motion to extend for one year rulemaking deadlines negotiated by EPA and the Environmental Defense Fund to govern EPA's promulgation of visibility protection regulations over the objections of those parties. Order Granting Intervenors' Mot. Re: Deadline Extension, *Envtl. Def. Fund, Inc. v. Reilly*, No. CV 82-6850 RPA (N.D. Cal. Jan. 9, 1990) (attached hereto as Exhibit 1). This Court noted that the industry intervenors had shown good cause to extend the rulemaking deadlines "so that Intervenors can conduct their own studies of visibility impairment" and so that EPA could "more fully consider that Intervenors' comments on the proposal." *Id.* at 1-2; s*ee also* 56 Fed. Reg. 5173, 5176 (Feb. 8, 1991) (noting effect of industry intervenors' request for more time).

The "reasonableness" of the period provided for public comment depends on the nature and complexity of the CAA rulemaking in question. Review of a NAAQS is one of the most complex rulemakings that EPA engages in, involving analysis of the most recent scientific studies and literature, assessments of anticipated exposure to and risk from the pollutant in question, and consideration of the Clean Air Scientific Advisory Committee's ("CASAC") recommendations. See EPA, EPA 452/R-11-006, Integrated Review Plan for the Ozone National Ambient Air Quality Standards at 2-2 Table 2-1 (Apr. 2011) ("Integrated Review Plan"), *available at* http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_2008_pd.html (listing

necessary steps for review of ozone NAAQS). A timetable for EPA's review of the current ozone NAAQS that does not provide adequate time for Proposed Defendant-Intervenors to complete and submit their relevant studies or to otherwise comment fully on the various stages of the review process would harm Proposed Defendant-Intervenors' legally protected procedural interest in providing input on that review, just as foregoing that review altogether would deprive Plaintiffs of the same right.

In any settlement agreement resulting from this lawsuit, Plaintiffs and EPA will, as has been done in every case involving rulemaking deadlines, preserve the ability of the parties to extend the rulemaking schedule by stipulation or motion, in the event that the schedule proves to be unreasonable from the standpoint of any party. *See* Stipulated Modification of Consent Decree at 2, *Envtl. Def. v. Johnson*, No. 03-01737 (RMU) (D.D.C. Apr. 15, 2005) (extending consent decree's deadlines so that EPA may "conduct additional technical analyses" in developing final rule required by settlement). In the interests of fairness and equity, Proposed Defendant-Intervenors should be granted leave to intervene so that they may be afforded the same opportunity to seek revision of any schedule that proves to be "unreasonable" from their standpoint.

Both Plaintiffs and EPA erroneously contend that Proposed Defendant-Intervenors assert an interest in extending the rulemaking process and causing additional delay. *See* Pls.' Resp. at 5 (Proposed Defendant-Intervenors "have no protectable procedural right to extend a rulemaking process that is already delayed beyond statutory deadlines"); EPA's Resp. at 10 (Proposed Defendant-Intervenors "essentially are asserting that their interest is in having additional time past the statutory deadline"). Not so. Rather, Proposed Defendant-Intervenors merely seek intervention as of right in order to *preserve* their statutory role in the NAAQS review process to which they would have been entitled had EPA performed its review within the deadline. Public notice and comment are fundamental requirements for any agency action, and Congress recognized their importance by mandating that EPA "in promulgating *any* regulation under [the CAA], *including a regulation subject to a deadline*, shall ensure a *reasonable* period for public participation . . . ." CAA § 307(h), 42 U.S.C. 7607(h) (2013) (emphasis added). Thus, even

where time is of the essence, the CAA requires EPA to afford interested parties a meaningful opportunity to provide input on proposed actions. Proposed Defendant-Intervenors' procedural interest in participating in any NAAQS review rulemaking is not mooted by the fact that EPA's statutory deadline has already passed, and Proposed Defendant-Intervenors should not be barred from protecting that interest through intervention due to EPA's delay.

B. EPA's Own Schedule for the NAAQS Review Demonstrates That Plaintiffs' Requested Relief Would Impair Proposed Defendant-Intervenors' Procedural Interest.

EPA argues that the disposition of this suit will not impair Proposed Defendant-Intervenors' procedural interest because the possibility that this litigation will result in unreasonably short NAAQS rulemaking deadlines is merely "speculation." EPA's Resp. at 10. However, EPA's own schedule for its ongoing review of the ozone NAAQS demonstrates that Plaintiffs' requested deadline of September 30, 2014, is unreasonable and would inevitably impact Proposed Defendant-Intervenors' ability to participate in the rulemaking. In its Integrated Review Plan, EPA identified the numerous steps involved in its review of the ozone NAAQS and outlined the time frame necessary for completion of each step. Integrated Review Plan at 2-2 Table 2-1. According to the Integrated Review Plan, EPA requires at least nine months to take public comment on any proposed rule regarding the adequacy of the existing ozone NAAQS, review and respond to those comments, incorporate any relevant comments or new data into its final determination, and publish a final rule regarding the ozone NAAQS. *See id*. (scheduling "Proposed Rulemaking" for September 2013 and "Final Rulemaking" nine months later in June 2014).

Thus, if EPA were theoretically able to publish a proposed rule by December 2013, Plaintiffs' requested schedule might not impair Proposed Defendant-Intervenors' ability to adequately comment on that rulemaking. But EPA cannot publish a proposed rule by that date, as the Agency's own estimates demonstrate. Plaintiffs recently requested that this Court take judicial notice of an EPA memorandum regarding recent updates to EPA's schedule for review

of the ozone NAAQS.[2] In that memorandum, EPA addresses the status of its second draft versions of the Risk and Exposure Assessments ("REAs") and the Policy Assessment ("PA"), which are components of EPA's NAAQS rulemaking that the Agency had originally scheduled for review by CASAC and the public by July 2012 and January 2013, respectively. *See* EPA Status Memo at 1; Integrated Review Plan at 2-2 Table 2-1 ("CASAC/Public Review of Second Draft REAs" and "CASAC/Public Review of Second Draft PA"). EPA now recognizes that "additional time is needed to complete these analyses," and expects that the requisite period for CASAC and public review of these documents will not be complete until March 2014, putting EPA *fourteen to twenty months* behind schedule. *Compare* EPA Status Memo at 1, *with* Integrated Review Plan at 2-2 Table 2-1. Extrapolating this fourteen month delay to the remainder of EPA's schedule for review of the ozone NAAQS shown in the Integrated Review Plan, EPA now could not publish a proposed rule before November 2014 at the earliest, with a final rule on the ozone NAAQS completed by August 2015. *See* Integrated Review Plan at 2-2, Table 2-1 (scheduling "Proposed Rulemaking" for September 2013 and "Final Rulemaking" for June 2014). Accordingly, Plaintiffs' requested deadline of September 2014 for final action on review of the ozone NAAQS is wholly unreasonable and would necessarily require EPA to substantially shorten the time allotted for each stage of the review, including the period for public comment and EPA review of those comments that forms the basis of Proposed Defendant-Intervenors' interest in this litigation.

C. EPA and Proposed Defendant-Intervenors Do Not Share a Common Ultimate Objective.

EPA will not adequately represent Proposed Defendant-Intervenors' procedural interest in this case, just as Plaintiffs assert EPA will not represent their procedural interests. Plaintiffs and EPA fail to acknowledge that the required showing of inadequate representation is

[2] Pls.' Req. for Judicial Notice Ex. A, Doc. No. 23 (Memorandum from Lydia Wegman, Dir., Office of Air Quality Planning & Standards, EPA, to Holly Stallworth, Designated Federal Officer, CASAC, EPA, regarding "Schedule for CASAC Review of the 2nd External Review Drafts of EPA's Health and Welfare Risk and Exposure Assessments and Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards" (undated) ("EPA Status Memo")).

"minimal" and that Proposed Defendant-Intervenors need only demonstrate that their representation by current parties "*may* be" inadequate. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (internal citation omitted) (emphasis added). Although the burden is higher where the proposed intervenor and an existing party share the same "ultimate objective," *id.*, Proposed Defendant-Intervenors and EPA do not share a common ultimate objective in this case.

EPA's ultimate objective in this litigation is to "defend its interest in obtaining a reasonable schedule" for its ongoing review of the ozone NAAQS. EPA's Resp. at 12. Although Proposed Defendant-Intervenors also seek to ensure that any remedial order by this Court establishes a reasonable timetable for EPA's review of the ozone NAAQS, the parties do not share a common objective regarding what time frame would be "reasonable." While EPA very well may "vigorously defend *its* interest" in the rulemaking schedule, *id.* (emphasis added), Proposed Defendant-Intervenors' specific protected interest in participating at certain stages of the rulemaking and presenting studies they have prepared is "more narrow and parochial" than the general public interest represented by EPA, *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (finding state agencies charged with administering prevailing wage law may not adequately represent union group's interest in receiving prevailing wage in challenge to that law). Proposed Defendant-Intervenors' ultimate objective is to secure a rulemaking schedule that allows adequate time for them to complete their scientific studies before EPA publishes a proposed rule and that provides a sufficient period for Proposed Defendant-Intervenors to review EPA's proposal and submit relevant comments. EPA, on the other hand, is focused on the timeline for every stage of the rulemaking process, and may seek to extend some portions of the schedule that are relevant to EPA at the expense of periods that are important to Proposed Defendant-Intervenors, such as the public comment period.

EPA can no more represent the interests of Proposed Defendant-Intervenors than it can adequately represent the interests of Plaintiffs, who no doubt would also assert that their "ultimate objective" in this litigation is the adoption of what they view as a reasonable schedule for EPA's review of the ozone NAAQS. *See* Pls.' Resp. at 9 ("The only remedy that will be granted in this case is an order setting a rulemaking deadline."). Indeed, should Plaintiffs

prevail, the ultimate objective of *every* party will be to ensure that the Court's remedial order provides a "reasonable" schedule for EPA's review. The distinguishing factor separating the ultimate objectives of Plaintiffs and Proposed Defendant-Intervenors from that of EPA is each party's specific interest in what constitutes a "reasonable" schedule. It is just as absurd to suggest that EPA will adequately represent the industry's interest in completing and submitting their studies as it would be to suggest that EPA adequately represents Plaintiffs' own interest in this litigation in more restrictive ozone NAAQS.

To the extent that this Court remains concerned that Proposed Defendant-Intervenors' interests overlap with those of EPA, Proposed Defendant-Intervenors would not object to participating in this case as intervenors on a limited basis to avoid any duplication of arguments or undue delay. Proposed Defendant-Intervenors would be willing to participate in any pleadings or briefing in this case on a staggered schedule, in which Proposed Defendant-Intervenors would file shortly after EPA and only address matters or arguments germane to their interests that are not adequately addressed by EPA. This format would allow Proposed Defendant-Intervenors to protect their unique interests while avoiding unnecessary duplication, and to the extent that EPA is able to fully represent Proposed Defendant-Intervenors' interests, it would place no additional burden on this Court.

III. The CAA's Provisions Allowing Public Comment on EPA Settlements Will Not Sufficiently Protect Proposed Defendant-Intervenors' Interest In This Case.

EPA suggests that Proposed Defendant-Intervenors' interest in the rulemaking schedule contained in any settlement that may result from this litigation is adequately protected by the provisions of CAA section 113(g) allowing for public comment on settlements to which the United States is a party. *See* EPA's Resp. at 11 n.7 (citing CAA § 113(g), 42 U.S.C. § 7413(g) (2013)). This is a hollow remedy. The section 113(g) comment process would not protect Proposed Defendant-Intervenors' interests as intervention as a party in this case would. That section merely allows members of the general public to "comment in writing" on a proposed settlement agreement and leaves EPA the discretion to withdraw or withhold consent to the settlement. CAA § 113(g), 42 U.S.C. § 7413(g) (2013). Proposed Defendant-Intervenors are

unaware of *any* case in which public participation through the section 113(g) comment process has led to the withdrawal or material revision of a proposed settlement agreement involving EPA. Moreover, section 113(g) would not provide commenters a role in any potential modifications to a settlement agreement once it is made final, depriving Proposed Defendant-Intervenors of input on any efforts by EPA to extend the agreed-upon deadlines. Therefore, the CAA's provisions regarding public comment on EPA settlement agreements do not adequately protect Proposed Defendant-Intervenors' interests.

IV. In the Alternative, This Court Should Grant Permissive Intervention.

Proposed Defendant-Intervenors satisfy all of the requirements for permissive intervention under Rule 24(b)(1)(B). *See* Mot. to Intervene at 18-21; *see also* Fed. R. Civ. P. 24(b)(1)(B). In the event that Proposed Defendant-Intervenors are not granted intervention as of right, this Court should grant permissive intervention in the alternative. Contrary to Plaintiffs' assertions, Proposed Defendant-Intervenors will bring no new "claims [that] are separate and apart from Plaintiffs' claims under these statutory provisions." Pls.' Resp. at 12. Proposed Defendant-Intervenors only seek to assert "defenses in support of EPA and against the relief Plaintiffs seek [that] will respond directly to Plaintiffs' claims . . . ." Mot. to Intervene at 19. Accordingly, Proposed Defendant-Intervenors are not required to show an independent basis for jurisdiction, and their defenses share common questions of law and fact with Plaintiffs' claims justifying permissive intervention. *See Ctr. for Biological Diversity v. Lubchenco*, No. 09-04087 EDL, 2010 WL 1038398, at *10 (N.D. Cal. Mar. 19, 2010) (granting permissive intervention in remedy phase of litigation).

CONCLUSION

For the foregoing reasons, the Court should enter an Order granting Proposed Defendant-Intervenors the status of Intervenors in support of Defendants in this case and ordering that Proposed Defendant-Intervenors' Proposed Answer to Complaint for Declaratory and Injunctive Relief be filed as of the date of that order.

DATED: September 6, 2013

Respectfully submitted,

/s/ Henry V. Nickel

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EXHIBIT 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL DEFENSE FUND, INC., et al., Plaintiffs, v. WILLIAM K. REILLY, Administrator of the United States Environmental Protection Agency, Defendant, ALABAMA POWER COMPANY, et al.; SALT RIVER PROJECT, et al.; et al., Intervenors.	CV 82-6850 RPA ORDER GRANTING INTERVENORS' MOTION RE: DEADLINE EXTENSION

IT IS HEREBY ORDERED:

1. Intervenors' Motion to Extend Deadlines for Rulemaking is hereby GRANTED.

2. Intervenors contend that the Environmental Protection Agency's (hereinafter the EPA) rulemaking deadlines should be extended so that Intervenors can conduct their own studies of

visibility impairment in the Grand Canyon. They assert that these studies would show that Intervenors are not liable for the problem and that imposition of BART technology would be prohibitively costly and useless in addressing the visibility problem. Intervenors also contend that additional time would allow the EPA to more fully consider that Intervenors' comments on the proposal. Intervenors further contend that the EPA has used the Court-imposed deadlines to avoid compliance with certain procedural laws.

3. The Supreme Court has stated that "[a]bsent constitutional constraints or extremely compelling circumstances the 'administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'' [Cite omitted.]" Vt. Yankee Nuclear Power v. Natural Resources Defense Counsel, 435 U.S. 519, 543 (1978). The Court also stated that "for more than four decades [it has] emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." Id. at 524.

4. The Clean Air Act (hereinafter the CAA) states that rulemaking procedures lie within the control and direction of the Administrator of the EPA and the CAA further directs the Administrator how to carry out his or her duties and responsibilities. 42 U.S.C. { 7607. The Code further states that "[t]he sole forum for challenging procedural determinations

made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit . . . at the time of the substantive review of the rule." 42 U.S.C. § 7607(d)(8).

5. Paragraph 6 of the Order approved in the present case by this Court on April 20, 1984 states that the "time limits" contained in the Order may be extended "by the Court" upon a showing of good cause.

In the case at bar, Intervenors argue that the final outcome of the rulemaking will result in a $1.6 billion dollar expenditure by the Intervenors. They argue that such an expense is not justified in light of the minimal help it could render to visibility concerns. The Court finds that the possible expenditure of $1.6 billion dollars constitutes a showing of good cause for adjustment of the time limits. Such an enormous expense would eventually be passed on to utility consumers for years to come. This overwhelming possibility requires the Court to extend the time limits of the Order.

Finally, the Court does not seek to impose its own decisions upon the parties regarding the nature of the rulemaking. This would be in direct contradiction to the Vermont Yankee case cited above. The Court merely extends the period of time in which the rulemaking may occur, and does not impose any particular decision

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on the EPA. Additionally, the parties will have the opportunity to raise their procedural claims to the Court of Appeals, pursuant to the CAA. Therefore, this Court grants the Intervenors' motion to extend the EPA's rulemaking deadlines.

6. The provisions of the amended stipulation approved by Order of this Court on July 6, 1989, are hereby modified as follows:

(1) Paragraph 4(m) is modified by changing "February 1, 1990" to "February 1, 1991."

(2) Paragraph 4(n) is modified by insertion in lieu thereof the following paragraph:

"4(n) If a proposal is issued pursuant to Paragraph 4(m), provide that the comment period shall close by a date not later than April 2, 1991, unless the Administrator extends the comment period for good cause shown;"

(3) Paragraph 4(o) is modified by insertion in lieu thereof the following paragraph:

"4(o) If a proposal is issued pursuant to Paragraph 4(m), take final action on that proposal and on any proposed identification under Paragraph 4(i) not later than October 2, 1991, or, if later, 6 months after the

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close of the comment period on the proposal made pursuant to Paragraph 4(m) or the close of the record under section 307(d)(5)(iv) of the Clean Air Act."

IT IS SO ORDERED.

DATED: JAN. 9, 1990

James M. Ideman

JAMES M. IDEMAN
United States District Judge