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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION

No. 2:11-cv-00384-MCE-GGH

Plaintiff,

v.

MEMORANDUM AND ORDER

MARY D. NICHOLS; Chairperson
of the California Air
Resources Board; JAMES
GOLDESTENE, Executive Office
of the California Air
Resources Board,

Defendants.

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Plaintiff California Dump Truck Owners Association
("Plaintiff") initiated this action against the Chairperson and
the Executive Officer of California's Air Resources Board
(hereafter collectively the "ARB") seeking to enjoin enforcement
of the ARB's Truck and Bus Regulation ("Regulation") on the basis
it is preempted by federal law.

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1 Presently before the Court is a Motion to Intervene ("Motion")
2 filed by the Natural Resources Defense Council, Inc. ("NRDC").
3 For the following reasons, the NRDC's Motion is GRANTED.¹
4

5 **BACKGROUND**
6

7 The Regulation, which is formally entitled "Regulation to
8 Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen
9 and Other Criteria Pollutants from In-Use Heavy-Duty Diesel-Fueled
10 Vehicles," 13 California Code of Regulations § 2025, sets fuel
11 emission standards for heavy-duty, diesel-fueled vehicles driven
12 on or designed to be driven on public highways and is intended to
13 reduce vehicle emissions. Plaintiff's First Amended Complaint,
14 ¶ 4. The Regulation is expected to drastically reduce fuel
15 emissions and to positively affect the health of California's
16 citizens. Motion, 3:1-16.

17 The NRDC's organizational purpose "is to protect the
18 environment and public health, including the environment and
19 health of its members." Id., 6:11-13. It is a national non-
20 profit organization with more than 400,000 members nationwide and
21 more than 70,000 California members. Id., 6:9-16. According to
22 the NRDC, many of its California members reside "near
23 transportation corridors where vehicles covered by the Regulation
24 will travel." Id., 6:15-16.

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27 ¹ Because oral argument will not be of material assistance,
28 the Court ordered this matter submitted on the briefing. E.D.
Cal. Local Rule 230(g).

1 While all NRDC members benefit from the Regulation's anticipated
2 reduction in vehicle emissions, and from the consequent reduction
3 in health risks, those members living near impacted freeways are
4 significantly affected by the rule. Id., 6:17-21. The NRDC thus
5 contends that, if Plaintiff is successful in its claims, "NRDC's
6 efforts to reduce diesel emissions across the state will be
7 significantly impaired and the health benefits of the Regulation
8 will be lost." Id., 7:23-8:1.

9 As part of the NRDC's efforts, it spent over two years
10 actively advocating passage of the Regulation. Id., 3:17-21.
11 More specifically, the "NRDC attended meetings with [ARB] staff
12 to help develop the Regulation, provided written comments to
13 [ARB] advocating that the Board strengthen the Regulation,
14 participated in public workshops on the Regulation, and testified
15 before [ARB] at the public hearing urging adoption of the
16 Regulation." Id., 3:18-21.

17 "During the rulemaking process, NRDC disagreed with [ARB]
18 over many aspects of the Regulation, with NRDC advocating for
19 more stringent controls." Id., 9:1-3. Moreover, despite the
20 NRDC's objections, the ARB amended the Regulation in December
21 2010, weakening compliance provisions and delaying the
22 implementation schedule for some requirements. Id., 9:3-6. Even
23 during the course of this still-new litigation, the NRDC has
24 taken issue with the ARB's defense of the rule, pointing to
25 statements in the ARB's Answer as evidence of the ARB's
26 willingness to amend the Regulation even further to appease
27 Plaintiffs.

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1 Reply, 11:16-12:3 (quoting ARB's Answer, ¶ 27 ("Plaintiff's claim
2 will soon be moot because the [ARB] is presently considering
3 amending the regulation at issue to make it less stringent for
4 dump trucks and other heavy duty trucks and buses.")). The NRDC
5 and the ARB have thus been at odds over the Regulation on a
6 number of occasions. Motion, 9:9-10.

7 The NRDC now argues that it should be allowed to intervene
8 as a matter of right pursuant to Federal Rule of Civil Procedure
9 24(a)(2).² Alternatively, Plaintiffs seek permissive
10 intervention under the provisions of Rule 24(b).

11 Plaintiff opposes the NRDC's Motion, though the ARB does
12 not. According to Plaintiff, its suit presents only a "binary"
13 question: "either the regulation is preempted or it is not."
14 Opposition, 2:5. Plaintiff thus argues that the NRDC will
15 unlikely be able to contribute anything meaningful to this
16 litigation because the law on preemption is settled, the relevant
17 facts are likely to be undisputed and settlement is unlikely.
18 Id., 2:8-12.

20 ANALYSIS

21 A. Intervention as of Right

22
23 An intervenor as a matter of right must meet all
24 requirements of Rule 24(a)(2) by showing:

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28 ² All further references to "Rule" or "Rules" are to the
Federal Rules of Civil Procedure unless otherwise noted.

1 (1) it has a significant protectable interest relating
2 to the property or transaction that is the subject of
3 the action; (2) the disposition of the action may, as a
4 practical matter, impair or impede the applicant's
ability to protect its interest; (3) the application is
timely; and (4) the existing parties may not adequately
represent the applicant's interest.

5 In evaluating whether these requirements are met,
6 courts "are guided primarily by practical and equitable
7 considerations." Further, courts generally "construe
8 [the Rule] broadly in favor of proposed intervenors."
9 "'A liberal policy in favor of intervention serves both
10 efficient resolution of issues and broadened access to
11 the courts. By allowing parties with a practical
12 interest in the outcome of a particular case to
13 intervene, we often prevent or simplify future
14 litigation involving related issues; at the same time,
15 we allow an additional interested party to express its
16 views before the court.'"

17 United States v. City of Los Angeles, 288 F.3d 391, 397-98 (9th
18 Cir. 2002) (citations omitted).

19 In its Opposition, Plaintiff challenges only whether the
20 NRDC has a significantly protectable interest related to the
21 litigation and whether, absent intervention, the ARB will
22 adequately represent the NRDC's interests. Each of the
23 aforementioned requirements articulated in Rule 24(a)(2) will
24 nonetheless be addressed in turn below.

25 **1. NRDC's application to intervene is timely.**

26 Three facts must be evaluated to determine whether a motion
27 to intervene is timely:

28 (1) the stage of the proceeding at which an applicant
seeks to intervene; (2) the prejudice to other parties;
and (3) the reason for and length of the delay. Delay
is measured from the date the proposed intervenor
should have been aware that its interests would no
longer be protected adequately by the parties, not the
date it learned of the litigation.

1 United States v. State of Washington, 86 F.3d 1499, 1503 (9th
2 Cir. 1996) (internal citations omitted). "Timeliness is to be
3 determined from all the circumstances" in the court's "sound
4 discretion". NAACP v. New York, 413 U.S. 345, 366 (1973).

5 Plaintiff does not dispute the timeliness of the NRDC's
6 request. Plaintiff filed its case in February, amended its
7 complaint at the beginning of April and no substantive
8 proceedings have been had. The NRDC's Motion is therefore
9 timely.

10
11 **2. The NRDC has a significant protectable interest**
12 **related to the subject matter of this litigation.**

13 A proposed intervenor has "a 'significant protectable
14 interest' in [the] action if (1) [it asserts] an interest that is
15 protected under some law, and (2) there is a 'relationship'
16 between [that] legally protected interest and the plaintiff's
17 claims." City of Los Angeles, 288 F.3d at 398 (quoting Donnelly
18 v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998)). "The 'interest'
19 test is not a clear-cut or bright-line rule, because '[n]o
20 specific legal or equitable interest need be established.'" Id.
21 (quoting Greene v. United States, 996 F.2d 973, 976 (9th Cir.
22 1993)). Under the interest test courts are required "to make a
23 'practical, threshold inquiry,' to discern whether allowing
24 intervention would be 'compatible with efficiency and due
25 process.'" Id. (citations omitted).

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1 An applicant may satisfy the requirement of a "significant
2 protectable interest" if resolution of the plaintiff's claims
3 will affect the applicant for intervention. Montana v. United
4 States Env'tl. Protection Agency, 137 F.3d 1135, 1141-42 (9th Cir.
5 1998). A "significant protectable interest" exists if the
6 applicant asserts an interest protected by law and there is a
7 "relationship" between that interest and the plaintiff's claims.
8 Donnelly, 159 F.3d at 409. The requisite interest need not be
9 direct as long as it may be impaired by the outcome of the
10 litigation. Cascade Natural Gas Corp. v. El Paso Natural Gas
11 Co., 386 U.S. 129, 135-36 (1967).

12 The NRDC cites two protectable interests as the basis for
13 its intervention: 1) its members' interests in reducing the
14 public health impacts of diesel emissions in California; and
15 2) its interests in upholding regulations the adoption of which
16 they actively advocated.

17 First, the NRDC argues that numerous of its California
18 members live near transportation corridors where vehicles covered
19 by the Regulation travel. These members will be affected the
20 most by the localized increase in emissions that will result from
21 a finding that the regulation is preempted.

22 In addition, the NRDC points out that it worked with the ARB
23 for over two years to develop the Regulation, and that the NRDC
24 advocated both the Regulation's adoption and strengthening. The
25 NRDC attended meetings with ARB staff, provided written comments,
26 participated in public workshops and testified before ARB to urge
27 adoption of the Regulation.

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1 Both of the NRDC's articulated interests are sufficient to
2 support intervention. To reiterate, the NRDC is not obligated to
3 identify a "specific legal or equitable interest." It is enough
4 that the NRDC members benefit from the challenged legislation by
5 way of improved air quality and health. See Californians for
6 Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184,
7 1189-90 (9th Cir. 1998) (union permitted to intervene in suit
8 challenging state prevailing wage laws because union members had
9 a significant interest in receiving those wages). Even if that
10 were not the case, however, the NRDC's interests are protected
11 under numerous federal and state statutes, such as the Clean Air
12 Act, 42 U.S.C. § 7401(b), the California Health and Safety Code
13 §§ 39000-01, and the Regulation itself. In addition, a public
14 interest organization has a significantly protectable interest in
15 defending legislation it supported. Idaho Farm Bureau Fed'n v.
16 Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995) ("A public interest
17 group is entitled as a matter of right to intervene in an action
18 challenging the legality of a measure it has supported.");
19 Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir.
20 1983). As such, the Court concludes here that a significant
21 protectable interest has been demonstrated.

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1 **3. Disposition of this matter, may, as a practical**
2 **matter, impair or impede the NRDC's ability to**
3 **protect its interests.**

4 According to the NRDC, a decision in Plaintiff's favor would
5 impair the NRDC's ability to protect its and its members'
6 interests in reducing the public health impacts of diesel
7 emissions in California as well as its interests in upholding
8 regulations the adoption of which they actively advocated.
9 Because of their proximity to highway corridors, some NRDC
10 members will suffer direct and immediate health consequences from
11 a ban on the enforcement of the Regulation's emissions reduction
12 standards. Finally, a decision for Plaintiff will undermine the
13 NRDC's advocacy efforts in supporting the passage of the
14 Regulation over the last several years. As the NRDC points out,
15 if the Regulation is struck down, it cannot "simply turn around
16 and adopt a similar regulation the next day that would result in
17 the same level of emissions reductions sorely needed for the
18 state to meet federal air quality standards." Reply, 5:17-19.
19 Consequently, this threshold requirement for intervention is also
20 satisfied.

21
22 **4. Existing parties may not adequately protect the**
23 **NRDC's interests.**

24 When determining whether a proposed intervenor's interests
25 are adequately represented, the following factors are considered:

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1 (1) whether the interest of a present party is such
2 that it will undoubtedly make all the intervenor's
3 arguments; (2) whether the present party is capable and
4 willing to make such arguments; and (3) whether the
would-be intervenor would offer any necessary elements
to the proceedings that such other parties would
neglect.

5 City of Los Angeles, 288 F.3d at 398 (citations omitted).

6 The burden of showing that existing parties may inadequately
7 represent the NRDC's interests is a minimal one. As noted by the
8 Supreme Court, all the applicant needs to show is that "the
9 representation of [its] interest 'may be' inadequate." Trbovich
10 v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972).

11 Any doubt as to whether the existing parties will adequately
12 represent the intervenor should be resolved in favor of
13 intervention. Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special
14 Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993).

15 "The most important factor in determining the adequacy of
16 representation is how the interest compares with the interests of
17 existing parties. When an applicant for intervention and an
18 existing party have the same ultimate objective, a presumption of
19 adequacy arises. If the applicant's interest is identical to
20 that of one of the present parties, a compelling showing should
21 be required to demonstrate inadequate representation. There is
22 also an assumption of adequacy when the government is acting on
23 behalf of a constituency that it represents. In the absence of a
24 very compelling showing to the contrary, it will be presumed that
25 a state adequately represents its citizens when the applicant
26 shares the same interest." Arakaki v. Cayetano, 324 F.3d 1078,
27 1086 (9th Cir. 2003) (internal citations and quotations omitted).

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1 While the NRDC and the ARB may share the same "ultimate
2 objective," namely defending the regulation against Plaintiff's
3 preemption argument, the parties' interests are neither
4 "identical" nor "the same." See Sw. Ctr for Biological Diversity
5 v. Berg, 268 F.3d 810, 823 (9th Cir. 2001) (presumption of
6 adequacy can be overcome by showing the parties "do not have
7 sufficiently congruent interests"). In fact, their interests are
8 not only different, they are in some respects adverse. The ARB
9 is a public agency that must balance relevant environmental and
10 health interests with competing resource constraints and the
11 interests of various constituencies (including Plaintiff's),
12 interests that can be, and here are, at odds with the NRDC's
13 interests. Indeed, the ARB's mission is to "promote and protect
14 public health, welfare and ecological resources through the
15 effective and efficient reduction of air pollutants while
16 recognizing and considering the effects on the economy of the
17 state." Motion, 8 n.9 (quoting the ARB's Mission, goal, and
18 Strategic Plan) (emphasis added). The NRDC, on the other hand,
19 is not required to balance any economic impact against its own
20 considerations pertaining to health and environmental
21 protections.

22 Moreover, prior to the passage of the Regulation, the NRDC
23 and the ARB were directly at odds on a number of pertinent
24 issues. Against the NRDC's objections, the ARB has already taken
25 steps to weaken the Regulation by amending certain compliance
26 provisions and pushing out compliance deadlines.

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1 Likewise, in its answer, the ARB indicates it is further
2 considering amending the Regulation to make its application "less
3 stringent" for vehicles such as those owned by Plaintiff's
4 members. The NRDC argues that ARB's past practices, along with
5 its current willingness to amend the Regulation, indicate the
6 NRDC is willing to compromise unnecessarily to appease Plaintiff
7 and to settle this action. The NRDC has thus made a sufficient
8 showing that its interests not only diverge from those of the
9 ARB, but at times are adverse to the ARB's.

10 Based on the above analysis, the NRDC has therefore made the
11 requisite showing that the ARB may not adequately represent its
12 interests because the NRDC has provided evidence that: 1) as
13 described above, the NRDC's interests are more "narrow and
14 parochial" than those of the ARB, which is tasked not only with
15 considering the environmental effects of its regulation, but also
16 with considering the economic impact its rules will have on the
17 state as a whole; and 2) despite the NRDC's protests, the ARB is
18 willing to compromise, and potentially eviscerate, the Regulation
19 in favor of Plaintiff's interests.³

21 ³ See California, ex rel. Bill Lockyer v. United States,
22 450 F.3d 436, 445 (9th Cir. 2006) (proposed intervenors overcame
23 presumption of showing government would adequately represent
24 their interests when intervenors had "more narrow, parochial
25 interests" than the government and intervenors had presented
26 evidence that the government would "take a position that actually
27 compromise[d] (and potentially eviscerate[d]) the protections of
28 the [challenged law]"); Golden Gate Rest. Ass'n v. City and
County of San Francisco, 2007 WL 1052820, * (N.D. Cal.)
(observing that the assumption of adequacy arising when a
government agency acts on behalf of its constituents may be
overcome by a showing that the proposed intervenor's interests
are "more narrow and parochial than the interests of the public
at large") (citing Californians For Safe and Competitive Dump
(continued...)

1 The requirement that existing parties may not adequately
2 represent the NRDC's interests is therefore satisfied.

3 After considering all of the intervention factors as set
4 forth above, the Court finds that the NRDC is entitled to
5 intervene as a matter of right in this action.

6
7 **B. Permissive Intervention**
8

9 Even if the NRDC had failed to make the requisite showing
10 that it is entitled to intervene as of right, the Court finds
11 permissive intervention proper as well. Permissive intervention
12 is appropriate if the moving party satisfies three requirements:

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17 ³(...continued)
18 Truck Transp., 152 F.3d at 1190 ("because employment interests of
19 [union's] members were potentially more narrow and parochial than
20 the interests of the public at large, [union] demonstrated that
21 the representation of its interests by [the state] may have been
22 inadequate"); Forest Conservation Council v. U.S. Forest Serv.,
23 66 F.3d 1489, 1499 (9th Cir. 1995) (intervenor met its burden of
24 showing inadequate representation when government was "required
25 to represent a broader view than the more narrow, parochial
26 interests" of the intervenor); In Defense of Animals v. U.S.
27 Dept. of Interior, 2011 WL 1085991, *3 (E.D. Cal.) (intervenor
28 made showing government may not adequately represent its
interests when intervenor "had specific interests...that may not
be shared by the Federal defendants, who represent a wide variety
of sometimes competing interests held by various segments of the
general public"); see also Arakaki, 324 F.3d 1087 (upholding
denial of intervention when the government made clear it would
make all necessary arguments to protect the would-be intervenors'
rights, no conflict prevented the state agency from making those
arguments, the would-be intervenor failed to show it would offer
any necessary elements not already offered in the litigation, and
similarly-situated parties had already been permitted to
intervene in the action).

1 "(1) the movant must show an independent ground for jurisdiction;
2 (2) the motion must be timely; and (3) the movant's claim of
3 defense and the main action must have a question of law and fact
4 in common." Venegas v. Skaggs, 867 F.2d 527, 529 (9th Cir.
5 1989), aff'd, 495 U.S. 82 (1990); see also Fed. R. Civ. Proc.
6 24(b).

7 This Court has an independent ground for jurisdiction under
8 28 U.S.C. §§ 1331 and 1367, the NRDC's defenses and the main
9 action raise common questions of law and fact, and the Court has
10 already found above the Motion is timely. Plaintiff's only
11 arguments in opposition to permissive intervention are that the
12 NRDC will add nothing of substance to the litigation of this
13 matter and that Plaintiff will be prejudiced by having to
14 litigate against both "the awesome power of the State" and a
15 "well-funded, nationwide organization." Opposition, 6:19-25. In
16 light of the NRDC's above-discussed interest in the merits of
17 this litigation, Plaintiff's objection is insufficient to warrant
18 denial of the Motion. Indeed, were this Court to accept
19 Plaintiff's unsupported argument that it will be unduly burdened
20 by litigating against the state and an intervenor, there would be
21 almost no case in which permissive intervention would be granted.
22 See also City of Los Angeles, 288 F.3d at 404 ("[T]he idea of
23 'streamlining' the litigation...should not be accomplished at the
24 risk of marginalizing those...who have some of the strongest
25 interests in the outcome.").

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1 Likewise, the NRDC has shown that it will bring a unique
2 perspective and expertise to this action that will not
3 necessarily, as Plaintiff suggests, duplicate the ARB's role.
4 Accordingly, the Court finds permissive intervention is
5 warranted.

6
7 **CONCLUSION**
8

9 For the reasons just stated, the NRDC's Motion to Intervene
10 (ECF No. 10) is GRANTED. The NRDC is ordered to file its Answer
11 not later than ten (10) days following the date this Order is
12 electronically filed.

13 IT IS SO ORDERED.

14 Dated: May 20, 2011

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MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE