

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:13-cv-02748-RBJ-MJW

WILDEARTH GUARDIANS,

Plaintiff,

v.

GINA McCARTHY, in her official capacity as  
Administrator of the United States Environmental  
Protection Agency,

Defendant.

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**MOTION TO INTERVENE BY THE STATE OF OKLAHOMA  
AND THE OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY**

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Applicants-in-Intervention the State of Oklahoma and the Oklahoma Department of Environmental Quality (“**ODEQ**”, collectively ODEQ and the State are referred to as “**Oklahoma**”), through undersigned counsel, and pursuant to Fed. R. Civ. P. 24(a) respectfully request this Court enter an order granting Oklahoma intervention as of right as a party in this action as a Defendant-Intervenor. In the alternative, Oklahoma respectfully requests the Court grant it permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1)(B). In support of its Motion, Oklahoma attaches the affidavit of John Edward Terrill, Division Director of the ODEQ Air Quality Division, setting forth the nature of Oklahoma’s interests in this proceeding.

Pursuant to D.C.COLO.LCivR 7.1A, on January 29, 2014, counsel for Oklahoma contacted all counsel of record in these proceedings requesting that counsel provide a response regarding the relief requested herein by February 3, 2014. Plaintiff WildEarth Guardians

(“WEG”) does not oppose Oklahoma’s Motion. Defendant Administrator McCarthy takes no position on Oklahoma’s Motion. As grounds for this motion, Oklahoma states as follows:

**STATEMENT OF RELEVANT FACTS**

**I. Legal and Factual Background**

On October 9, 2013, pursuant to 42 U.S.C. § 7604(a)(2), Plaintiff filed a complaint alleging that the United States Environmental Protection Agency and its Administrator (hereafter collectively “EPA” or “Agency”) failed to perform a nondiscretionary duty under the Clean Air Act (“CAA” or “Act”). Specifically, Plaintiff alleges that the Administrator had a duty to make a “finding of failure” within six months after the date by which Oklahoma is alleged to have failed to submit to EPA a state implementation plan (“SIP”) that provides for the implementation, maintenance and enforcement of the revised national ambient air quality standard (“NAAQS”) for nitrogen dioxide (“NO<sub>2</sub>”). Compl. ¶¶ 3, 31. Plaintiff further alleges that the Administrator’s failure to take such action constitutes a failure to perform an act or duty that is not discretionary within the meaning of section 304(a)(2) of the CAA, 42 U.S.C. §7604(a)(2). Compl. ¶ 4.

EPA promulgates NAAQS for certain air pollutants that the Agency anticipates endanger public health or welfare. CAA §§ 108(a)(1), 109(a), 42 U.S.C. §§ 7408(a)(1), 7409(a). “Primary” NAAQS are at the level “requisite to protect the public health” and “allowing an adequate margin of safety,” and “secondary” NAAQS “specify a level of air quality” that “is requisite to protect the public welfare from any known or anticipated adverse effects.” CAA §109(b)(1) & (2); 42 U.S.C. § 7409(b)(1) & (2). NAAQS are “based on” air quality criteria that “accurately reflect the latest scientific knowledge useful in indicating the kind and extent of” effects of the pollutant “on public health or welfare,” CAA §§ 108(a)(2), 109(b)(1) & (2); 42 U.S.C. §§ 7408(a)(2), 7409(b)(1) & (2), and promulgated through a rulemaking process defined by the Act.

CAA § 307(d), 42 U.S.C. § 7607(d). EPA must review both the NAAQS and the air quality criteria on which they are based at least every five years and may revise them “as may be appropriate.” CAA § 109(b)(1) & (2), (d)(1), 42 U.S.C. § 7409(b)(1) & (2), (d)(1).

Once EPA sets a new or revised ambient standard, the Act requires States (like Oklahoma) to play a leading role in implementing that standard. This role is consistent with the cooperative federalism approach set forth in the CAA. The CAA establishes “a comprehensive national program that makes the States and the Federal Government partners in the struggle against air pollution.” *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). At the same time, the CAA recognizes that “air pollution prevention . . . and air pollution control at its source **is the primary responsibility of States** and local governments.” 42 U.S.C. § 7401(a)(3) (emphasis added); *see also id.* § 7407(a) (“Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . .”).

On January 22, 2010, EPA promulgated the NO<sub>2</sub> NAAQS, setting a new 1-hour standard of 100 ppb. *See* 75 Fed. Reg. 6474/1. Prior to EPA’s January 22, 2010 rule, there was no one-hour NO<sub>2</sub> standard. Under CAA § 107(d), within one year of EPA’s setting of a new ambient standard, the governor of each State must submit to EPA information indicating which parts of the State meet that standard (designated “attainment areas”), which parts of the State do not meet the standard (“nonattainment areas”), and which parts of the State cannot be classified attainment or nonattainment because adequate data are not available to make a determination one way or another (“unclassifiable areas”). *See also* 75 Fed. Reg. 6520/1. Based primarily upon the § 107(d) recommendations submitted by the States, EPA must then publish final “designations” of all areas as attainment, nonattainment, or unclassifiable. *See* 42 U.S.C. § 7407(d)(1)(B).

On January 3, 2011, the Governor of Oklahoma submitted to EPA the State's proposed initial designations under the NO<sub>2</sub> NAAQS, recommending that all areas in Oklahoma be designated as attainment. *See* Affidavit at ¶ 4. Oklahoma's recommended designation of attainment for the entire State for the 1-hour NO<sub>2</sub> NAAQS was based upon monitored data collected that demonstrated compliance with the new NAAQS. *See id.* Despite Oklahoma's monitoring data showing compliance, EPA designated Oklahoma, along with all other areas of the country as being unclassifiable/attainment with the 1-hour NO<sub>2</sub> NAAQS. *See* 77 Fed. Reg. 9532, 9534/1, 9573-74 (February 17, 2012).

The CAA requires that within three years after the promulgation of the NO<sub>2</sub> NAAQS, States prepare and submit "a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State." 42 U.S.C. § 7401(a)(1). The implementation plans described in § 7401(a)(1) and in (a)(2)(A)-(M) are commonly referred to as infrastructure state implementation plans or "Infrastructure SIPs." The States were required to submit their NO<sub>2</sub> NAAQS Infrastructure SIPs to EPA for review and approval by no later than January 22, 2013. *See* 2 U.S.C. § 7401(a)(1).

In promulgating the NO<sub>2</sub> NAAQS, EPA announced to the States that "EPA may provide additional guidance in the future, as necessary, to assist States and emission sources to comply with the CAA requirements for implementing new or revised NO<sub>2</sub> NAAQS". 75 Fed. Reg. 6521/3. The "additional guidance" EPA refers to in its final rule, is guidance to the States on how they should develop their Infrastructure SIPs. If EPA does not timely publish its guidance, States are forced to either delay the preparation and submission of their Infrastructure SIPs until such guidance is issued, or move forward without the needed EPA guidance. On September 13, 2013, nine months after the States were required to submit to EPA their Infrastructure SIPs, EPA

first issued its “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2),” (“**Infrastructure SIP Guidance**”). *See* <http://www.epa.gov/airquality/urbanair/sipstatus/docs/Guidance%20on%20Infrastructure%20SIP%20Elements%20Multipollutant%20FINAL%20Sept%202013.pdf> . Within its belated Infrastructure SIP Guidance, EPA “acknowledge[d] that air agencies continue to express concerns about the EPA’s issuance of timely guidance to assist their efforts to implement a new or revised NAAQS.” Infrastructure SIP Guidance at 2.

The State of Oklahoma, through the ODEQ implements and enforces the State’s various environmental regulatory programs. Specifically, the ODEQ is the agency in charge of preparing and developing the NO<sub>2</sub> Infrastructure SIP. *See* Affidavit at ¶ 2. Because there had never been a 1-hour NO<sub>2</sub> NAAQS prior to EPA’s promulgation of the standard in 2010, Oklahoma’s infrastructure SIP had to be revised in order to accommodate the new 1-hour standard. *See* Affidavit at ¶2. However, Oklahoma chose not to proceed with finalizing its Infrastructure SIP until after EPA issued the Infrastructure SIP Guidance. *See* Affidavit at ¶10.

Oklahoma’s NO<sub>2</sub> NAAQS Infrastructure SIP was posted for public comment on January 15, 2014. *See* Affidavit at ¶ 8. The public has a minimum of 30-days from January 15 in which to comment on the proposed SIP. *See id.* Should a hearing on the Infrastructure SIP be requested by a member of the public that hearing would occur on February 19, 2014. *See id.* Upon completion of the public comment process, the Infrastructure SIP will be forwarded to the Oklahoma Secretary of Energy and Environment for review for submission to EPA. *See id.* It is anticipated this process could be completed by March 15, 2014. *See id.*

## **ARGUMENT**

### **I. Oklahoma Is Entitled To Intervention As A Matter Of Right.**

Oklahoma satisfies all of the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). Fed. R. Civ. P. 24 states that upon timely application, anyone shall be permitted to intervene in an action when the applicant claims interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the position of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by interested parties. *See* Fed. R. Civ. P. Rule 24(a). Intervention of right pursuant to Fed. R. Civ. P. 24 is not a test to be mechanically applied. *See San Juan County v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007). Courts must "exercise judgment based on the specific circumstances of the case" when determining whether to grant intervention by right. *Id.* (quoting *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001.))

The "central purpose" of Fed. R. Civ. P. 24 is to allow intervention by those who might be "practically disadvantaged" by a case's disposition. *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 970 (3rd Cir. 1998). The standards for intervention of right are to be "construed broadly in favor of applicants for intervention." *United States v. Oregon*, 913 F.2d 576, 587 (9th Cir. 1990). The Tenth Circuit follows a liberal line in allowing intervention. *See WildEarth Guardians v. USFS*, 573 F.3d 992, 995 (10th Cir.2009). As demonstrated below, Oklahoma satisfies all requirements of Rule 24(a) and is entitled to intervene in this action as of right.

#### **A. Oklahoma's Intervention Is Timely.**

The timeliness of a motion is determined from "all the circumstances." *Utah Ass'n.*, 255 F.3d at 1250. In particular, the Court must weigh four considerations, including "the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Id.* (quoting

*Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984) (citations omitted). Timeliness does not depend solely on the amount of time which has elapsed since the litigation began, but also on the purposes for which intervention is sought and the improbability of prejudice to existing parties. *See National Wildlife Fed'n v. Burford*, 878 F.2d 422, 433 (D.C. Cir. 1989).

Plaintiff filed its Complaint on October 9, 2013. ODEQ learned in December 2013 that the Complaint was filed. *See* Affidavit at ¶7. Upon learning of Plaintiff's Complaint and the parties' intent to explore settlement of the case, Oklahoma immediately began the process to seek intervention in this matter so as to protect Oklahoma's several sovereign and legally cognizable and distinct interests. On January 15, 2014, Defendant filed A Second Unopposed Motion for Extension of Time to Answer or Otherwise Respond to Plaintiff's Complaint, in which it sought, and was granted, an extension of time up to and including March 3, 2014. In its Motion for Extension of Time, Plaintiff indicated that it will be amending its Complaint to include EPA's failure to make findings for the States of Alaska and Hawaii. Doc. # 10 at ¶ 4. Second, the Motion notes that the parties are discussing possible settlement of Plaintiff's claims. *See id.* at ¶ 5.

Under the CAA, Oklahoma, not EPA, has the "primary responsibility for assuring air quality within the entire geographic area comprising" the State. 42 U.S.C. § 7407(a). Oklahoma, through its ODEQ, has been working to develop its NO<sub>2</sub> Infrastructure SIP as expeditiously as possible even before EPA released the Infrastructure SIP Guidance. *See* Affidavit at ¶9. As detailed further *infra*, Oklahoma is concerned that should Plaintiff and Defendant proceed to settle this matter without Oklahoma having a seat at the table, such a settlement will be harmful to Oklahoma and could be detrimental to the work that the ODEQ has completed to date on its

Infrastructure SIP. A settlement of Plaintiff's Complaint will certainly include an agreement as to when EPA must take action with respect to Oklahoma's Infrastructure SIP. As explained in Mr. Terrill's Affidavit, Oklahoma is proceeding as expeditiously as possible to complete the public notice and comment rulemaking process on its Infrastructure SIP. *See* Affidavit at ¶ 8. An agreement between the parties that requires EPA to make a "finding of failure" with respect to Oklahoma's Infrastructure SIP would prejudice Oklahoma. In addition, Oklahoma faces the prospect that in resolving this lawsuit, EPA could agree to promulgate a federal implementation plan ("FIP") for Oklahoma prior to receiving or considering Oklahoma's Infrastructure SIP, which would supplant Oklahoma's authority under the CAA to be the primary authority to prevent and control air pollution, as it relates to the NO<sub>2</sub> NAAQS, within its borders.

While Defendant may object to Oklahoma's intervention on the grounds that it will prejudice the parties by delaying their proposed "settlement" of this action, such an objection is not supportable. Any alleged prejudice to a proposed settlement is not a legally cognizable prejudice to the existing parties; the prejudice prong of the timeliness inquiry "measures prejudice caused by the intervenors' delay - not by the intervention itself." *Utah Ass'n.* at 1251 (internal citation omitted). Further, no substantive pleadings or proceedings have occurred in this case. Accordingly, there has been no delay by Oklahoma that would weigh against intervention. *See Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (no intervenor delay where no substantive proceedings had yet taken place). Allowing intervention at this early stage in the proceedings will not delay this action or otherwise prejudice the parties, since there will be no need to reopen or re-litigate any prior proceedings between the parties. Here, Oklahoma has not prejudicially delayed the proceedings because it promptly filed this Motion to Intervene as soon as practicable after learning of the Complaint and of the parties desire to settle the case

quickly. Allowing intervention at this early stage in the proceedings will not delay this action or otherwise prejudice the parties. Rather, denying Oklahoma's intervention will only result in prejudicing Oklahoma. Oklahoma's motion is timely.

**B. Oklahoma Has Significant Legally Cognizable Interests That Are Affected By This Litigation.**

Oklahoma has a "significant protectable interest" in preserving its ability to adequately and effectively participate in any settlement that results from this litigation. A proposed intervenor has a "significant protectable interest" justifying intervention as of right if the interest "could be adversely affected by the litigation." *San Juan Cnty.*, 503 F.3d at 1199. However, a Court must apply "practical judgment ... in determining whether the strength of the interest and the potential risk of injury to that interest justify intervention." *Id.* "[I]ntervention 'of right,' is not a mechanical rule. It requires courts to exercise judgment based on the specific circumstances of the case." *Id.*

The very real injuries faced by Oklahoma arise directly from the role that Oklahoma plays in CAA implementation generally and in the NO<sub>2</sub> NAAQS implementation process in particular. The CAA specifically assigns to the States the authority to develop and propose to EPA Infrastructure SIPs. *See* CAA § 110. Oklahoma's direct interest in this case arises from EPA and WEG proceeding to come to a settlement that will dictate how EPA proceeds with Oklahoma's Infrastructure SIP. The fact that EPA may have missed its statutory deadline to issue a "finding of failure" that Oklahoma has not yet submitted its Infrastructure SIP cannot be an argument against granting Oklahoma's intervention. "The interest of the intervenor is not measured by the particular issue before the court but is instead measured by whether the interest the intervenor claims is related to the property that is the subject of the action." *Utah Ass'n*, 255

F.3d at 1252. The subject of WEG’s action is Oklahoma’s, (and other States), Infrastructure SIP. If the character, content or timing of Oklahoma’s Infrastructure SIP is dictated to any extent by a process in which Oklahoma is not a proper participant, Oklahoma will suffer substantial harm to its several governmental interests under the CAA. Oklahoma has invested many hours of time and State resources working on this matter and can speak to the benefits that its citizens will receive from its Infrastructure SIP as opposed to a FIP developed and enforced by EPA. *See* Affidavit at ¶9. Accordingly, this case involves the significant interests of Oklahoma that warrant intervention as of right.

**C. The Disposition Of This Case Threatens To Impair Or Impede Oklahoma’s Interests.**

Intervention is appropriate where disposition of the case “may as a practical matter impair or impede” the ability of the intervenor to protect its interests. *See San Juan Cnty.*, 503 F.3d at 1201. In considering whether an applicant’s interests may be impaired by an action, the Tenth Circuit follows the guidance of the Rule 24 Advisory Committee notes, which state: “[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.” *See Id.* at 1195. Thus, both legal harms and practical impediments should be considered.

An applicant for intervention is impaired if “as a practical matter” that disposition of the Complaint will “impair or impede [their] interest.” *WildEarth Guardians v. Nat’l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010). However, the burden to demonstrate impairment is minimal. *See Coalition of Arizona/New Mexico Counties v. Dept. of the Interior*, 100 F.3d 837, 844 (10th Cir.1996). Oklahoma must only show that impairment is possible if its request for intervention is denied. *Id.*

As detailed above, any settlement of Plaintiff's claims will directly affect Oklahoma. Plaintiff's claims and requested relief threaten the sovereign interests of Oklahoma, including its delegated authority under the CAA to develop and implement Infrastructure SIPs. Further, any settlement or resolution of Plaintiffs' claims will direct when EPA must take action on Oklahoma's Infrastructure SIP. And the potential exists that a settlement of Plaintiff's claims could extend beyond directing EPA to only act by a date certain on Oklahoma's Infrastructure SIP. Such a result would gravely affect Oklahoma. As a partner with EPA in the fight against air pollution, and as the primary lead in air pollution control and prevention, Oklahoma must be part of the dialogue with EPA on when and how the Agency addresses the State's Infrastructure SIP. To exclude its partner from decisions that directly affect how Oklahoma is to proceed with implementing and enforcing the NO<sub>2</sub> NAAQS is contrary to the CAA. 42 U.S.C. § 7401(a)(3).

**D. Oklahoma's Interests Are Not Adequately Represented By Existing Parties.**

An applicant's burden to prove inadequate representation by existing parties is minimal and the possibility that the interest of the applicant and the existing parties may diverge does not need to be great. *Utah Ass'n.* at 1254. Indeed, the United States Supreme Court has held this "requirement of the rule is satisfied if the applicants show the representation of its interest 'may be' inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972). The Tenth Circuit has adopted the standard *Trbovich* established. *See San Juan Cnty.*, 503 F.3d at 1204.

Neither Plaintiff WildEarth Guardians, a not-for-profit environmental organization, nor EPA, a Federal regulatory agency, can adequately represent Oklahoma's interests. Further, Oklahoma is not presumed to be adequately represented by EPA since Oklahoma seeks to protect State and local interests not necessarily shared or represented by EPA. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993). If granted intervention,

Oklahoma is likely to assert arguments that EPA cannot make. At this early stage of litigation, before EPA has filed a responsive pleading or Plaintiff has filed any additional pleadings, it is impossible to predict Plaintiff or the Agency's ultimate position on the issues in this case. But it is safe to predict that neither Plaintiff nor EPA will make all of Oklahoma's arguments, particularly arguments related to Oklahoma's unique role under the CAA and how that role and responsibility is harmed should the parties proceed to a settlement that ignores Oklahoma's interests and responsibilities under the CAA.<sup>1</sup> Moreover, beyond their different interests and objectives in this case, Oklahoma, WEG and EPA may disagree about issues during the course of litigation, especially the nature of any potential remedy or the terms of any potential settlement of the case.

Courts have recognized that an intervenor's interest in the terms of an action's resolution may differ substantially from that of the other parties. *See Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 132-33 (2d Cir. 2001) (party may have interest in ending litigation through settlement that is against the interest of potential intervenors); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 906-08, 912-13 (D.C. Cir. 1977) (interest in implementation of settlement sufficient grounds for intervention as of right). If the parties to this case propose a settlement agreement, Plaintiff, EPA and Oklahoma may have substantially different views on the timeline for any potential remedy.

In short, Oklahoma's interests in protecting its sovereign interests are of highest priority. No other party to this case has the same role in implementing the NO<sub>2</sub> NAAQS under the CAA as does Oklahoma. Plaintiff, an environmental organization and not a sovereign entity delegated

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<sup>1</sup> In two recent cases, Oklahoma sued EPA after the Agency took actions that ignored Oklahoma's authority under the CAA and the Agency sought instead to impermissibly impose its preference for how Oklahoma should implement certain CAA programs. *See Oklahoma v. U.S. E.P.A.*, 723 F.3d 1201 (10th Cir. 2013) and *ODEQ v. EPA*, No. 11-1307 ( D.C. Cir. Jan. 17, 2014).

by the CAA with a unique role and responsibility to partner with EPA to prevent air pollution, cannot represent the unique interests of Oklahoma. Therefore, Oklahoma must be allowed to intervene to protect its interests. And EPA cannot represent Oklahoma's interests since EPA does not represent the unique State and local interests that only Oklahoma can represent.

## **II. In The Alternative Oklahoma Should Be Granted Permissive Intervention.**

Even if this Court were to deny Oklahoma's leave to intervene as of right, the Court should still grant it permissive intervention under Federal Rule of Civil Procedure 24(b). Rule 24(b) provides the Court discretion to grant permissive intervention "[o]n timely motion" to anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); *see Lower Arkansas Valley Water Conservancy Dist. v. United States*, 252 F.R.D. 687, 690 (D. Colo. 2008) ("Permissive intervention requires as its starting point that a would-be intervenor have a 'claim or defense that shares with the main action a common question of law or fact,'" citing Fed.R.Civ.P. 24(b)(1)(B)).

There is no question that this intervention is timely and advances defenses that share common questions of law or fact with the main action. As described *supra*, this motion is timely, given the limited amount of time that has elapsed since Plaintiff filed its Complaint and given that no answer or substantive motions have yet been filed. Permitting intervention here will not cause any delay or otherwise prejudice the parties to this case because there will be no need to reopen any prior proceedings between them. *See* Fed. R. Civ. P. 24(b)(3) (court must consider whether intervention would "unduly delay or prejudice the adjudication of the original parties' rights"). In addition, Oklahoma's defense involves common issues of fact and law that are the subject of Plaintiff's Complaint against EPA. Oklahoma seeks to defend its authority under the CAA to develop, submit and implement its Infrastructure SIP.

In *Sierra Club et al. v. Regina McCarthy et al.*, Case No.4:13-cv-03953-KAW (N.D. Cal. August 26, 2013), seven States were granted permissive intervention under Fed. R. Civ. P. 24(b) so as to protect and defend their authority under the CAA. *See* Order, Doc. #79. In the case of *Sierra Club v. McCarthy*, like the present case, an environmental organization filed a complaint against EPA because of the Agency's failure to perform timely its nondiscretionary duty act to promulgate in all fifty States area designations for the recently revised sulfur dioxide (“SO<sub>2</sub>”) NAAQS. In *Sierra Club*, each of the seven intervening States submitted to EPA proposed area designations for the SO<sub>2</sub> NAAQS, which EPA has yet to take action on. And as in this case, the parties in *Sierra Club* were seeking to proceed with settlement discussions without the States whose SO<sub>2</sub> NAAQS designations are at issue in the case.

Sierra Club opposed the seven States' request for intervention by right, as did EPA, and the States' request in the alternative for permissive intervention. EPA took no position on the States' request in the alternative for permissive intervention. In granting the States intervention, the Court found that “[e]ven if, as the parties assert, the remedy in this case will be limited to a court-ordered deadline for EPA to complete its designations, the States will be directly affected because they have an interest in when the EPA makes its designations.” Order at 2-3. Oklahoma will be directly affected by the outcome of this case because it is Oklahoma's Infrastructure SIP and its status that is at issue before this Court. Therefore, Oklahoma satisfies all of the requirements for permissive intervention.

### **III. The Court Should Allow Intervention Without Requiring The Filing Of A “Pleading” In Conjunction With The Motion To Intervene.**

Finally, Rule 24(c) provides that a motion to intervene should “be accompanied by a pleading that sets out the claim or defense for which intervention is sought.” In light of

Fed.R.Civ.P. 7(a) the only “pleading” Oklahoma could conceivably file here would be an answer. However, the “purpose of Rule 24(c) is to inform [the] court of grounds upon which intervention is sought and to inform parties against whom some right is asserted or relief sought so that they might be heard before the court rules on the motion to intervene.” *Hill v. Kansas Gas Serv. Co.*, 203 F.R.D. 631, 634 (D. Kan. 2001). The Ninth Circuit has construed Rule 24(c) as a technical requirement to be applied flexibly in light of its obvious purpose to ensure that the court and the parties are informed about the would-be intervenor’s claims or defenses. *See, e.g., Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) (“Courts, including this one, have approved intervention motions without a pleading where the court was otherwise apprised of the grounds for the motion.”); *Smith v. Pangilinan*, 651 F.2d 1320, 1326 (9th Cir. 1981) (one sentence in intervenor’s motion was sufficient to satisfy requirements of Rule 24(c)). Oklahoma respectfully requests that the Court apply Rule 24(c) flexibly to dispense with the need for Oklahoma to file an answer. Under the circumstances of this case, the Motion to Intervene places the Court and the parties on notice of the harm that Oklahoma would suffer were it excluded from settlement discussions between Plaintiff and Defendant.

### CONCLUSION

For all the foregoing reasons, the Court should grant Oklahoma’s motion to intervene.

DATED: February 5, 2014.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of February, 2014, a true and correct copy of the above and foregoing **MOTION TO INTERVENE BY THE STATE OF OKLAHOMA AND THE OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY** was e-filed via ECF.

s/ Paul M. Seby