

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CITIZENS FOR CLEAN AIR, a project of  
ALASKA COMMUNITY ACTION ON  
TOXICS; and SIERRA CLUB,

Plaintiffs,

v.

ANDREW WHEELER, in his official capacity as  
Acting Administrator of the U.S. Environmental  
Protection Agency; and CHRIS HLADICK, in  
his official capacity as Regional Administrator of  
the U.S. Environmental Protection Agency,  
Region 10,

Defendants.

NO: 18-1803 TSZ

**DEFENDANT-INTERVENOR STATE  
OF ALASKA'S MOTION TO  
INTERVENE**

**INTRODUCTION**

Pursuant to Federal Rule of Civil Procedure 24, the State of Alaska (State) moves to intervene as a party defendant in the above-captioned case as a matter of right, or alternatively, for permissive intervention. The State is entitled to intervene to protect the State, its political subdivisions, and its residents from impacts that may result from prematurely initiating the Clean Air Act (CAA) sanctions processes and to protect the State's interest in maintaining its primary role in addressing air quality issues in the Fairbanks area.

1 The Plaintiffs in this case allege that the U.S. Environmental Protection Agency (EPA)  
2 has a non-discretionary duty to “make a finding that the state of Alaska has failed to submit a  
3 serious area nonattainment [state implementation plan (SIP)] addressing 24-hour  
4 concentrations of PM-2.5 in the Fairbanks North Star Borough.”<sup>1</sup> They request an order  
5 requiring EPA “to make and publish in the Federal Register a finding of failure to submit.”<sup>2</sup>  
6 Such a finding would empower EPA to issue a Federal Implementation Plan (FIP) in place of  
7 the SIP and initiate timelines under the CAA that culminate in permitting and transportation  
8 funding sanctions.<sup>3</sup>

9 The relief sought by the Plaintiffs clearly affects significant State interests. At its core,  
10 this case is about the State’s role in developing a SIP to address air pollution – Plaintiffs ask  
11 this Court to order EPA to make the State submit a SIP or face sanctions and loss of  
12 regulatory discretion. The relief sought by the Plaintiffs affects the State’s interests because it  
13 requires a determination of how much discretion EPA has to accommodate state and area-  
14 specific circumstances in exercising its authority to impose sanctions and a FIP. Accordingly,  
15 the State moves to intervene, both as a matter of right and, alternatively, for permissive  
16 intervention.  
17

18 The State of Alaska informed counsel for plaintiffs and defendants that the State  
19 would be seeking to intervene in this case. Counsel for the Plaintiffs indicated that they would  
20 file a response to this motion. Counsel for EPA stated that do not oppose intervention out of  
21 comity.  
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24 <sup>1</sup> Complaint at 11.

25 <sup>2</sup> *Id.*

<sup>3</sup> 42 U.S.C. §§ 7410(c), 7509(a)-(b).

## BACKGROUND

### A. Factual and procedural background

#### 1. The role of states under the Clean Air Act

Under the Clean Air Act (CAA), once EPA designates a “nonattainment area,” states are responsible for developing and implementing SIPs that establish enforceable measures for improving air quality.<sup>4</sup> EPA has certain oversight responsibilities; but the primary responsibility for determining how to improve air quality rests with states.<sup>5</sup>

EPA oversight includes providing technical guidance, reviewing SIPs<sup>6</sup> and, when warranted, initiating sanctions clocks and issuing a FIP.<sup>7</sup> In addition, EPA has some discretion to modify statutory deadlines as an equitable remedy in certain circumstances, specifically where necessary to accomplish Congressional purpose.<sup>8</sup>

#### 2. The Fairbanks nonattainment area

In 2009, EPA designated Fairbanks as a nonattainment area for PM<sub>2.5</sub> based on monitored levels of 44.7 µg/m<sup>3</sup> at the State Office Building in downtown Fairbanks, almost 10 µg/m<sup>3</sup> over the standard of 35 µg/m<sup>3</sup>.<sup>9</sup> Later, in 2012, with the addition of monitors

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<sup>4</sup> 42 U.S.C. §§ 7410 (state implementation plans generally), 7502 (nonattainment area plans generally), 7513a (particulate matter nonattainment area plans); *see also* 42 U.S.C. §7401(a)(3) (“The Congress finds ...that air pollution prevention... and air pollution control at its source is the primary responsibility of States and local governments.”).

<sup>5</sup> *Id.*; *see also* 42 U.S.C. §7401(a)(4) (“The Congress finds ...that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.”).

<sup>6</sup> 42 U.S.C. §§ 7410(k), 7502, 7508, 7513b.

<sup>7</sup> 42 U.S.C. §§ 7509(b), 7410(c).

<sup>8</sup> *NRDC v. EPA*, 22 F.3d 1125 (D.C. Cir. 1994); *Wildearth Guardians*, 2014 WL 943136 (D. Colo. 2014); *Wildearth Guardians v. EPA*, 830 F.3d 529 (D.C. Cir. 2016); *see also NRDC v. Thomas*, 805 F.2d 410 (D.C. Cir. 1986).

<sup>9</sup> EPA, Air Quality Designations for the 2006 24-Hour Fine Particle (PM<sub>2.5</sub>) National Ambient Air Quality Standards, 74 Fed. Reg. 58688 (Nov. 13, 2009).

1 thirteen miles away in the neighboring community of North Pole, the State found a much  
2 more substantial problem of 24-hour concentrations at  $158.4 \mu\text{g}/\text{m}^3$ .<sup>10</sup> Since the initial 2009  
3 nonattainment designation, the air monitors in downtown Fairbanks are reporting  $\text{PM}_{2.5}$  levels  
4 well-under EPA's standard and the North Pole monitor is showing substantial improvement,  
5 at  $52.8 \mu\text{g}/\text{m}^3$  in 2018.<sup>11</sup>

6 Residential woodstove emissions are the primary direct source of  $\text{PM}_{2.5}$  in the  
7 Fairbanks nonattainment area. Reducing those emissions poses particular challenges for  
8 regulators given the number of sources as well as health and welfare concerns for residents in  
9 a subarctic climate with some of the highest utility rates in the country. Notably, providing an  
10 indication of community sentiment on the issue, Fairbanks North Star Borough (FNSB) voters  
11 passed a ballot initiative last fall prohibiting FNSB from regulating solid fuel heating  
12 appliances (including wood stoves).<sup>12</sup>

13  
14 In response to EPA's June 2017 reclassification of the nonattainment area to  
15 "Serious," ADEC has been diligently working to develop a Serious SIP. In March 2018, only  
16 six months after EPA approved the Moderate SIP,<sup>13</sup> ADEC issued a number of preliminary  
17 draft documents that comprise much of the technical foundation for the Serious SIP.<sup>14</sup> ADEC  
18 and FNSB engaged a stakeholder workgroup through the summer and fall of 2018 to solicit  
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20 <sup>10</sup> SOA Exhibit 1, Excerpt from ADEC, Public Notice Draft Fairbanks  $\text{PM}_{2.5}$  Serious SIP: Section  
21 III.D.7.4 Ambient Air Quality Data and Trends (May 10, 2019).

22 <sup>11</sup> *Id.*

23 <sup>12</sup> Exhibit 2: Fairbanks Daily News Miner, Fairbanks voters OK measure limiting borough's power on air  
24 quality (Oct. 3, 2018).

25 <sup>13</sup> See EPA, Air Plan Approval, FNSB 2006  $\text{PM}_{2.5}$  Moderate Area Plan, 82 Fed. Reg. 42457 (Sept. 8, 2017).

<sup>14</sup> ADEC, Preliminary Serious SIP, Possible Concepts and Potential Approaches (March 22, 2018)  
available at <https://dec.alaska.gov/air/anpmsf/communities/fbks-pm2-5-serious-sip-development/>

1 community input.<sup>15</sup> Most recently, on May 10, 2019, ADEC published a draft Serious SIP for  
2 public comment.<sup>16</sup>

3 Meanwhile, pointing to EPA’s initial statement that the Serious SIP would be due in  
4 December 2017,<sup>17</sup> the Plaintiffs filed this suit. On June 4, 2019, EPA published notice of a  
5 proposed consent decree that would resolve this litigation by providing the relief requested by  
6 the Plaintiffs – issuing a failure to submit notice.<sup>18</sup> As required by 42 U.S.C. §7413(g), EPA  
7 provided a 30-day public comment period on the proposed consent decree.<sup>19</sup> Following the  
8 comment period, the statute requires:

9  
10 The Administrator or the Attorney General, as appropriate, shall promptly  
11 consider such written comments and may withdraw or withhold his consent to  
12 the proposed order or agreement if the comments disclose facts or  
13 considerations which indicate that such consent is inappropriate, improper,  
14 inadequate, or inconsistent with the requirements of this chapter.<sup>20</sup>

13 The comment period closes on Friday, July 5 and EPA proposes to issue the failure to submit  
14 notice after the weekend – “no later than” Monday, July 8.

15 **B. The State of Alaska’s interests in this case.**

16 The State’s interests in this case are clear and distinct. As outlined above, states have a  
17 distinct role in developing and implementing plans to address air quality in nonattainment  
18

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20 <sup>15</sup> See Fairbanks North Star Borough, Air Quality Stakeholders Group,  
<http://co.fairbanks.ak.us/transportation/Pages/stakeholders.aspx> (last visited June 6, 2019).

21 <sup>16</sup> Exhibit 3: ADEC, Public Notice of Draft Fairbanks PM2.5 Serious SIP (May 10, 2019), also available  
at <http://dec.alaska.gov/air/anpms/communities/fbks-pm2-5-serious-sip/>.

22 <sup>17</sup> While EPA did initially set a December 2017 deadline for the Serious SIP, in later correspondence with  
23 the State, EPA agreed the deadline would be December 2018. Exhibit 6: Letter from Michelle Pirzadeh, Acting  
Regional Administrator for EPA Region 10 to Larry Hartig, ADEC Commissioner (Oct. 31, 2017); *see also* 42  
U.S.C. §7513a(b)(2).

24 <sup>18</sup> Exhibit 4: EPA, Notice of Proposed Consent Decree, 84 Fed. Reg. 25803 (June 4, 2019).

25 <sup>19</sup> *Id.*

<sup>20</sup> 42 U.S.C. §7413(g).

1 areas under the CAA. The State of Alaska has an interest in maintaining that role in order to  
2 ensure air quality regulations are best tailored for affected communities and residents.

3 The State also has an interest in protecting the integrity of its process for developing a  
4 Serious SIP that includes the time necessary for stakeholder engagement and public comment  
5 on a complex regulatory document that may have broad economic and practical impacts for  
6 residents. A sound process is part of the State's responsibility generally, but is also  
7 particularly critical in this matter as part of building local support. Because residential  
8 woodstoves are a primary source of the problematic particulate matter, that support is critical  
9 for successful implementation of measures to improve air quality.

10 The State also has an interest in ensuring EPA maintains its flexibility in enforcing  
11 CAA provisions. And the State clearly has an interest in any EPA decision that affects the  
12 State and its residents, including in any settlement or consent decree.

13  
14 Finally, the State's interest in the outcome of this case is also rooted in state law. The  
15 Alaska Constitution imposes a duty on the State to responsibly manage Alaska's natural  
16 resources consistent with the public interest and for the maximum benefit of its people.<sup>21</sup> It is  
17 "the policy of the state to conserve, improve, and protect its natural resources and  
18 environment and control water, land, and air pollution, in order to enhance the health, safety,  
19 and welfare of the people of the state and their overall economic and social well-being."<sup>22</sup>  
20 Likewise, state law mandates that ADEC regulate activities in the state that potentially affect  
21 air quality.<sup>23</sup>  
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24 <sup>21</sup> Alaska Const. Art. VIII, §§ 1 and 2.

25 <sup>22</sup> AS 46.03.010(a).

<sup>23</sup> AS 46.03.020, *et. seq.*

**POINTS AND AUTHORITIES**

**A. The State is entitled to intervene as a matter of right.**

Pursuant to Federal Rule of Civil Procedure 24(a)(2), a court must, upon timely motion, permit intervention by anyone who:

claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

Courts construe the rule liberally and in favor of potential intervenors.<sup>24</sup> The court’s evaluation is “guided primarily by practical considerations,”<sup>25</sup> and a court must accept as true the non-conclusory allegations made in support of an intervention motion.<sup>26</sup>

The Ninth Circuit has adopted a four-part test for intervention as of right: (1) the motion must be timely; (2) the applicant must claim a “significantly protectable interest” relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant’s interest must not be adequately represented by the parties to the action.<sup>27</sup> The State meets all four facets of this test.

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<sup>24</sup> *Sw. Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001).

<sup>25</sup> *Id.*, at 818; *see also United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (“[a] liberal policy in favor of intervention serves both efficient resolution of issues and broad access to courts”).

<sup>26</sup> *Sw. Ctr. For Biological Diversity*, 268 F.3d at 819 (citing to *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995)).

<sup>27</sup> *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (citing *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)).

1                   **1.       The State’s motion is timely.**

2                   Timeliness is dependent on the stage of the proceedings, potential prejudice to the  
3 parties, and the reason for any delay.<sup>28</sup> In this case, the State has moved to intervene before  
4 any substantive briefing and before any settlement negotiations have culminated in a filing  
5 with the Court. In addition, the necessity of intervening to protect the State’s interests became  
6 clear with EPA’s notice regarding a proposed consent decree that would grant Plaintiffs’  
7 requested relief the next business day after the close of a required public comment period. The  
8 State’s intervention will not cause undue delay or otherwise prejudice any parties’ rights in  
9 this action. Thus, the State’s intervention at this stage is timely. The proposed intervenor has  
10 prepared and is ready to file its Answer to the Complaint, which is attached as Exhibit 5 to  
11 this motion.

12                   **2.       The State claims a significantly protectable interest.**

13                   To intervene as of right, an applicant need not establish standing, or show a  
14 particularized injury of the type used to establish standing.<sup>29</sup> No specific legal or equitable  
15 interest need be established.<sup>30</sup> An applicant need only demonstrate a “significantly protectable  
16 interest.”<sup>31</sup> A proposed intervenor will “generally demonstrate a sufficient interest” if “it will  
17 suffer a practical impairment of its interests as a result of the pending litigation.”<sup>32</sup> The Ninth  
18 Circuit applies this broad interest criterion to involve “as many apparently concerned persons  
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22

23 <sup>28</sup> *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1319 (9th Cir. 1997).

24 <sup>29</sup> *Didrickson v. United States Dept. of Interior*, 982 F.2d 1332, 1340 (9th Cir 1992).

25 <sup>30</sup> *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993).

<sup>31</sup> *Id.*, 996 F.2d at 976 (citations omitted).

<sup>32</sup> *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1180 (9th Cir. 2011) (citations omitted).



1 as is compatible with efficiency and due process.”<sup>33</sup> It is generally enough that the interest  
 2 asserted is protectable under some law and that there is a relationship between the protected  
 3 interest and the claims at issue.<sup>34</sup>

4 The State’s interests satisfy the second element of the intervention analysis. As  
 5 detailed above, the State has a clear interest – under both state and federal law – in  
 6 maintaining its primary role in managing air quality issues in Fairbanks. That interest includes  
 7 an interest in maintaining regulatory flexibility generally, as well as flexibility regarding the  
 8 introduction and timing of selected regulatory measures and to ensure the plan is best-tailored  
 9 to the community. The State also has an economic interest in the dispute arising from both the  
 10 potential of sanctions as well as the relative costs incurred by the State and residents resulting  
 11 from a hurried and ill-tailored implementation plan.

12  
 13 **3. Absent intervention, disposition of this dispute would impair and  
 14 impede the State’s ability to protect its interests.**

15 The third criterion for intervention as of right is that the action’s disposition, as a  
 16 practical matter, may impair or impede the intervenor’s ability to protect its asserted  
 17 interests.<sup>35</sup> The question of impairment is not separate from the question of existence of an  
 18 interest.<sup>36</sup> In reviewing this criterion, the courts look to the “‘practical consequences’ of  
 19 denying intervention, even where the possibility of future challenge to the regulation  
 20 [remains] available.”<sup>37</sup>

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 23 <sup>33</sup> *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (citations omitted).

24 <sup>34</sup> *Sw. Ctr. For Biological Diversity*, 268 F.3d at 818.

25 <sup>35</sup> *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d at 1177.

<sup>36</sup> *See, e.g., Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 578 F.2d 1341, 1345 (10th Cir. 1978).

<sup>37</sup> *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. 1977).

1 Disposition of this action may result in a constraint upon or circumvention of State  
2 authority. The relief sought by the Plaintiffs, a finding from EPA that the State has failed to  
3 submit a Serious SIP, initiates a process that culminates in automatic sanctions as well as  
4 responsibility for EPA to issue a FIP in place of the SIP. Thus, disposition of this dispute may  
5 limit the State's flexibility in developing (as well as authority to implement) a SIP. In  
6 addition, to the extent consequences of the requested relief may be automatic, the State may  
7 not have another opportunity to protect its interests. The effects of the legal and factual  
8 determinations made in this litigation may constrain the State's ability to challenge future  
9 federal actions.<sup>38</sup> For these reasons, the State satisfies the impairment requirement.

10 **4. The State's interests are not adequately represented.**

11 The final criterion for intervention is whether the representation of the State's interests  
12 by existing parties "may be" inadequate. The burden of that showing is minimal.<sup>39</sup> In  
13 assessing the adequacy of representation, courts consider (1) whether the present parties'  
14 interests are such that they will undoubtedly make all the intervenor's arguments; (2) whether  
15 the present parties are capable of and willing to make those arguments; and (3) whether the  
16 would-be intervenor would offer any necessary elements to the proceedings that other parties  
17 would neglect.<sup>40</sup> The court's inquiry focuses on the subject of the action, not just the  
18 particular issues before the court at the time of the motion.<sup>41</sup>

23 <sup>38</sup> *U.S. ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1396 (9th Cir. 1992); *Fund for*  
24 *Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir 2003).

24 <sup>39</sup> *Sw. Ct'r for Biological Diversity*, 268 F.3d at 823.

25 <sup>40</sup> *Id.* at 822.

<sup>41</sup> *Id.* at 823.

1 Here, it has become evident that no other existing party will represent the State's  
2 interests. First, the proposed consent decree confirms EPA's intention to not defend the case.  
3 Thus, while there may be some overlap between the State's and EPA's interests generally, it  
4 has become clear that EPA's participation in the suit will not be adequate to protect the State.

5 Second, the State's interests differ from EPA's. As outlined above, the Clean Air Act  
6 establishes distinct roles and responsibilities for states and the EPA. The State also has a  
7 distinct interest in being responsive to a broader range of relevant local conditions and  
8 concerns and in maintaining primary regulatory responsibility so that decisions can be best  
9 tailored to the affected community.

10 The consequences that would flow from the Plaintiff's requested relief are  
11 fundamentally different for EPA and the State. For example, the responsibility to impose a  
12 FIP will increase EPA's control and authority in the area. On the other hand, the issuance of a  
13 FIP will mark a loss of authority and flexibility for the State. EPA is also likely largely  
14 indifferent to the imposition of sanctions on the nonattainment area – a consequence that will  
15 impose a burden on the State, the local government and planning authorities, and residents.

16 The State of Alaska satisfies all elements under Rule 24(a) and is entitled to intervene  
17 in this case as a matter of right for all purposes.

18  
19 **B. The State should be granted permissive intervention.**

20 Alternatively, if this Court finds that the State is not entitled to intervention as a matter  
21 of right, the State requests permissive intervention under Federal Rule of Civil Procedure  
22 24(b)(1). Upon timely filing of a motion, a court may permit a party to intervene who “has a  
23 claim or defense that shares with the main action a common question of law or fact” after  
24 considering whether “intervention will unduly delay or prejudice the adjudication of the rights  
25

of the original parties.”<sup>42</sup> The Ninth Circuit applies a three-prong test to determine if permissive intervention is appropriate: “(1) the movant must show an independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant’s claim or defense and the main action must have a question of law and fact in common.”<sup>43</sup>

First, this Court has jurisdiction as a federal question 28 U.S.C. §1331. Second, the motion is timely for the same reasons articulated above – no substantive briefing or negotiated resolution has been submitted to the Court. Third, State satisfies the commonality requirement by raising defenses regarding the Plaintiffs’ right to their requested relief.

**CONCLUSION**

For the reasons set forth above, the State requests that the Court grant the State’s Motion to Intervene as of right under Federal Rule of Civil Procedure 24(a), or alternatively, permit the State to intervene under Rule 24(b).

DATED this 12<sup>th</sup> day of June, 2019.

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<sup>42</sup> Fed. R. Civ. P. 24 (b)(1)(B), (b)(3).

<sup>43</sup> *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989) *aff’d sub nom. Venegas v. Mitchell*, 495 U.S. 82, 110 S. Ct. 1679, 109 L. Ed. 2d 74 (1990) (citations omitted).

**CERTIFICATE OF SERVICE**

1  
2 I hereby certify that on June 12, 2019, I electronically filed the foregoing with the  
3 Clerk of the Court using the CM/ECF, which will send notification of such filing to the  
4 Court's electronic mailing list recipients as follows:

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