

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

MISSOURI COALITION FOR)	
THE ENVIRONMENT FOUNDATION,)	
a non-profit corporation,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	2:10-cv-04169-NKL
LISA P. JACKSON, Administrator)	
of the United States Environmental)	
Protection Agency; and THE UNITED)	
STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Defendants.)	
_____)	

**MOTION TO INTERVENE AS A NON-ALIGNED PARTY
AND SUGGESTIONS IN SUPPORT**

The Missouri Department of Natural Resources (“Department”), by and through counsel and pursuant to Rule 24 of the Federal Rules of Civil Procedure, respectfully moves to intervene as a non-aligned party in these proceedings. The Missouri Coalition for the Environment Foundation (“Coalition”) has indicated that it has no objection to the Department’s motion to intervene and Lisa P. Jackson and the United States Environmental Protection Agency (collectively “EPA”) have indicated that they will take no position as to the motion to intervene. A proposed order granting the motion is attached. In support thereof, the Department states as follows:

1. The Coalition filed a civil action against EPA under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1) and the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1635(a)(2), alleging that EPA violated the Clean Water Act by failing to perform a non-

discretionary duty to approve or disapprove proposed revised water quality standards submitted by the State of Missouri as part of Missouri's triennial review.

2. The Coalition also alleges that Missouri's water quality standards do not comply with the requirements of the Clean Water Act. Among other demands, the Coalition requests a finding that Missouri's water quality standards are inconsistent with the Clean Water Act, and an order enjoining EPA to disapprove Missouri's "new or revised water quality standards" and to promulgate new water quality standards for the State of Missouri. *See* Complaint; First Amended Complaint.

3. EPA filed its Answer to the Coalition's Complaint on October 8, 2010. The Coalition filed its First Amended Complaint on October 18, 2010, and EPA filed its Answer to the First Amended Complaint on November 1, 2010. However, on February 1, 2011, EPA requested leave to file an Amended Answer to the Amended Complaint. The Amended Answer was subsequently filed on February 3, 2011.

4. On November 23, 2010, the Court entered a scheduling order setting a discovery deadline of May 2, 2011, a dispositive motion cutoff of June 1, 2011, and a trial date of November 7, 2011. However, no discovery has been pursued in the case by any party. Instead, a mediation session was held that did not result in the case settling. In a phone conference on March 4, 2011, the parties told the Court that this matter could be resolved after the filing of an administrative record by EPA on cross motions for summary judgment, and the Court, on that same day, entered an order for the filing of the administrative record within thirty days and filing of motions for summary judgment within sixty days.

5. The Department is appearing in this matter to protect the interests of the Missouri Department of Natural Resources in administering the Missouri Clean Water Law and its

implementing regulations, and the Department requests that it be accorded status as a non-aligned party intervenor. For the reasons stated in the Suggestions in Support of its Motion to Intervene as a Non-aligned Party, attached hereto and incorporated as though fully set forth herein, the Department is entitled to intervene as of right under Rule 24(a)(2). Should the Court determine that the Department has not demonstrated a basis for mandatory intervention under Rule 24(a)(2), the Department requests permissive intervention under Rule 24(b)(2) based on the Department's responsibility for implementing changes to the Missouri Clean Water Law and allocating resources thereto.

**SUGGESTIONS IN SUPPORT OF
MOTION TO INTERVENE AS A NON-ALIGNED PARTY**

In making its determination, the Court should recognize that Rule 24 is “to be liberally construed with all doubts resolved in favor of the proposed intervenor.” *South Dakota ex rel. Barnett v. U.S. Dep’t of Interior*, 317 F.3d 783, 785 (8th Cir. 2003); *Scott v. United States*, 2011 WL 690210, *2 (E.D. Mo. 2011).

A. The Department is entitled to intervene as of right under Rule 24(a)(2).

To intervene as of right, the moving party must demonstrate the following: (1) the application is timely; (2) it has an interest relating to the property or transaction that is the subject of the action; (3) it is so situated that the disposition of the action, as a practical matter, may impede or impair its ability to protect that interest; and (4) its interest is represented inadequately by existing parties. Fed. R. Civ. P. 24(a)(2); *South Dakota ex rel. Barnett v. U.S. Dep’t of Interior*, 317 F.3d 783, 785 (8th Cir. 2003).

(1) The Department’s motion is timely.

“Although the point to which a suit has progressed is one factor in the determination of timeliness, it is not solely dispositive.” *NAACP v. New York*, 413 U.S. 345, 365-66 (1973). The

timeliness of a Rule 24 motion is determined from all the circumstances. *Id.* at 366. To determine timeliness, the Court should consider four factors: “(1) how far the litigation has progressed, (2) the prospective intervenor’s prior knowledge of the pending action, (3) the reason for the delay in seeking intervention, and (4) the likelihood of prejudice to the parties in the action.” *United States v. Ritchie Special Credit Invs.*, 620 F.3d 824, 832 (8th Cir. 2010) (quoting *Minn. Milk Producers Ass’n v. Glickman*, 153 F.3d 632, 646 (8th Cir. 1998)).

First, in the present case, the litigation has not progressed so far as to make intervention impracticable. Although the Department is seeking to intervene at a point at which the parties have engaged in one mediation session, the Department understands that very little has transpired to establish facts in this case. Specifically, discovery has not occurred, the administrative record has not been filed, and cross motions for summary judgment have not yet been filed. The litigation is therefore at a stage where intervention is practicable.

Second, the Department’s prior knowledge of the pending action is limited and should not be dispositive in this matter. While the Department has been aware of the litigation, the Department has been working on promulgating a rule that it believed would resolve this action. However, the Department has since determined that the rule will not be completed prior to this Court’s ruling on the Coalition’s Complaint. The Department is, therefore, concerned that should it not be permitted to intervene, its interests will not be represented in the potential decision.

Third, the Department did not unduly delay seeking intervention. At the time that this case was first filed, the Department was very hopeful that through the rulemaking process, it would resolve all of the Coalition’s claims prior to this Court’s consideration of the same. As previously mentioned, the Department has since realized that the rulemaking will not be

complete prior to the disposition of this case. In addition, as the neutral party that will ultimately be responsible for implementing any resolution in these proceedings, the Department reasonably expected to be invited to participate in settlement discussions and mediations. However, the Department has not been permitted to be involved in settlement discussions or mediation. Since the Department has been excluded from these discussions, it now seeks to intervene in the proceedings. Although the Department seeks to intervene as a non-aligned party, the Department's intervention and participation in this matter is very important because the Department bears the responsibility of adopting and implementing water quality standards.

Fourth, the parties will not be prejudiced by the Department's intervention. The Department is intervening as a non-aligned party and seeks only to ensure that its interests are adequately represented. Furthermore, the discovery process has not yet begun and the parties' cross motions for summary judgment are not due until May 3, 2011. If granted intervention, the Department will present information pursuant to the Court's scheduling orders, or such other schedule as the Court determines to be appropriate, so that there will be no delay in the proceedings. If the Department's motion is denied, however, the Department will be greatly prejudiced. Specifically, the Coalition asks for an order directing EPA to identify necessary changes to Missouri's water quality standards and give Missouri just ninety days to change its rule. *See* Amended Complaint (Doc. 10), at 20. The issues of what changes are necessary to Missouri law and the timeframe for making those changes have a great and potentially negative impact on the state. The Department should be heard to assure that any order is both lawful and reasonable.

- (2) The Department has an interest relating to the property or transaction that is the subject of the action.**

A party seeking to intervene must satisfy both Article III standing and the interest requirement of Rule 24(a)(2). *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833-34 (8th Cir. 2009). To demonstrate standing, the proposed intervenor must establish that it has a “legally protectable interest that is ‘concrete, particularized, and either actual or imminent.’” *Id.* at 384. In order for an intervenor to have the requisite interest under Rule 24(a)(2), the interest must be “direct, substantial, and legally protectable in nature.” *Medical Liability Mut. Ins. Co. v. Alan Curtis, LLC*, 485 F.3d 1006, 1008 (8th Cir. 2007); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1161 (8th Cir. 1995).

The Department has a legally protectable interest in the present matter, and the litigation affects the Department in a direct and substantial way. The Missouri Department of Natural Resources has a constitutional and statutory obligation to further the interests of the environment in Missouri. Under article IV, section 47 of the Missouri Constitution, the director of the Department must “administer the programs of the state as provided by law relating to environmental control and the conservation and management of natural resources.” Missouri statute further requires the director of the Department to administer the programs assigned to the Department relating to environmental control and the conservation and management of natural resources, coordinate and supervise all staff and other personnel assigned to the Department, and faithfully cause to be executed all policies established by the boards and commissions assigned to the Department. MO. REV. STAT. § 640.010.1 (Supp. 2009).

The Missouri Clean Water Law and its implementing regulations are administered by the Department under the management of its director. The subject of this litigation relates to revisions of the water quality standards applicable in Missouri. The Clean Water Act expressly contemplates state involvement in revising water quality standards, and furthermore, any

revision to the state's water quality standards will ultimately impact the terms and conditions of the permits issued by the Department under the both the Missouri Clean Water Law and the federal Clean Water Act. In keeping with constitutional and statutory mandates, the director of the Department bears the responsibility of ensuring that all Missouri environmental matters are properly managed. In order to carry out these oversight obligations, the director must be aware of impending changes in the law and be prepared to allocate already scarce resources to accommodate those changes. The Coalition has requested the Court enjoin EPA to promulgate new water quality standards and regulations for the state of Missouri. Since the Department is directly responsible for implementing and administering these environmental standards, the Department has a substantial interest in the subject matter of this action. Furthermore, the Department's interest is more than tangential; the structure, resources, staff, and administration of the Department's Clean Water Program will be greatly affected by any changes that EPA makes to Missouri's water quality standards.

As the constitutionally and statutorily mandated supervisor of all matters pertaining to the environment, the Department represents the interests of Missouri in the regulation of water quality. The Department therefore has a legally protectable interest and maintains Article III standing. And since the Department's legally protectable interest is direct and substantial, it also fulfills the Rule 24(a)(2) interest requirement. In light of these facts, the Court should grant the Department intervenor status.

(3) Disposition of the action without the Department will impede or impair the Department's ability to protect its interests.

“The purpose of intervention is to promote the efficient and orderly use of judicial resources by allowing persons, who might otherwise have to bring a lawsuit on their own to protect their interests or vindicate their rights, to join an ongoing lawsuit instead.” *United States*

v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 840 (8th Cir. 2009) (internal quotations omitted). Disposition of this action without permitting the Department to intervene would be contrary to the efficient and orderly use of judicial resources, and furthermore, will impair the Department's ability to protect its interests.

It is clear that any decision in this matter will significantly affect the resources of the Department in several ways. For instance, as a result of these proceedings, the Department may be need to develop new rules, enforce these rules, provide additional technical support, manage potential challenges to the rules, and incorporate resulting standards into permits issued by the Department. Additionally, the Department and the director of the Department have an interest in ensuring compliance with the Clean Water Act so that no additional duties are imposed by the federal government on the Department that are not specifically required by the Clean Water Act.

In addition, the Department is already in the process of rulemaking that is intended to address the Coalition's claim in this lawsuit. While the ultimate authority to promulgate rules lies with the Missouri Clean Water Commission, the Department is expending substantial resources to submit a rule for Commission approval. The rule is modeled after water quality regulations in the state of Iowa, which were previously approved by EPA. Whether this litigation is resolved through either settlement or a final adjudication, the outcome will impact the Department's rulemaking process, and ultimately, the permits issues by the Department. The Department has and will continue to devote resources towards these efforts.

(4) The existing parties do not adequately represent the Department's interests.

A proposed intervenor bears only a "minimal burden of showing that its interests are not adequately represented by the parties," a burden that courts consider "easy to satisfy." *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996). The adequacy of representation is determined

“primarily by comparing the interests of the proposed intervenor with the interests of the current parties to the action.” *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992). In addition, “the inadequate representation condition is satisfied if the proposed intervenor shows that the representation of its interests by the current party or parties to the action ‘*may be*’ inadequate.” *Id.* at 85-86 (emphasis added). This element may be satisfied even when the interest of a proposed intervenor and a party are similar. *Id.* at 86 (“The ‘tactical similarity’ of the ‘legal contentions’ of a current party with that of a proposed intervenor . . . does not assure adequate representation.”).

Neither the Coalition, who seeks to impose new, expansive water quality standards on the Department, nor EPA, which would promulgate such standards, can be expected to represent the Department’s interests in this suit and consider the impacts of these standards on the Department. The interests of the Department differ from the interests of the other parties. The Department is working to promulgate a rule that would protect the state’s waters while complying with the strictures of the Clean Water Act, and the Department has already expended a significant amount of resources toward this rule. This effort will be adversely affected if the standards proposed by the Coalition to EPA do not take into account the Department’s work towards establishing its own rule. Since it is well established that “doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it because this serves the judicial system’s interest in revolving all related controversies in a single action,” this Court should grant the Department intervenor status. *See Sierra Club*, 960 F.2d at 86.

B. Alternatively, permissive intervention under Rule 24(b)(2) is appropriate in this case.

Permissive intervention by a government agency is allowed, in the Court’s discretion, when the motion is timely and “a party’s claim or defense is based on (A) a statute or executive

order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.” Fed. R. Civ. P. 24(b)(2). In ruling on this motion, the Court should also consider whether the “proposed intervention would unduly delay or prejudice the adjudication of the parties’ rights.” *South Dakota ex rel. Barnett v. U.S. Dep’t of Interior*, 317 F.3d 783, 787 (8th Cir. 2003); *see also* Fed. R. Civ. P. 24(b)(3).

As discussed above, the Department’s Rule 24 motion is timely. Also, this motion to intervene and the suggestions in support sufficiently demonstrate that the Plaintiff’s claims are based on statutes that the Department directly implements. Specifically, the foregoing recites the constitutional and statutory mandates and authority that the Department has requiring it to further the interests of the environment in Missouri and to administer the state’s environmental statutes and regulations. In addition, the status of the present proceedings is such that the Department’s intervention will not unduly delay or prejudice the adjudication of either party’s rights. No discovery has been pursued by either party, and cross motions for summary judgment have not yet been filed and are therefore not ready for consideration by the Court. If granted intervention, the Department will present information pursuant to the Court’s Scheduling Order, or such other schedule as the Court determines to be appropriate, so that there will be no delay in the proceedings. If the Department’s motion is denied, however, the Department will be greatly prejudiced.

The Department is actively working on promulgating rules that will address the issues raised in the Coalition’s Complaint. The Coalition’s Complaint, while based on federal law, is actually an attempt to force changes in state regulations and require EPA to take over the responsibilities of the Department in carrying out its duties under federal law. Because it is the governmental agency responsible for implementing and administering environmental statutes

and regulations, the Department and its programs will be greatly affected if the case is disposed of without the Department's involvement. Permissive intervention in these proceedings is therefore appropriate and should be granted.

WHEREFORE, the Department of Natural Resources respectfully requests that this Court allow the Motion to Intervene as a Non-aligned Party pursuant to Rule 24(a)(2) or, in the alternative, pursuant to Rule 24(b)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was by

Notice of Filing through the Court's ECF system this 22st day of March, 2011, to:

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