District Court, Denver County, Colorado 1437 Bannock Street Denver, Colorado 80202 Colorado Automobile Dealers Association, Plaintiff, v. The Colorado Department of Public Health and Environment, the Colorado Air Quality Control Commission, and the Colorado Air Pollution Control Division, Defendants.	**▲ COURT USE ONLY ▲**
Attorneys for Proposed Intervenor-Defendants Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club Thomas A. Bloomfield (Colo. Bar. No. 35281) Sarah M. Keane (Colo. Bar. No. 51109) Samantha R. Caravello (Colo. Bar. No. 48793) Nicholas A. DiMascio (Colo. Bar. No. 39399) Kaplan Kirsch & Rockwell LLP 1675 Broadway, Suite 2300 Denver, Colorado 80202 303-825-7000 303-825-7005 (fax) Email: ndimascio@kaplankirsch.com	**Case No. 2019CV30343** Division 2 Courtroom 424
Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club's Unopposed Motion to Intervene as Defendants and to Extend Time to Answer Complaint	

Pursuant to C.R.C.P. 24(a)-(b), Environmental Defense Fund ("EDF"), Natural Resources Defense Council ("NRDC"), and Sierra Club (collectively, the "Environmental

Coalition" or "Coalition") hereby move to intervene as defendants in the Colorado Automobile Dealers Association's ("CADA") challenge to Colorado Regulation Number 20, also known as the Colorado Low Emission Automobile Regulation or CLEAR. The Coalition further moves, under C.R.C.P. 6(b) and 24(c), to extend the deadline to file its answer or any pre-answer motion to be the same date that the State Defendants' answer or pre-answer motion is due. In compliance with C.R.C.P. 121(c) § 1-15(8), the Environmental Coalition has conferred with the present parties to this lawsuit. The State Defendants do not oppose this motion. CADA takes no position on this motion.

BACKGROUND

In promulgating CLEAR, the Colorado Air Quality Control Commission (the "Commission") acted pursuant to its rulemaking authority under the Colorado Air Pollution Prevention and Control Act, C.R.S. 25-7-105(1), and the authority provided by Section 177 of the federal Clean Air Act ("CAA"), 42 U.S.C. § 7507. Section 177 of the CAA empowers states to adopt California's vehicle emissions standards instead of those issued by the federal government, provided that "such standards are identical to the California standards for which a waiver has been granted," and the state affords manufacturers two years' lead time to comply. *Id.*; *see generally Chamber of Commerce v. EPA*, 642 F.3d 192, 197 (D.C. Cir. 2011). EPA has granted California a waiver for its Low Emission Vehicle ("LEV") standards, which include greenhouse gas emissions limitations for passenger cars and light trucks. *See* 78 Fed. Reg. 2112 (Jan. 9, 2013). With CLEAR, the Commission chose to adopt California's LEV standards rather than follow the corresponding federal standards.

Other than Colorado, twelve states currently follow California's LEV standards. Presently, EPA's and California's greenhouse gas emissions standards are essentially the same. But in the spring of 2018, then EPA Administrator Scott Pruitt summarily determined that the federal greenhouse gas standards for passenger cars and light trucks were no longer appropriate. 83 Fed. Reg. 16,077 (Apr. 13, 2018).[1] Later that summer, EPA proposed to substantially weaken those standards for model years 2021 through 2025. *See* 83 Fed. Reg. 42,986 (Aug. 24, 2018).

Consequently, in order to "retain the vehicle standards currently in place in Colorado and avoid the disbenefits of the anticipated roll back of federal standards," the Air Pollution Control Division of the Colorado Department of Public Health and Environment initiated the rulemaking at issue here and proposed to adopt California's LEV standards rather than the federal government's. *See* C.C.R. eDocket Tracking Number 2018-00417, Proposed Rule § XII.A. (Aug. 24, 2018).[2] Additionally, the Division proposed to require that aftermarket catalytic converters sold or installed in Colorado comply with California's performance standards and labeling requirements, which are more stringent than the federal government's. *Id.* § IX. The Division proposed CLEAR because its analysis showed that adopting California's standards would benefit Colorado's citizens by reducing greenhouse gas emissions *and* by saving new vehicle purchasers money through avoided fuel costs. *Id.* § XII.A.

To lend its expertise in the scientific, environmental, and public health implications of CLEAR, the Environmental Coalition requested and was granted formal party status in the

[1] A coalition of states and environmental groups currently is challenging EPA's determination that the existing standards are no longer appropriate. The Court has not yet issued a decision. *See California v. EPA*, No. 18-1114 (D.C. Cir.).

[2] https://www.sos.state.co.us/CCR/eDocketDetails.do?trackingNum=2018-00417.

rulemaking proceeding. Ex. 1, Environmental Coalition Request for Party Status (Sept. 17, 2018); Ex. 2, Revised Party List (Oct. 3, 2018). The Coalition filed prehearing statements, expert reports and other papers and offered witness testimony at the hearing before the Commission. *See, e.g.*, Ex. 3, Environmental Coalition's Prehearing Statement (Oct. 9, 2018); Ex. 4, Environmental Coalition's Rebuttal Prehearing Statement (Oct. 24, 2018). Ultimately, the Commission unanimously voted to adopt CLEAR, which it found "will reduce vehicle [greenhouse gas] emissions in Colorado by retaining vehicle standards demonstrated through comprehensive analyses as being economically reasonable, technologically feasible and to provide the co-benefit of reducing costs for Colorado drivers." 41 Colo. Reg. 23 at 1337 (Dec. 10, 2018).[3]

ARGUMENT

I. The Environmental Coalition is entitled to intervene as of right.

The rules governing intervention "should be liberally interpreted to allow, whenever possible and compatible with efficiency and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level." *Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist.*, 266 P.3d 401, 404 (Colo. 2011) (quoting *Feigin v. Alexa Grp., Ltd.*, 19 P.3d 23, 28 (Colo. 2001)). A court must permit a party to intervene if (1) the party's motion is timely; (2) the party has an interest in the subject matter of the action; (3) the party's interest may be impaired by the disposition of the action; and (4) none of the existing parties to the lawsuit

[3] https://www.sos.state.co.us/CCR/RegisterContents.do?publicationDay=12/10/2018&Volume=41&yearPublishNumber=23&Month=12&Year=2018#2.

adequately represent the party's interest. *Id.* (citing C.R.C.P. 24(a)(2)). The Environmental Coalition easily meets each of those factors and therefore is entitled to intervene as of right.

First, the Coalition's motion is timely. Rule 24 does not provide an express time limit for intervention, so "the timeliness of the attempted intervention is to be gathered from all the circumstances in the case." *Diamond Lumber, Inc. v. H.C.M.C., Ltd.*, 746 P.2d 76, 78 (Colo. App. 1987) (granting intervention even though suit had been pending for 16 months because movant promptly sought to intervene upon the filing of a proposed stipulation that materially changed the posture of the lawsuit). Here, CADA filed its complaint on January 28, 2019, and the Coalition is moving to intervene only six weeks later.[4] The State Defendants have moved to dismiss CADA's complaint and thus have not yet filed an answer. Because this suit still is at a very early stage, the Coalition's motion is timely.

Second, the Coalition has a strong interest in defending the environmental and public health benefits of CLEAR. "The existence of an interest under Colorado's Rule 24(a)(3) should be determined in a liberal manner" and "should not be viewed formalistically." *Feign*, 19 P.3d at 29 (citing *O'Hara Group Denver, Ltd. v. Marcor Housing Sys., Inc.*, 595 P.2d 679, 687 (1979)). Protection of the environment and public health qualify as legally protected interests for the purposes of intervention. *See, e.g.*, *Rocky Mt. Animal Def. v. Colo. Div. of Wildlife*, 100 P.3d 508, 513 (Colo. App. 2004) (holding that "aesthetic and ecological interests are generally

[4] Within fourteen days of filing its complaint, or by February 11, 2019, CADA was supposed to notify each person on the agency's docket of the fact that a suit had been commenced. *See* C.R.S. § 24-4-106(4). CADA served the Environmental Coalition with such notice only on February 26, 2019, and the Coalition is filing this motion just two weeks after receiving that notice.

sufficient" to satisfy the interest prong of the intervention test); *Friends of the Black Forest Reg'l Park, Inc. v. Bd. Of County Comm'rs*, 80 P.3d 871, 877 (Colo. App. 2003) (same); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253-54 (10th Cir. 2001) ("[O]rganizations whose purpose is the protection and conservation of wildlife and its habitat have a protectable interest in litigation that threatens those goals.").[5] The Environmental Coalition sought and was granted formal party status in the rulemaking based on its interests in the environmental and public health benefits of maintaining greenhouse gas emissions standards for new vehicles sold in Colorado and improving the quality of aftermarket catalytic converters sold in Colorado. Ex. 1, Request for Party Status; Ex. 2, Revised Party List. Those same interests support the Coalition's motion to intervene in this lawsuit. *See* Ex. 5, Tonachel Decl. ¶¶ 4-11 & Attachs. A-B; Ex. 6, Stith Decl. ¶¶ 5-10; Ex. 7, Linhardt Decl. ¶¶ 10-12. *Cf. Colo. Water Quality Control Com. v. Frederick*, 641 P.2d 958, 961-63 (Colo. 1982) (explaining that "party status in an agency proceeding is a prerequisite to judicial review of agency action").

Third, the Environmental Coalition's interests may be impaired by this lawsuit. To satisfy this factor, the party seeking intervention must show that "the disposition of the underlying action *may* as a practical matter impair its ability to protect its interest." *Cherokee Metro. Dist*, 266 P.3d at 406 (citing C.R.C.P. 24(a)) (emphasis added). Because the rule refers to impairment "as a practical matter," the court may consider any significant effect that the outcome of the suit may have on the applicant's interests. C.R.C.P. 24(a). This element

[5] C.R.C.P. 24(a) is substantively identical to Fed. R. Civ. P. 24(a). Colorado courts therefore may look to federal case law when interpreting and applying the intervention standards. *See People v. Dore*, 997 P.2d 1214, 1219 (Colo. App. 1999) (citing *Forbes v. Goldenhersh*, 899 P.2d 246 (Colo. App. 1994)).

typically is satisfied so long as there is not "a *clear* alternative venue in which the proposed intervenor may pursue relief" or defend its interests. *Mauro v. State Farm Mut. Auto. Ins. Co.*, 410 P.3d 495, 499 (Colo. Ct. App. 2013); *see also Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) (explaining that the movant must show only that impairment of its interest is possible and the court's analysis "is not limited to consequences of a strictly legal nature" (quoting *Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978)).

Here, CADA requests the Court to "[h]old unlawful, set aside, and enjoin enforcement of Regulation 20." Compl., Prayer for Relief ¶ A. CADA's goal is to subject new vehicles and aftermarket catalytic converters sold in Colorado to less stringent emissions standards. Evidence submitted by the Environmental Coalition during the rulemaking process showed that those less stringent standards would cause, by 2030, an additional 3.8 million metric tons in climate pollution, the loss of $326 million in avoided climate damage, and a significant increase in ozone precursors, particulate matter, and other harmful emissions. Ex. 4, Rebuttal Prehearing Statement at 13-14. Because CADA's objectives with this lawsuit threaten to eliminate the very climate and public health benefits that the Environmental Coalition supported throughout the rulemaking process, CADA's lawsuit threatens to impair the Coalition's interests. *See* Ex. 5, Tonachel Decl. ¶¶ 16-17; Ex. 6 Stith Decl. ¶ 10; Linhardt Decl. ¶¶ 13-14. This lawsuit is the only venue available for the Coalition to defend those interests.

Fourth, no present party to this lawsuit adequately represents the Coalition's interests. The U.S. Supreme Court has held that a prospective intervenor bears only a "minimal" burden to show that representation of its interests "may be" inadequate. *Trbovich v. United Mine Workers*

of Am., 404 U.S. 528, 538 & n.10 (1972). Once a prospective intervenor has demonstrated an interest that may be impaired, it "*should* be allowed to participate if it appears that all of its interests *may* not be adequately represented by those already parties to that lawsuit." *O'Hara Grp. Denver, Ltd. v. Marcor Hous. Sys., Inc.*, 595 P.2d 679, 688 (1979) (emphasis added). If a prospective intervenor's "interest is similar to, but not identical with, that of one of the party's . . . intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation." *Cherokee Metro. Dist*, 266 P.3d at 407 (emphasis and internal quotation marks omitted); *see also WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010) (explaining that the possibility that "the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden").

The State does not adequately represent the Environmental Coalition's interests in this lawsuit. The State represents a much broader spectrum of interests and viewpoints than does the Environmental Coalition. When formulating its position, the State must balance the concerns of stakeholders with divergent interests and reconcile the views of multiple Departments and Divisions. As a result, the State may prioritize issues of administrative convenience or programmatic flexibility over environmental concerns. Because the Environmental Coalition focuses exclusively on protecting the environment and public health, the State's and the Environmental Coalition's positions on some of the interpretive questions in this case may diverge. *See* Tonachel Decl. ¶¶ 12-15.

For example, CADA's complaint asserts a number of claims attacking the Division's Regulatory Analysis, Cost Benefit Analysis, and Economic Impact Analysis. *See* Compl. ¶¶ 138-181. During the rulemaking process, the Environmental Coalition's experts opined that

the State's analyses in those documents included a host of conservative assumptions that tended to overstate the costs and understate the benefits of CLEAR. *See* Ex. 4, Rebuttal Prehearing Statement at 16-22; Ex. 8, Environmental Coalition Comments on the Cost Benefit Analysis, Regulatory Analysis, and Revised Economic Impact Analysis at 2-8 (Nov. 13, 2018). And the Environmental Coalition uniquely monetized the carbon reduction benefits of the rule using the social cost of carbon metric and quantified how adopting CLEAR would produce the co-benefit of reducing other harmful emissions by lowering vehicle use of gasoline, which would lower the demand for gasoline refining and the emissions associated with such reduced demand. *See* Ex. 3, Prehearing Statement at 12-17; Ex. 8, Comments on the Cost Benefit Analysis at 4. The clear differences between the Environmental Coalition's analyses and those of the Division during the rulemaking underscore their separate interests and readily satisfy the requirement that the State may not adequately represent the Environmental Coalition's interests in this litigation. *See Cherokee Metro. Dist*, 266 P.3d at 407; *O'Hara Grp. Denver*, 595 P.2d at 688; *Trbovich*, 404 U.S. at 538 & n.10.

This difference of interests between the State and the Coalition is not unique. This Court has regularly granted intervention to environmental and other groups under similar circumstances. *See, e.g.*, *Martinez v. Colo. Oil & Gas Conservation Comm'n*, No. 2014CV32637, Order Granting Motion to Intervene (Denver Dist. Ct. Dec. 24, 2014) (granting industry trade groups' motion to intervene as defendants in case challenging Colorado Oil & Gas Conservation Commission's denial of rulemaking petition); *Colo. Mining Ass'n v. Urbina*, No. 11CV2044, Order re: Joint Motion to Intervene (Denver Dist. Ct. Nov. 18, 2011) (granting

environmental coalition's motion to intervene as defendants in case challenging rule issued by the Colorado Air Quality Control Commission).

Similarly, other courts that have explicitly considered the question have often recognized the divergent interests of governmental entities and would-be intervenors, holding that "governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-37 (D.C. Cir. 2003).[6] "[T]he government's prospective task of protecting 'not only the interest of the public but also the private interest of the petitioners in intervention' is 'on its face impossible' and creates the kind of conflict that 'satisfies the minimal burden of showing inadequacy of representation.'" *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002) (quoting *Utah Ass'n of Counties*, 255 F.3d at 1255). Accordingly, "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995).

Here, the unique interests that qualified the Coalition to become a party to the rulemaking did not suddenly merge with and become identical to the State's interests merely because the Commission voted to adopt CLEAR. To the contrary, the Coalition's unique scientific viewpoint and expertise entitle it to participate as a party in this lawsuit. *See Utahns for Better Transp.*, 295 F.3d at 1117 (explaining that the inadequacy-of-representation prong is met if the

[6] *Accord Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973-74 (3d Cir. 1998); *Forest Conserv. Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (en banc); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994); *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 41-44 (1st Cir. 1992); *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991).

prospective intervenor "has expertise the government may not have"); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (party entitled to intervene when it has "expertise apart from that of the [government], . . . [and] offers a perspective which differs materially from that of the present parties to this litigation").

For all those reasons, the Environmental Coalition has significant interests in the environmental and public health impacts of CLEAR that could be impaired by the outcome of this lawsuit and that the State does not adequately represent. This Court therefore should grant the Coalition's unopposed motion to intervene as of right.

II. In the alternative, the Court should permit the Environmental Coalition to intervene.

The Environmental Coalition alternatively requests permission to intervene. Permissive intervention is available "when an application's claim or defense and the main action have a question of law or fact in common" and the applicant's intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." C.R.C.P. 24(b)(2). Like the rule governing intervention as of right, the rule governing permissive intervention "should be liberally interpreted to allow, whenever possible and compatible with efficiency and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level." *Moreland v. Alpert*, 124 P.3d 896, 904 (Colo. App. 2005). "When a trial court allows intervention pursuant to C.R.C.P. 24(b), its ruling [will] not be disturbed absent a showing of abuse of discretion." *CF&I Steel, L.P. v. Air Pollution Control Div.*, 77 P.3d 933, 939 (Colo. App. 2003).

The Environmental Coalition qualifies for permissive intervention because it seeks to defend CLEAR against the same legal claims that CADA asserts in its complaint and therefore

will not inject extraneous matters into the case. This Court will review CADA's claims based on the administrative record compiled during the underlying rulemaking proceeding, in which the Coalition participated and submitted evidence and testimony. The Coalition's familiarity with that factual record and its expertise in the scientific underpinnings and ramifications of CLEAR will substantially assist the Court in adjudicating the issues raised by CADA. *See* C.R.C.P. 1(a).

The Coalition's participation also will not unduly delay this case or prejudice any existing party. The Coalition's intervention motion is timely and its arguments will concern the same core factual and legal issues addressed by the other parties. Although, as described above, the Coalition's substantive position on some of those issues may differ from the other parties, permitting the Coalition to advocate its unique position on the merits does not constitute prejudice. To the contrary, the *Coalition* would be prejudiced if it were unable to defend the important interests that qualified it to participate as a party to the rulemaking. *Cf.* C.R.S. § 24-4-106(4) (requiring person challenging rulemaking to "notify each person on the agency's docket of the fact that a suit has been commenced" so that parties to the rulemaking may consider intervening in the lawsuit).

Accordingly, the Environmental Coalition respectfully requests permission to intervene so that it can defend its unique interests and provide additional perspective and expertise that will assist the Court in properly adjudicating the claims at issue.

III. Aligning the State Defendants' and the Coalition's answer deadlines will promote judicial economy.

The State Defendants have moved to dismiss CADA's complaint and therefore have not yet answered the complaint. *See* C.R.C.P. 12(a)(1). Pursuant to C.R.C.P. 6(b) and 24(c), the Coalition respectfully requests that its deadline to answer the complaint or file a pre-answer

motion be the same date that the State Defendants' answer or subsequent pre-answer motion is due. Aligning the State's and the Coalition's answer deadlines will promote judicial economy by enabling the defendants to coordinate their responses to the complaint and potentially avoid duplicative filings.

CONCLUSION

For all the foregoing reasons, the Environmental Coalition respectfully requests that the Court grant the Coalition's unopposed motion to intervene and to extend its deadline to answer the complaint or file a pre-answer motion.

Respectfully submitted,

March 11, 2019

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INDEX OF EXHIBITS

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, I electronically filed the foregoing motion, together with its exhibits and a proposed order, with the Clerk of the Court via ICCES.

The participants in the case are registered ICCES users and service will be accomplished by the ICCES system.

s/ Nicholas A. DiMascio
NICHOLAS A. DIMASCIO