

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NAVISTAR, INC.)

Plaintiff,)

v.)

LISA P. JACKSON, Administrator, and U.S.)
ENVIRONMENTAL PROTECTION AGENCY,)

Defendants.)

No. 11-cv-0769-CKK

**CUMMINS INC., DAIMLER TRUCKS NORTH AMERICA LLC,
DETROIT DIESEL CORPORATION, MACK TRUCKS, INC., AND
VOLVO GROUP NORTH AMERICA, LLC’S MOTION FOR LEAVE TO
INTERVENE**

Cummins Inc. (“Cummins”), Daimler Trucks North America LLC (“Daimler”), Detroit Diesel Corporation (“Detroit Diesel”), Mack Trucks, Inc. (“Mack Trucks”), and Volvo Group North America, LLC (“Volvo”), pursuant to Rule 24 of the Federal Rules of Civil Procedure, seek leave to intervene as defendants in the above-captioned case. Counsel for Defendant EPA has indicated that EPA takes no position on this motion. Counsel for Plaintiff Navistar has indicated that Navistar will oppose this motion.

For the reasons presented in the accompanying Memorandum, the Proposed Intervenors should be granted leave to intervene to protect their

interests in continued approval, certification and sale of the engines that Navistar demands be recalled – engines equipped with the SCR technology used by the Proposed Intervenors, indeed by every manufacturer but Navistar.

Respectfully submitted,

July 12, 2011

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Intervenors have a right to intervene to protect their interests in continued approval, certification and sale of engines with the SCR technology used by every manufacturer but Navistar. 2/

STATEMENT OF FACTS

This proceeding involves a challenge by Navistar to EPA's exercise of its enforcement authority under the Clean Air Act ("CAA"). Navistar seeks an order compelling the Administrator to "require the recall and repair of MY [Model Year] 2010, SCR-equipped engines" under CAA section 207(c)(1), 42 U.S.C. § 7541(c)(1). Compl. ¶¶ 1, 18. 3/

Proposed Intervenors either manufacture the SCR-equipped engines that are the subject of Navistar's challenge or use them in their diesel-powered heavy-

2/ Counsel for Defendant EPA has indicated that EPA takes no position on this motion. Counsel for Plaintiff Navistar has indicated that Navistar will oppose this motion.

3/ Selective Catalyst Reduction ("SCR") technology, which underlies this dispute, is a cost-effective and fuel-efficient clean diesel technology designed to reduce nitrogen oxide (NO_x) emissions and meet EPA's 2010 emission standards. SCR technology was also at the heart of Navistar's petitions for review of EPA's November 9, 2009 Notice entitled "Control of Emissions From New Highway Vehicles and Engines: Approval of New Scheduled Maintenance for Selective Catalyst Reduction Technologies," 74 Fed. Reg. 57,671 (Nov. 9, 2009), *see Navistar v. EPA*, No. 09-1317 (D.C. Cir.); EPA's 2009 guidance document entitled "Certification Requirements for Heavy-Duty Diesel Engines Using Selective Catalyst Reduction (SCR) Technologies"; and EPA's 2001 rulemaking entitled "Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements," 66 Fed. Reg. 5,002 (Jan. 18, 2001), *see Navistar v. EPA*, No. 09-1113 (consolidated with No. 09-1114) (D.C. Cir.).

duty trucks and commercial vehicles, or both. Specifically, Proposed Intervenor Cummins, Detroit Diesel, and Mack Trucks (through its subsidiary Volvo Powertrain) all manufacture diesel engines that rely on SCR technology to meet Clean Air Act requirements. *See* Jorgensen Decl. ¶¶ 3-4 (Cummins); Burton Decl. ¶¶ 3-4 (Detroit Diesel); Tasik Decl. ¶¶ 3-4 (Mack Trucks). Intervenor Daimler, Mack Trucks and Volvo manufacture and sell heavy-duty trucks with engines that utilize SCR technology. *See* Burton Decl. ¶¶ 3, 6; Tasik Decl. ¶¶ 3, 6.

Navistar's complaint seeks the recall of Proposed Intervenor's 2010 SCR-equipped engines based on meritless allegations that the engines do not comply with certificates of conformity issued by EPA. Given that these engines comply fully with the certificates of conformity, Navistar's litigation is really just a backdoor attempt to challenge the EPA's decision to approve engines using SCR technology in general. Either way, the lawsuit puts each of the Proposed Intervenor's products directly at risk of an improper and unlawful recall. Navistar has not challenged EPA's decisions with respect to its own engines, which use a technology known as Exhaust Gas Recirculation ("EGR"). Instead, it has focused its challenge on engines other than its own, those using the SCR technology adopted by the rest of the industry. The Federal Defendants moved for summary judgment on July 1, 2011, seeking dismissal of Navistar's complaint, and that motion remains pending.

On July 5, 2011, Navistar filed a second citizen suit in service of its campaign against SCR technology. In its July 5 complaint, also filed in this Court, Navistar seeks, *inter alia*, injunctive relief to require EPA to conduct certification testing or retesting of MY 2010 and later SCR engines under testing protocols of Navistar's devise. *See Navistar v. EPA, et. al.*, Civ. No. 11-01234-CKK. Navistar has filed a notice of related cases in that action, indicating that it shares common questions of fact with this case. Proposed Intervenors assume that both of Navistar's complaints will be handled in a coordinated way, and Proposed Intervenors intend to intervene in Number 11-01234-CKK and to coordinate filings between the two cases for maximum efficiency.

For the reasons more fully set forth below, this Court should permit Proposed Intervenors to intervene and defend the technology used in their products against Navistar's effort to use the Clean Air Act as a device for impeding competition. ^{4/} Proposed Intervenors will coordinate their defense and make joint filings to the maximum extent possible.

^{4/} Although Proposed Intervenors have attached proposed Answers to this motion as required by Fed. R. Civ. P. 24(c), Proposed Intervenors reserve their right to assert, as appropriate, any defenses listed in Fed. R. Civ. P. 12(b).

ARGUMENT

I. Standards for Intervention

Rule 24 of the Federal Rules of Civil Procedure sets forth the standards for intervention in the federal district courts. *See* Fed. R. Civ. P. 24. Rule 24(a)(2) provides for intervention as of right where the party seeking to intervene demonstrates that: (1) its application to intervene is timely; (2) it has an interest relating to the property or transaction which is the subject of the action; (3) it is so situated that disposing of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) its interest is not adequately represented by existing parties to the action. Fed. R. Civ. P. 24(a)(2); *see Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). ^{5/}

Rule 24(b) also allows for permissive intervention for any party who "has a claim or defense that shares with the main action a common question of law or

^{5/} In addition to establishing its qualification for intervention as of right under Rule 24(a), a prospective intervenor must demonstrate that it has standing under Article III of the Constitution. *Fund for Animals*, 322 F.3d at 731-32 ("[B]ecause a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties.") (citation and internal quotation marks omitted). To establish standing, a prospective intervenor "must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Id.* at 732-33. All three are clearly present here, since Proposed Intervenors seek to oppose a claim aimed at forcing unlawful recall of their products. We need not address the Article III elements at length, however, because Proposed Intervenors clearly meet the Rule 24(a) standard for intervention of right. As the D.C. Circuit has held, "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003).

fact.” Fed. R. Civ. P. 24(b)(1)(B). This Court regularly permits business and industry interests to intervene in support of EPA and other federal agencies in cases involving challenges to agency regulatory actions. *See, e.g., Fund for Animals*, 322 F.3d at 731-32; *Cnty. of San Miguel v. MacDonald*, 244 F.R.D. 36, 41-49 (D.D.C. 2007); *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 66-71 (D.D.C. 2006); *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 80 & n.3 (D.D.C. 2001); *Wilderness Soc’y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000).

II. The Proposed Intervenors are Entitled to Intervene as a Matter of Right.

A. The Intervention Motion is Timely.

The Proposed Intervenors’ motion is timely, as Navistar filed its complaint on April 21, 2011, and this motion is filed shortly after Defendant EPA’s initial response to the complaint. “Timeliness is determined by all of the circumstances in a case and is determined by the court in the exercise of its sound discretion.” *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007) (citing *NAACP v. New York*, 413 U.S. 345, 365-66 (1973)). There should be no dispute here that this motion to intervene is timely. It is being filed shortly after EPA made its first substantive filing, only two months after the Complaint was filed, and obviously well in advance of any initial conference or status hearing of the Court. *See Atl. Refinishing & Restoration, Inc. v. Travelers Cas. & Sur. Co.*, 272 F.R.D. 26, 29 (D.D.C. 2010) (“[I]t is undisputed that the petitioner’s motion [to intervene],

which was filed before the scheduling of an initial status hearing in this matter, is timely.”); *Cnty. of San Miguel*, 244 F.R.D. at 38, 46 (finding the motion to intervene timely when filed almost four months after the complaint was filed).

B. The Proposed Intervenors Have an Interest Related to a Property or Transaction That is a Subject of This Action.

Proposed Intervenors’ interest in the matter is also beyond fair dispute. They each manufacture diesel engines and/or diesel-powered heavy-duty trucks and commercial vehicles utilizing the SCR technology that Navistar challenges in this action. It is hard to imagine any interest more clearly at risk than those of the many competitors whose EPA-certified products Navistar seeks to wipe from the market through the unlawful recall of all model year 2010 SCR-equipped engines. If successful, Navistar’s efforts would not only impose an immensely expensive and unwarranted burden on Proposed Intervenors, it also would damage Proposed Intervenors’ relationships with customers and dramatically impact their competitiveness – the likely true and only motive behind Navistar’s actions. In such cases, the interests and right of private entities to intervene in challenges to government action are irrefutable. *See Natural Res. Def. Council, Inc. v. U.S. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (“*NRDC*”) (pesticide manufacturers entitled to intervene in suit challenging pesticide registration procedures); *New England Petroleum Corp. v. Fed. Energy Admin.*, 71 F.R.D. 454, 457-58 (S.D.N.Y. 1976) (oil company granted intervention in action by refiner against

Federal Energy Administration where impact of lawsuit would have substantial adverse economic effects). Navistar's complaint should be seen for what it is: an attempt to eliminate competition from SCR engine manufacturers in the market place, not to address emissions.

Based on their respective manufacturing operations and product designs, the Proposed Intervenors will offer unique and important perspectives on the issues raised in Navistar's complaint, perspectives that would assist the Court in understanding the SCR technology challenged by Navistar. Indeed, given that Navistar's allegations involve direct attacks on the design and operation of individual manufacturers' emissions control systems, the individual manufacturers are in the best position to defend their technology.

Proposed Intervenors have already been allowed to intervene in another litigation Navistar has filed in its campaign against SCR technology. On March 10, 2011, Navistar filed a complaint against the California Air Resources Board ("CARB") and its chairperson, Mary D. Nichols, challenging CARB's certification process for engines that use SCR technology. In that action, Navistar alleges that CARB's testing methods for SCR engines violates CARB's statutory mandates under the California Health and Safety Code and implementing regulations, and seeks a judgment ordering CARB to revise these testing methods for model year 2011 and later SCR engines. On April 11, 2011, these same

Proposed Intervenors sought to intervene in the California action. On May 5, 2011, the California court granted the intervention motion, recognizing that the Proposed Intervenors have a significant interest in protecting their rights in certifications issued by CARB that authorize their use of SCR technology. *See Navistar, Inc. v. Cal. Air Res. Bd.*, CGC-11-509074, Minute Order (S.F. Super. Ct. May 5, 2011). Proposed Intervenors' interest is even greater here, as Navistar is seeking recall of their model year 2010 SCR-equipped engines.

C. The Proposed Intervenors' Interests are not Adequately Represented by the Existing Parties.

Rule 24(a)'s requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). *See also Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (burden of showing that existing parties to litigation will not adequately represent a prospective intervenor's interests is "not onerous," and applicant need only show that "representation of [its] interest 'may be' inadequate, not that representation will in fact be inadequate").

Although the Proposed Intervenors generally share EPA's interest in defending the agency's regulatory position with respect to SCR technology, EPA's participation in this litigation is not adequate to represent the Proposed Intervenors' interests. EPA acts to protect the public interest in general; it does

not and cannot advocate for or on behalf of a private party's interests, including those of the Proposed Intervenors. *See, e.g., Dimond*, 792 F.2d at 192 (noting “the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances”); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (an agency's interest in content of regulation will differ from the interest of one governed by those regulations); *NRDC*, 99 F.R.D. at 610 (“Facially, it would seem that EPA and the intervenors have the same interest in demonstrating that the Reform Measures are lawful. Yet, the interests of EPA and the intervenors cannot always be expected to coincide.”).

Moreover, as noted above, Navistar is alleging that the design and operation of individual manufacturers' SCR systems fail to comply with EPA-issued certificates of conformity. *See* Compl. ¶ 17. The manufacturers are in the best, and perhaps only, position to defend their individual systems. It is critical that they be able to do so, as this may affect the arguments made in defense of Navistar's complaint. In addition, the Proposed Intervenors – not EPA – are in the best and perhaps only position to understand and convey the very substantial impacts that a recall of their 2010 SCR engines would have on their businesses and those of their customers. After all, were Navistar to succeed in its campaign against SCR-equipped engines—which it surely should not—it is the Proposed

Intervenors that would suffer the expense, business disruption and impact on customer relations of implementing product recalls.

Just as importantly, Proposed Intervenors' unique interests may also affect any settlement discussions. Were EPA to consider settlement of this case, any alteration of the certifications or EPA procedures could have a significant impact on the Proposed Intervenors' interests. ^{6/} It would badly distort such discussions to allow participation by Navistar, the one manufacturer that does not use SCR technology, but not the many who do.

While Proposed Intervenors will strive to avoid duplicating arguments by EPA, the agency's interests here are clearly not equivalent to those of the Proposed Intervenors. Thus, absent intervention, Proposed Intervenors will not be in a position to adequately protect their interests in this matter, and absent intervention, disposition of the action may as a practical matter impair or impede Proposed Intervenors' ability to protect their interests as they may not have the ability to relitigate these issues in a separate suit. *See Atl. Ref. Co. v. Standard Oil Co.*, 304 F.2d 387, 394 (D.C. Cir. 1962) (observing that "a judgment invalidating [an] order or regulation will result in substantial injury to those

^{6/} Proposed Intervenors' interests include specific procedural rights that they seek to protect through intervention. Under Section 207(c)(1) of the Clean Air Act, 42 U.S.C. § 7541(c)(1), a manufacturer that holds a certificate of conformity issued by EPA has a right to an adjudicatory hearing before EPA can require recall of its products. The SCR manufacturers, alone, are positioned to protect that interest.

deriving direct benefit therefrom and will be as final and conclusive to them as if they were bound by it under the doctrine of res judicata . . .”).

Having timely filed a motion to intervene, and having established an interest in the proceedings that is not adequately represented by the existing parties, Proposed Intervenors have a right to intervene in this matter.

III. Alternatively, the Proposed Intervenors Should be Granted Permissive Intervention.

Proposed Intervenors also qualify for permissive intervention under Rule 24(b). *See* Fed. R. Civ. P. 24(b). Rule 24(b) provides, in relevant part: “On timely motion, the court may permit anyone to intervene 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). Rule 24(b) further states that in considering a motion for permissive intervention, the Court “must consider whether intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *Id.* at 24(b)(3).

Proposed Intervenors’ defense of EPA’s regulatory position plainly involves the same questions of law and fact that are the subject of Navistar’s challenge. And Proposed Intervenors’ intervention at this early stage of the proceedings will not unduly delay or prejudice the adjudication of either Navistar’s or EPA’s rights. To the contrary, participation by Proposed Intervenors will assure that all sides are heard regarding the lawfulness of EPA’s

decision to approve engines using SCR technology – Navistar, as the sole exponent of an alternative technology, EPA, as the regulatory agency seeking to protect the public interest in general, and the Proposed Intervenors, who have all implemented SCR technology in their various products.

CONCLUSION

For all of the foregoing reasons, the Proposed Intervenors' motion for leave to intervene as defendants should be granted.

Respectfully submitted,

July 12, 2011

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CERTIFICATE OF SERVICE

This is to certify that on this 12th day of July, 2011, a true and correct copy of the foregoing Motion to Intervene, Memorandum in Support of Motion to Intervene, and attached exhibits (including proposed Answers) were served by overnight mail on:

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