

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NATIONAL SOLID WASTES MANAGEMENT)
ASSOCIATION,)

Plaintiff,)

v.)

JENNIFER M. GRANHOLM, in her official)
capacity as Governor of the State of Michigan;)
STEVEN E. CHESTER, in his official capacity as)
Director of the Michigan Department of)
Environmental Quality; MIKE COX, in his official)
capacity as Michigan's Attorney General; COL.)
TADARIAL J. STURDIVANT, in his official)
capacity as Director of the Michigan Department of)
State Police; and the CHARTER COUNTY OF)
WAYNE)

Defendants,)

and,)

SIERRA CLUB,)

Intervenor-Applicant)

File No. 04-71271
Hon. George E. Woods

U.S. DIST. COURT OF E.D. MICH.
EAST DIST. MICH.
DETROIT

04 MAY 17 P 2:25

FILED

BRIEF IN SUPPORT OF SIERRA CLUB'S MOTION TO INTERVENE

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I. ISSUES PRESENTED

The State of Michigan has enacted a package of laws protecting the health and safety of its residents from the toxic hazards associated with the State's landfills. The National Solid Wastes Management Association (the "Wastes Association") challenges those laws under the federal and Michigan constitutions. Sierra Club hereby seeks leave to intervene of right as a defendant, under Federal Rule of Civil Procedure 24(a). Sierra Club has substantial interests that could be affected by this litigation: the Club has engaged in a decade-long effort to secure the landfill legislation, and the Club and its members are directly affected by the environmental hazards addressed by the legislation. This motion is timely made, and none of the existing parties adequately represents the Sierra Club's narrow substantive interest in environmental quality, or its broad geographic interest in waste-disposal issues outside of Michigan. The Club may therefore intervene of right. Fed. R. Civ. P. 24(a). In the alternative, Sierra Club moves for permissive intervention under Rule 24(b). The State of Michigan and Wayne County do not oppose this motion. The Wastes Association has indicated that it currently intends to oppose Sierra Club's intervention.

II. GOVERNING AUTHORITY

The most appropriate governing authority for the Court's decision is Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997), discussed on pages 7 to 9, below.

III. FACTUAL BACKGROUND

A. Background: Waste and Landfills in Michigan

Landfills, and the waste materials that concentrated at landfills, pose serious threats to the health of nearby residents, and to the surrounding environment. "Leachate" – pollutants dissolved in water as it percolates through land-filled wastes – can contaminate groundwater and drinking supplies, as well as nearby lakes, rivers and wetlands. Decomposing organic matter in landfills releases methane gas, a potent (and explosive) contributor to global warming. See John Rousakis & Bernard A. Weintraub, "Packaging, Environmentally Protective Municipal Solid Waste Management, and the Limits to the Economic Premise," 21 Ecology L.Q. 947, 954-956 (1994) (summarizing environmental hazards associated with waste landfills). Moreover, everyday consumer-items such as batteries and fluorescent lights, when dumped at common landfills, can leach mercury and a variety of other toxins into the surrounding soils, air and water. See Robert R.M. Verchick, "The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars," 70 S. Cal. L.R. 1239, 1247 n.28 (1997). And, as one observer has noted, "[e]xternalities associated with landfill operations such as increased noise, traffic, smell, and rat populations plague neighboring communities." Id. at 1247. See also Declaration of Gloria Miller ("Gloria Miller Decl.") ¶ 4. Those hazards are borne primarily by the

working class communities in whose vicinity landfills are most often sited. See Vicki Been & Francis Gupta, "Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims," 24 Ecology L.Q. 1, 34 (1997) (working class neighborhoods bear a disproportionate share of environmental burdens from landfills).

Over the past decade, the amount of solid waste dumped into Michigan landfills has skyrocketed, along with the attendant hazards. Between 1996 and 2003, the amount of solid waste deposited in Michigan's landfills rose by nearly 50%, from 42 to over 62 million tons. Waste & Hazardous Materials Div., Michigan Dep't of Environmental Quality, Report of Solid Waste Landfilled in Michigan 3 (January 30, 2004). That rise was fueled, in part, by the continued availability of low-cost landfill capacity in Michigan, even as neighboring states and Canadian territories began to exhaust their capacity. As a result, those neighboring states and territories have exported an increasing amount of waste to Michigan. Id. at 3-4.

During this rise, Michigan has attempted to tighten the standards governing waste deposited at the State's landfills. Those efforts have achieved only limited success – in part because waste-disposal standards have proven remarkably difficult to enforce. Policing the tons of waste arriving at Michigan's landfills has proven well-nigh impossible; checking that waste for prohibited materials requires sifting, quite literally, through truck-loads of garbage. See Waste & Hazardous Materials Div., Michigan Dep't of Environmental Quality, Report on Waste Inspections at Michigan Landfills 10 (September 22, 2003) (noting that "[n]o effective screening tool exists" to eliminate threat of "hazardous waste mixed with general refuse"). The only means by which

hazardous materials can feasibly be eliminated, accordingly, is by preventing their entry into the waste-stream.

B. The Landfill Legislation

The Sierra Club, through its staff and volunteers, has devoted over a decade of advocacy to promoting stricter regulation of solid wastes and landfills in Michigan. The Club has sponsored two wide-ranging programs seeking to reduce the impacts of solid waste disposal on Michigan's environment. Declaration of Gayle Miller ("Gayle Miller Decl.") ¶¶ 2-3. Sierra Club members and staff coordinated petition and letter-writing campaigns, and went door-to-door to garner support for the waste-control legislation challenged here. See id. ¶ 4. The Sierra Club has provided legislative testimony in support of strong waste regulations, and worked on a series of initiatives to secure more effective landfill regulation. See Declaration of Peter Pasterz (Pasterz Decl.) ¶¶ 4-6.

Those efforts, among others, led to the passage of the legislation that is the subject of this lawsuit. In rough outline, the challenged bills: (1) tighten the standards governing all waste deposited in Michigan's landfills, by expressly prohibiting certain waste materials, e.g. M.C.L. § 324.115114(3); (2) provide enforcement mechanisms to ensure uniform application of those standards to all waste deposited in Michigan's landfills, including waste originating outside Michigan, e.g. M.C.L. §§ 324.11526a, 324.11546(2); and (3) establish a two-year moratorium on the construction of new landfills in Michigan, e.g. M.C.L. § 324.11511a. The laws took effect in March. The Wastes Association filed its complaint challenging the landfill legislation on April 5, 2004, alleging that the State

has exceeded its authority under both federal and state constitutions. The defendants answered on April 23, 2004. No other substantive pleadings have been filed to date.

IV. LEGAL STANDARD

A party may intervene of right under Rule 24(a), if it demonstrates: the “(1) timeliness of [its] application to intervene, (2) . . . [a] substantial legal interest in the case, (3) impairment of [its] ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court.” Stupak-Thrall v. Glickman, 226 F.3d 467, 471 (6th Cir. 2000) (citation omitted). Permissive intervention, under Rule 24(b), is proper “so long as the motion for intervention is timely and there is at least one common question of law or fact,” subject to “the balancing of undue delay, prejudice to the original parties, and any other relevant factors.” Id. at 472 (citation omitted). Under the Sixth Circuit’s caselaw, “Rule 24 should be ‘broadly construed in favor of potential intervenors,’” whether intervention is sought of right or permissively. Id. (citation omitted).

V. ARGUMENT

Sierra Club’s long-standing advocacy in support of the legislation challenged in this litigation, as well as the Club’s overarching concern in the environmental protections achieved by that legislation, is sufficient to warrant intervention of right. In the alternative, Sierra Club requests permissive intervention. Under either standard, there is no question of timeliness; the lawsuit was filed just over one month ago, and no substantive pleadings, aside from the complaint and answer, have been filed. See Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997) (intervention

motion filed two weeks after complaint, when “case was obviously in its initial stage” is “timely as a matter of law”).

A. Sierra Club Has A Right to Intervene Under Rule 24(a) to Protect Its Interests in the Landfill Legislation and the Protection of Michigan’s Environment.

1. *Sierra Club Has a Substantial Interest in This Litigation*

Sierra Club has two interests, each of which falls well within the “rather expansive notion of the interest sufficient to invoke intervention of right.” Grutter v. Bollinger, 188 F.3d 394, 398 (6th Cir. 1999) (citation omitted) (noting that applicant need not demonstrate “the same standing necessary to initiate a lawsuit,” or a “specific legal or equitable interest”). See also id. at 399 (“close cases should be resolved in favor of recognizing an interest under Rule 24(a)”) (citation omitted).

a. *Sierra Club’s Advocacy in Support of the Legislation Creates a Substantial Interest in Defending the Legislation.*

First, Sierra Club has expended significant effort in support of the landfill legislation. See Gayle Miller Decl. ¶¶ 2-6; Pasterz Decl. ¶¶ 3-6. That effort creates an interest in defending the legislation sufficient to satisfy Rule 24(a): “a public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation.” Michigan State AFL-CIO v. Miller, 103 F.3d at 1245.

The Sixth Circuit, in Michigan State AFL-CIO, permitted the Michigan Chamber of Commerce to intervene in a union challenge to State campaign finance laws, based on circumstances precisely paralleled here. The Circuit found that intervention was appropriate because the Chamber had been “a vital participant in the political process that

resulted in the legislative adoption” of the challenged statute. Id. at 1247. Likewise, the Sierra Club here was a vital participant in the political process that led to adoption of the landfill legislation. Gayle Miller Decl. ¶¶ 2-6; Pasterz Decl. ¶¶ 3-6. The Circuit relied on the fact that the Chamber was a “repeat player” in the campaign finance litigation. Id. The Sierra Club is, similarly, a repeat player in waste-regulation litigation. See, e.g., Environmental Technology Council v. Sierra Club, 98 F.3d 774 (4th Cir. 1996) (commerce clause challenge to state waste legislation, Sierra Club as intervenor-defendant); Waste Systems Corp. v. County of Martin, Minnesota, 985 F.2d 1381 (8th Cir. 1993) (commerce clause challenge to local waste regulation, Sierra Club as intervenor-defendant); Sierra Club v. U.S. Env'tl. Protection Agency, 992 F.2d 337 (D.C. Cir. 1993) (Sierra Club challenge to EPA regulations governing solid waste disposal, waste management group as intervenor-defendant).

The Chamber in Michigan State AFL-CIO was “a significant party which [was] adverse to the [plaintiff] in the political process surrounding Michigan state government’s regulation of practical campaign financing.” 103 F.3d at 1247. The Sierra Club here is a significant party adverse to the Wastes Association in the political process surrounding Michigan’s regulation of solid waste disposal. See Pasterz Decl. ¶¶ 4-6. The Chamber was “regulated by . . . [the] statutory provisions challenged by the plaintiffs.” Michigan State AFL-CIO, 103 F.3d at 1247. Sierra Club members here are directly protected by the statutory provisions challenged by the Wastes Association. Gayle Miller Decl. ¶¶ 7-8; Gloria Miller Decl. ¶¶ 2-5. In short, just as the Chamber had “a substantial legal interest” giving it a right of intervention, the Sierra Club likewise possesses an interest

here that meets the requirements of Rule 24(a). Michigan State AFL-CIO, 103 F.3d at 1247.

- b. Sierra Club Has An Interest in the Environmental Protections Achieved by the Legislation.

Second, even if Sierra Club did not have that direct interest in the landfill legislation, Sierra Club's and its members have a substantial interest in avoiding the environmental harms addressed by the legislation. Sierra Club members live and work in the vicinity of landfills that would be regulated by the landfill legislation. Gloria Miller Decl. ¶¶ 2-5. Sierra Club's central mission is environmental protection, and reducing the impacts of waste disposal has been a core element of the Sierra Club's agenda in Michigan. Pasterz Decl. ¶¶ 3-6; Gayle Miller Decl. ¶¶ 2-6. The Sierra Club accordingly has an interest in environmental protection sufficient to support intervention under Rule 24(a). See Grutter v. Bollinger, 188 F.3d at 397 (finding that public interest group, inter alia, whose "stated mission is to preserve opportunities in higher education" had "a substantial legal interest in educational opportunity" sufficient to warrant intervention of right in lawsuit challenging university's affirmative action policies).

2. *This Lawsuit May Impair Sierra Club's Ability to Protect Its Interests.*

The Wastes Association seeks to invalidate the landfill legislation. Such relief would wholly vitiate the Sierra Club's efforts in support of the legislation. It would further hamper the Club's efforts to seek state regulation of landfill-related pollution throughout the country; a ruling from this Court finding such regulation unconstitutional would strongly discourage future efforts in Michigan and elsewhere. See Michigan State

AFL-CIO, 103 F.3d at 1247 (“This court has already acknowledged that potential stare decisis effects can be a sufficient basis for finding an impairment of interest.”). And such a ruling would subject Club members to continued environmental threats from landfills, substantially setting back the Club’s efforts to protect Michigan’s environmental quality. In short, “impairment of [the Sierra Club’s] substantial legal interest is possible if intervention is denied”; that possibility meets the “minimal” burden required to justify intervention under Rule 24(a). Id.

3. *The Current Parties Do Not Adequately Represent Sierra Club’s Interests.*

Finally, none of the current parties to this litigation shares Sierra Club’s narrow interest in environmental protection, or its broad geographic interest in sustaining environmental quality across the United States. The State and County of Wayne each represent a broad range of substantive concerns beyond environmental protection, including revenue collection and economic and businesses development. Those concerns create a significant difference between the interests represented by the governmental defendants in this case, and the purely environmental mission of the Sierra Club. “[T]he government represents numerous complex and conflicting interests in matters of this nature. The straightforward [narrow] interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies.” Kleissler v. U.S. Forest Serv., 157 F.3d 964, 973-94 (3d Cir. 1998). See Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 (1972) (holding that governmental body representing multiple interests is not adequate representative of group seeking to defend specific concern).

Moreover, the Club is actively involved in waste-regulation issues beyond Michigan's borders, both in other states and at the federal level. Sierra Club seeks to intervene, therefore, not just to protect the particular legislation at issue here, but to preserve the opportunities of other states to regulate wastes. Sierra Club further seeks to preserve the proper scope of federal authority, insofar as such authority is necessary to ensure appropriate national policies regarding waste-disposal. See Christine A. Klein, "The Environmental Commerce Clause," 27 Harv. Envtl. L. Rev. 1, 53-59 (2003) (noting interplay between federal and state authority under commerce clause and dormant commerce clause jurisprudence). On each of those issues, Sierra Club's interests diverge from the more parochial concerns of the State and County. See Mille Lacs Band of Chippewa Indians v. State of Minnesota, 152 F.R.D. 583, 586 (D. Minn. 1993) (finding representation inadequate because Indian Tribe lacked "incentive to protect the interests of other tribes in the nation" and could not represent "overall federal Indian policy").

Sierra Club's interests in this litigation are thus substantively narrower and geographically broader than those of the current defendants. That is more than adequate to meet Rule 24(a)'s requirements. "The Supreme Court has held, and we have reiterated, that the proposed intervenors' burden in showing inadequacy is 'minimal.' The proposed intervenors need show only that there is a *potential* for inadequate representation." Grutter, 188 F.3d at 400 (citations omitted).

B. In the Alternative, Sierra Club Should Be Granted Permissive Intervention

Sierra Club likewise satisfies Rule 24(b)'s requirements for permissive intervention. As set forth above, this motion is timely. Sierra Club's defense and the

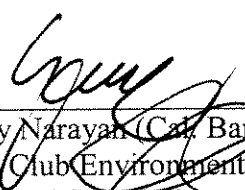
State's contain some common questions of law and fact. See Sierra Club's Proposed Answer, Michigan Answer. Sierra Club's participation will not "unduly delay or prejudice the adjudication of the rights of the original parties." Purnell v City of Akron, 925 F.2d 941, 951 (6th Cir. 1991). And Sierra Club possesses expertise in the environmental impacts of unregulated waste disposal, and the benefits of the landfill legislation, that would aid the Court in its resolution of this case. Permissive intervention is, accordingly, appropriate. See id.

VI. CONCLUSION

For the reasons set forth above, Sierra Club seeks leave to intervene as a defendant in this action.

Respectfully submitted this 14th day of May, 2004.

By:



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