

Protection Agency, and the U.S. Environmental Protection Agency (jointly “EPA”) hereby oppose SVTC’s Motion to Intervene as a Joint Petitioner on the following grounds.

First, the Solid Waste Disposal Act (“SDWA”) requires that petitions for review of EPA’s action “in promulgating any regulation or requirement under this chapter or denying any petition for the promulgation, amendment, or repeal of any regulation under this chapter” must be filed within 90 days “from the date of such promulgation or denial.” See 42 U.S.C. § 6976(a)(1). SVTC seeks to join as a Petitioner in review of EPA’s “Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program” issued on May 16, 2006. Assuming arguendo that EPA’s “Determination” amounts to the promulgation of a “regulation” or the denial of a “petition for the promulgation, amendment, or repeal of any regulation”(which EPA intends to contest at the appropriate time), the 90-day statutory period for filing challenges to this determination expired on August 14, 2006. Because SVTC has failed to file within the requisite ninety-day time period, the Court should deny SVTC’s motion.

SVTC appears to seek intervention as a matter of right under Federal Rule

of Civil Procedure 24(a)(2).² See SVTC Mot. to Intervene at 3 (referring to Rule 24(a)'s intervention of right standard).³ Courts examine four factors to determine whether to grant a motion for intervention under Rule 24(a)(2): (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction that is the subject of the transaction; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by the existing parties. See Jones v. Prince George's County, Maryland, 348 F.3d 1014, 1018 (D.C. Cir. 2003); see also Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1074 (D.C. Cir. 1988).

While SVTC has filed its motion to intervene within the period set forth in Rule 15(d) of the Federal Rules of Appellate Procedure, intervention is not timely in this matter, as SVTC did not challenge EPA's "Determination" within ninety days of its promulgation. This Court has held that "intervenors under Rule 24(a)(2) assume the status of full participants in a lawsuit and are normally treated

² As this Court has noted, "standards for intervention applicable in the district court" also apply in the court of appeals. See Building & Constr. Trades Dep't. AFL-CIO v. Reich, 40 F.3d 1275, 1282-83 (D.C. Cir. 1994).

³ SDWA Section 7006, 42 U.S.C. § 6976(a)(1) provides no express authority for intervention.

as if they were original parties once intervention is granted.” District of Columbia v. Merit Systems Protection Board, et al., 762 F.2d 129, 38 (D.C. Cir. 1985).

Granting SVTC’s motion would thwart the express jurisdictional bar of SDWA section 7006(a) (1), 42 U.S.C. § 6976(a)(1), by allowing non-petitioning parties to challenge the promulgation of regulations or the denial of a petition for the promulgation, amendment, or repeal of a regulation as original petitioners over 120 days after promulgation.

This Court considered a similar set of facts in Process Gas Consumers Group v. FERC, 912 F.2d 511, 515 (D.C. Cir. 1990). Process Gas involved review of a Federal Energy Regulatory Commission order under the Natural Gas Act. See id. The court disallowed an intervenor from assuming the role of a petitioner after the original petitioner had withdrawn because, among other things, the notice of intervention was filed beyond the jurisdictional time limit. Similarly, SVTC’s motion to intervene in this case was filed well beyond the SDWA’s ninety-day jurisdictional time limit and, therefore, must be considered untimely. Id.; see also Waste Management of Illinois v. EPA, 945 F.2d 419, 421 (DC Cir. 1991) (refusing to allow intervention when a proposed intervenor’s motion was

filed outside of SDWA's § 7006(a)(1) ninety-day statutory period).⁴

Additionally, it appears that, if granted intervention as a Joint Petitioner, SVTC intends to raise new issues for review. See SVTC Mot. to Intervene at 4 (“It remains uncertain whether Petitioners’ request for relief will encompass all possible issues related to EPA’s alleged improper rulemaking.”). EPA opposes intervention for this purpose. As this Court has noted on multiple occasions, “[a]n intervening party may join issue only on a matter that has been brought before the court by another party.” See Edison Electric Institute v. EPA, 391 F.3d 1267, 1274 (D.C.Cir. 2004); see also Vinson v. Washington Gas Light Co., 321 U.S. 489, 498 (1944) (“[A]n intervenor is admitted to the proceedings as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.”); Beethoven.com v.

⁴ Because SVTC’s Motion to Intervene is untimely, the Court need not consider whether SVTC satisfies any of the other elements of Rule 24(a). See Hodgson v. United Mine Workers of Am., 473 F.2d 118, 129 (D.C.Cir.1972) (“[T]imeliness is a prerequisite to any claim for intervention under Rule 24 . . .”).

Additionally, to the extent that SVTC intends to seek permissive intervention under Rule 24(b), it must demonstrate that its petition has an independent ground for subject matter jurisdiction. Because SVTC’s motion to intervene was filed outside of RCRA’s section 6976(a)(1) ninety-day statutory filing period, SVTC has no independent ground for subject matter jurisdiction. In addition, for the reasons discussed above, their motion to intervene is not timely. Thus, SVTC cannot satisfy the requirements for permissive intervention as a Joint Petitioner.

Librarian of Congress, 394 F.3d 939, 946 (D.C. Cir. 2005) (“We will not permit intervention for the purpose of raising these new issues.”). Intervenors may not expand the proceedings, for “[o]therwise, the time limitations for filing a petition for review . . . could easily be circumvented through the device of intervention.”

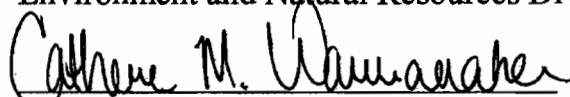
See Illinois Bell Telephone Co. v. F.C.C., 911 F.2d 776, 786 (D.C. Cir. 1980).

Here, SVTC improperly seeks to expand the scope of this court’s review by raising expanded claims, filed well outside of the statutory time period, as a “Joint Petitioner” - a status not recognized by case law or the federal rules. In this situation, the Court should deny SVTC’s motion. See, e.g. id.

For the foregoing reasons, Respondents respectfully request that the Court deny SVTC’s Motion to Intervene as a Joint Petitioner.

Respectfully submitted,

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment and Natural Resources Division



CATHERINE M. WANNAMAKER
Environmental Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Telephone: (202) 514-9365

Facsimile: (202) 514-8865

Attorney for Respondents Stephen L.
Johnson and U.S. EPA

OF COUNSEL:
GAUTAM SRINIVASAN
U.S. EPA
Office of General Counsel (2344-A)
1200 Pennsylvania Avenue, NW
Washington DC 20460
Telephone: (202) 564-5647
Facsimile: (202) 566-0070

DAVID GILLESPIE
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
Telephone: (214) 665-7467
Facsimile: (214) 665-2182

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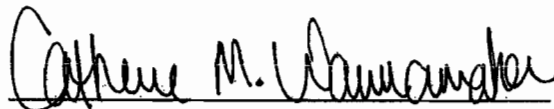
CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2006, I caused a true and correct copy of the foregoing "Respondents' Opposition to Silicon Valley Toxics Coalition's Motion to Intervene" to be served by first class mail, postage prepaid, on the following:

DAVID FREDERICK
RICK LOWERRE
LOWERRE & FREDERICK
44 East Ave., Ste. 101
Austin, TX 78701
Telephone: (512)469-6000
Facsimile: (512)482-9346

Attorneys for Petitioners Texas Disposal Systems Landfill, Inc.; Texas Campaign for the Environment; and Clean Water Action

JIM BLACKBURN
BLACKBURN & CARTER
4709 Austin St.
Houston, TX 77004
Telephone: (713) 524-1012
Counsel for Petitioner Texas
Disposal Systems Landfill, Inc.


CATHERINE M. WANNAMAHER

Dated: September 20, 2006