UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RIVERKEEPER, INC.; CONNECTICUT FUND FOR THE ENVIRONMENT, d/b/a/ SAVE THE SOUND; NATURAL RESOURCES DEFENSE COUNCIL, INC.; WATERKEEPER ALLIANCE, INCL.; RARITAN BAYKEEPER, INC., d/b/a NY/NJ BAYKEEPER; BRONX COUNCIL FOR ENVIRONMENTAL QUALITY; NEWTOWN CREEK ALLIANCE; JAMAICA BAY ECOWATCHERS; HUDSON RIVER WATERTRAIL ASSOCIATION,

Plaintiffs, No. 1:17-cv-4916-VSB

v.

SCOTT PRUITT, Administrator of the United States Environmental Protection Agency; PETER D. LOPEZ, Regional Administrator, Environmental Protection Agency, Region 2; and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO INTERVENE AS DEFENDANT OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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PRELIMINARY STATEMENT

This action concerns water quality regulations that the New York State Department of Environmental Conservation ("DEC") promulgated in 2015. Under federal law, a water quality standard for a lake, stream, ocean bay or other water body includes both designated uses, such as a source of drinking water or a location for swimming, and numeric or other criteria relating to pollution levels. Neither Plaintiffs nor anyone else filed a direct judicial challenge or any other challenge to the DEC regulations, and the time for doing so is long past.

Plaintiffs now seek to challenge those regulations indirectly by suing the U.S. Environmental Protection Agency, its Administrator and its Regional Administrator for the region that includes New York (collectively, "EPA"). Plaintiffs' first claim alleges that, under the pertinent facts, EPA had a duty under the federal Clean Water Act to replace the DEC regulations with its own water quality standards and unlawfully failed to do so. Plaintiffs' second claim alleges that EPA has unlawfully failed to approve or disapprove the DEC regulations. On these two claims, Plaintiffs ask this Court for relief that would require EPA either to promulgate standards to replace the DEC regulations or, in the alternative, to determine that the DEC regulations do not meet federal requirements.

Movant for intervention DEC has an indisputable interest in defending DEC's water quality regulations against this collateral attack. DEC has a further interest in explaining its legal positions to the Court so that the Court will be fully informed before making a ruling that may not only affect the current regulations but may govern DEC's authority to promulgate future regulations and EPA's review of such future regulations. DEC's interests in these regulations differs significantly from EPA's interest. For all these reasons, the Court should grant DEC

intervention as of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, permissive intervention under Federal Rule of Civil Procedure 24(b)(2).

BACKGROUND

Under the Clean Water Act, water quality standards for a lake, stream, ocean bay or other water body include both (a) designated uses, such as a source of public drinking water, a location for swimming or fishing, or habitat for fish, shellfish or wildlife, and (b) numeric or other criteria relating to pollution levels. *See, e.g.*, 33 U.S.C. § 1313(c)(2)(A); EPA, What Are Water Quality Standards, *at* https://www.epa.gov/standards-water-body-health/what-are-water-quality-standards. Under the Act, states are responsible for promulgating water quality standards for water bodies within their boundaries. 33 U.S.C. § 1313(a)(3)(A) & (c)(1). For purposes of the Act, the states then submit new or revised water quality standards to EPA for EPA review. 33 U.S.C. § 1313(c)(2)(A). If EPA disapproves such standards in full or in part or otherwise determines that a new or revised standard is legally necessary, the Clean Water Act gives EPA authority to promulgate its own standards within a set time frame. 33 U.S.C. §§ 1313(c)(3) & (4).

Plaintiffs' complaint arises out of a letter that EPA sent to DEC on May 9, 2016 concerning water quality regulations that DEC had promulgated in 2015 and subsequently sent to EPA for review. The EPA letter set out the results of EPA's review of those 2015 regulations, approving some aspects of the regulations and expressing no position with regard to other aspects.

Plaintiffs' claims allege that EPA's review of DEC's 2015 water quality regulations did not meet the requirements of the federal law in two ways. First, Plaintiffs allege that, in the May 2016 letter, EPA disapproved portions of the 2015 regulations and as a result had a mandatory

duty to promulgate its own standards in lieu of the DEC regulations. Complaint ¶¶ 43-51 [Docket Item 1]. Second, in the alternative, Plaintiffs assert that EPA's letter failed to expressly approve or disapprove of the 2015 regulations in violation of a statutory duty to do so. *Id.* ¶¶ 53-58.

An assumption underlying both claims is that the 2015 water quality regulations did not meet the requirements of the Clean Water Act, *id.* ¶¶ 45, 54, and that EPA had a duty to act in light of the purported inadequacy of the regulations, *id.* ¶¶ 49, 56. As relief, Plaintiffs principally seek an order either compelling EPA to promulgate standards to replace the 2015 DEC regulations or compelling EPA to send a notice of disapproval to DEC that would direct DEC to revise its regulations. *Id.* at 17-18.

ARGUMENT

I. DEC IS ENTITLED TO INTERVENE AS OF RIGHT

Federal Rule of Civil Procedure 24(a)(2) provides for intervention as of right upon timely motion by anyone who:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). DEC meets all of these criteria.

A. DEC Has an Interest in Defending DEC's Own Actions, and This Litigation May Impair and Impede DEC's Ability to Protect Its Interests

There is ample case law authority supporting intervention as of right of a government when the subject of the litigation relates to a government agency's authority or actions. *See, e.g.*, *AB ex rel. CD v. Rhinebeck Central Sch. Dist.*, 224 F.R.D. 144, 156-57 (S.D.N.Y. 2004) (allowing United States to intervene to ensure proper enforcement of federal statute when

adverse judgment could interfere with the United States' ability to enforce that statute); *Stevenson v. Rominger*, 905 F. Supp. 836, 837, 842-43 (E.D. Wash. 1995) (allowing commission consisting primarily of state designees to intervene as of right when the lawsuit could affect the commission's duties regarding a plan that the commission was involved in creating and might need to amend over time). "The rule is satisfied whenever disposition of the present action would put the movant at a practical disadvantage in protecting its interest." 7C Wright & Miller, *Fed. Practice & Procedure* § 1908.2; *see also Peruta v. County of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) (allowing state to intervene when upholding prior court decision could "substantially impair[ ]" the state's ability to regulate), *cert. denied*, 137 S. Ct. 1995 (2017).

This Court's decision granting intervention of right to New York State and a State agency commissioner in *Dixon v. Heckler*, 589 F. Supp. 1512 (S.D.N.Y. 1984), is particularly relevant. That case involved a challenge to a federal regulation that set standards for evaluating claims for disability benefits. Under the governing statute, the State commissioner made the initial benefit determinations subject to the requirements of that regulation, and a federal official then reviewed such determinations for compliance with the regulation. *Id.* at 1514. The State and the State commissioner had a protectable interest and otherwise met the requirements of Rule 24(a)(2) because the litigation might have affected standards governing the commissioner's actions. *Id.* at 1515.

The situation here is parallel. Plaintiffs here have sued to challenge EPA's review, pursuant to federal regulations, of DEC action. In theory, Plaintiffs' claims solely concern EPA's obligations under the Clean Water Act. But Plaintiffs' allegations that EPA failed to take action required by law with respect to DEC's water quality regulations are based on the contention that those DEC regulations were themselves unlawful. *See, e.g.*, Complaint ¶¶ 45, 54

[Docket Item 1]. This appears to be a back-door attempt to collaterally challenge DEC's regulations after the four-month statute of limitations for a direct challenge in state court has passed.

In any event, the Court may ultimately address, expressly or implicitly, questions regarding the obligations and limitations the Clean Water Act places on DEC as well as those the statute places on EPA. DEC seeks to intervene to argue as may be appropriate that rulings on DEC's authority are not necessary, and that Plaintiffs' or EPA's views of DEC's authority or EPA's review authority are erroneous.

Thus, like the state intervenors in *Dixon*, DEC has an interest in protecting itself against any outcome of this litigation that may affect its existing water quality regulations or change EPA's existing approach to reviewing DEC's water quality standards in a way that DEC believes is unlawful or improper. This latter point is of immediate importance because, as the Court is aware, DEC is currently undertaking a new water quality standards rulemaking. Opinion & Order Denying Stay at 9 (Feb. 20, 2018) [Docket Item 60]. DEC accordingly has an interest that may as both a legal and practical matter be impaired by this litigation and that DEC may otherwise not have an opportunity to protect.

B. DEC's Interest Would Not Be Adequately Represented by Existing Parties

DEC's interest would not be adequately represented by either Plaintiffs or EPA. Intervention as of right should be granted "unless" existing parties adequately represent the movant's interest. Fed. R. Civ. P. 24(a)(2). This requirement is satisfied when representation "may" be inadequate, and the "burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 & 539 (1972) (quoting 3B J.

Moore, *Federal Practice* § 24.09-1(4) (1969)) (allowing intervention when applicant might have a "valid complaint" about the conduct of the agency it is otherwise aligned with).

Plaintiffs, of course, are acting contrary to DEC's interests by attempting indirectly to displace or otherwise invalidate DEC's water quality regulations. As for EPA, the agency, its administrator and its regional administrator are federal entities or officers with limited authority, and certainly a different motivation than DEC, to determine whether DEC's water quality standards meet federal requirements. EPA's interests in and interpretations of federal law governing state water quality standards and EPA's authority to interpret and review state water quality standard submissions is different from DEC's interests in and interpretations of that law. EPA accordingly does not adequately represent DEC's interests. *See AB ex rel. CD*, 224 F.R.D. at 157 (federal government applicants for intervention not adequately represented when parties could settle in ways that would impede government's ability to implement the law); *Dixon*, 589 F. Supp. at 1516 (State government applicants for intervention not adequately represented when they had an interest in ensuring federal official issued proper instructions and guidelines for state decisionmaking); *Avery v. Heckler*, 584 F. Supp. 312, 316 (D. Mass. 1984) (allowing intervention when the court's ruling could make the state government's interest adverse to the party with which it was otherwise aligned).

C. DEC's Intervention Is Timely

Because DEC is intervening early in these proceedings, its intervention would create no prejudice to other parties and is therefore timely. *See, e.g.*, *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 101 F.R.D. 497, 500, 501 (E.D.N.Y. 1984) (quoting 7A Wright & Miller, *Federal Practice and Procedure*, § 1908 (1972) for the proposition that "[t]he most important consideration in deciding whether a motion for intervention is untimely is whether the

delay in moving for intervention will prejudice the existing parties to the case" and allowing intervention 4 ½ months after complaint filed); *Meyer v. Macmillan Publishing Co.*, 85 F.R.D. 149, 150 (S.D.N.Y. 1980) (allowing intervention 1 ½ years after complaint filed because there was no prejudice). Aside from the filing and denial of EPA's stay motion and the filing of EPA's answer, nothing substantive has happened in this case since it was filed. Now that the stay motion has been denied, DEC wishes to intervene in opposition to Plaintiffs' expected motion for judgment on the pleadings and otherwise to participate in the case. Since DEC is willing to participate in briefing on Plaintiff's expected motion on the schedule set by the Court for EPA, DEC's intervention will cause no delay or prejudice. Indeed, given that Plaintiffs filed this challenge approximately 20 months after DEC promulgated its regulations, there would be little basis for complaint regarding timing from Plaintiffs.

Other factors this Court considers in evaluating timeliness include prejudice to the applicant if intervention is denied, the amount of time that the applicant had notice of its interest, and any unusual circumstances. *Republic of the Phillipines v. Abaya*, 312 F.R.D. 119, 122 (S.D.N.Y. 2015). Here, DEC would be severely prejudiced if it is not allowed to have a voice on questions governing its authority and EPA's review authority. While DEC has been aware of this litigation, it chose not to burden the Court with an intervention motion while the stay motion was pending since granting the stay motion would have allowed DEC to proceed with its current rulemaking without concern about possible court rulings regarding its authority. Under all of the circumstances here, DEC's intervention motion is timely.

II. ALTERNATIVELY, THE COURT SHOULD ALLOW DEC TO INTERVENE BY PERMISSION

Federal Rule of Civil Procedure 24(b)(2) provides for permissive intervention by a government officer or agency on timely motion if a party to the litigation makes a claim or defense 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). The "thrust" of this provision is "in the direction of allowing intervention liberally to governmental agencies and officers seeking to speak for the public interest." 7C Wright & Miller, *Federal Practice & Procedure* § 1912.

DEC meets the plain letter of this provision. DEC has authority to promulgate water quality standards consistent with the public interest under the federal Clean Water Act, *see, e.g.*, 33 U.S.C. § 1313(a)(3)(A) & (c)(1), and the state Environmental Conservation Law, § 17-0301. DEC has exercised that authority in promulgating the water quality regulations at issue in this case. Plaintiffs base their claims that EPA failed to take action required under the Clean Water Act on the underlying assumption that those DEC regulations do not meet the requirements of the Clean Water Act. *See, e.g.*, Complaint ¶ 45, 54 [Docket Item 1]. Since this litigation focuses on a regulation that implements the Clean Water Act through DEC's state law authority, the Court should permit DEC to intervene. *See, e.g.*, *Dascola v. City of Ann Arbor*, No. 2:14-cv-11296-LPZ-RSW, 2014 WL 3529731, at *2-*3 (E.D. Mich. July 16, 2014) (allowing state official to intervene when defendants' arguments addressed official's legal authority); *Disability Advocates, Inc. v. Paterson*, No. 03-cv-3209 (NGG), 2009 WL 4506301, at *2 (E.D.N.Y. Nov. 23, 2009) (courts should adopt a "hospitable attitude" toward "allowing a government agency to

intervene in cases involving a statute it is required to enforce") (quoting *Blowers v. Lawyers Coop. Publishing Co.*, 527 F.2d 333, 334 (2d Cir. 1975); *Group Health Inc. v. Blue Cross Ass'n*, 587 F. Supp. 887, 892 (S.D.N.Y. 1984) (allowing federal agency to intervene when the outcome of the action might affect the administrative framework the agency operated under). As with the request for intervention as of right above, allowing permissive intervention would create no prejudice, and this request for intervention is timely.

CONCLUSION

The Court should allow DEC to intervene as defendant.

Dated: New York, New York
March 6, 2018

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