UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RIVERKEEPER, INC., et al.,

Plaintiffs,

v.

SCOTT PRUITT, Administrator of the United States Environmental Protection Agency; CATHERINE McCABE, Acting Regional Administrator, Environmental Protection Agency, Region 2; and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No.:

17 CV 4916 (VSB)

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MEMORANDUM OF LAW OF THE CITY OF NEW YORK IN SUPPORT OF ITS MOTION FOR LEAVE TO INTERVENE AS A DEFENDANT

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PRELIMINARY STATEMENT

The City of New York ("City") seeks to intervene as a defendant in this case in which Plaintiffs allege that EPA failed to approve or disapprove water quality standards issued by New York State in 2015 for waters in and around New York City. Plaintiffs' theory, which the City disputes, is that the New York standards are inconsistent with the Clean Water Act because they do not apply EPA's 2012 Recreational Water Quality Criteria to the Class I and Class SD waters that were the subject of the 2015 rule.

The City, through its Department of Environmental Protection ("DEP"), has completed and is continuing to construct billions of dollars of projects to abate combined sewer overflows, and is planning several additional billions of dollars' worth of further projects intended to meet the current New York State standards. Any change in those standards resulting from this litigation could have significant impacts on the City's program and its residents, who will ultimately bear the costs of compliance through increased water rates. Accordingly, the City qualifies for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. In the alternative, the City should be permitted to intervene under Rule 24(b).

STATEMENT OF FACTS

As set forth in the accompanying Declaration of James Mueller, dated March 5, 2018 ("Mueller Decl."), DEP is the largest water and wastewater utility in the nation. Averaged across the year, DEP's wastewater system treats approximately 1.2 billion gallons of wastewater per day collected through 7,500 miles of sewers, 96 pumping stations and 14 in-City wastewater treatment plants ("WWTPs") that remove coliform bacteria and other pollutants from wastewater. In addition to its WWTPs, DEP also operates four combined sewer overflow ("CSO") storage facilities and in is the process of designing and constructing additional CSO facilities at significant cost. Mueller Decl. ¶ 4.

About two-thirds of New York City's sewer system, like those in many municipalities throughout the country, is a combined system in which the sewer pipes are designed to convey both sanitary sewage wastewater and stormwater runoff. In dry weather, virtually all of New York City's sewage is treated at one of DEP's 14 WWTPs, but during some rain events, the amount of stormwater entering the combined sewer system can exceed the wet weather design capacity of the WWTPs. Sending too much flow to the WWTPs can wash out the biological organisms that break down and treat waste, so the City's combined sewer system is equipped with relief structures, or outfalls, through which stormwater runoff mixed with untreated sewage is discharged into waterbodies in and around New York City when rainfall exceeds the capacity of the system to convey and treat the combined flows. These discharges are called "combined sewer overflows" or "CSOs." During these rain events, DEP is authorized to discharge CSOs under Clean Water Act permits issued by the New York State Department of Environmental Conservation ("NYSDEC") to DEP. Mueller Decl. ¶ 5.

Water quality standards regulations in New York are promulgated by NYSDEC. NYSDEC's Class I and SD water quality standards, which are the subject of this lawsuit, primarily apply to urban waterbodies in and around New York City, along with a small number of waterbodies in Suffolk County. NYSDEC has not designated either Class I or Class SD waters for primary contact recreation, such as swimming, diving, water skiing, skin diving, surfing and other activities where the human body may come in direct contact with raw water to the point of complete body submergence.[1] Many of these waters serve as industrial waterways

[1] *See* NYSDEC, Assessment of Public Comments for Rulemaking Re 6 NYCRR Parts 701 and 703, Proposed December 3, 2014, at 19 (response to comment 11), *available at* http://www.dec.ny.gov/docs/water_pdf/asmtpbcmnt701703.pdf (clarifying that NYSDEC did not intend to change the use designations for Class I and Class SD waters, which are designated for

and/or serve commercial shipping traffic, or have other physical human-made or natural constraints, rendering them not suitable for swimming. For many of the Class I and SD waterbodies in New York City, the City is the predominant point source discharger, either through permitted CSO outfalls or through its permitted municipal separate storm sewer system. Mueller Decl. ¶ 6.

CSO discharges are regulated under the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, and the New York State Environmental Conservation Law ("ECL"). The City's program to address CSO discharges is overseen by NYSDEC, and is being implemented under the provisions of State Pollutant Discharge Elimination System ("SPDES") permits issued by NYSDEC and a CSO Consent Order between DEP and NYSDEC. Pursuant to its SPDES permits and the CSO Consent Order, the City is developing ten waterbody-specific Long Term Control Plans ("LTCPs") and one citywide LTCP under its current LTCP program to address CSO discharges and improve water quality in NYC waters. The goal of each LTCP is to identify appropriate CSO controls necessary to achieve waterbody-specific water quality standards, consistent with EPA's CSO Control Policy[2] and the water quality goals of the Clean Water Act. Mueller Decl. ¶ 10.

As required by the EPA Policy, the City's LTCPs evaluate and seek to cost effectively achieve or improve compliance with the State's existing water quality standards, including the standards promulgated by NYSDEC in 2015 for Class I and Class SD waterbodies. The LTCPs are highly technical documents, which require extensive water quality sampling and

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secondary contact recreation and fishing, respectively); 6 NYCRR § 700.1(a)(49) (defining primary contact recreation).

[2] *See* EPA, Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994), codified at 33 U.S.C. § 1342(q).

other data collection, modeling, and alternatives analysis to predict the water quality impacts of the various CSO control projects being considered under the plans. Each LTCP takes 1.5 to 2.5 years to complete, and involves close coordination with NYSDEC as well as a robust public review process. Once approved by the State, the recommended projects identified in the LTCPs become enforceable requirements of the City's CSO Consent Order, and must be designed, constructed and operated on a defined and enforceable schedule. Mueller Decl. ¶ 12.

Even before the massive investment that will be required to implement the LTCPs, the City has already spent over $4 billion on projects to control CSO discharges, resulting in substantial improvements to water quality. Mueller Decl. ¶ 9. Indeed, the cleanliness and health of waters in and around New York City continue to improve to levels not seen in more than a century. Mueller Decl. ¶ 8. Building on that effort, under the current CSO long term control program, DEP has submitted nine waterbody-specific LTCPs to NYSDEC for review and approval. NYSDEC has approved seven of these, which together include new investments to address CSO discharges worth an additional $2.4 billion. If the remaining two LTCPs under NYSDEC review are approved as submitted, these LTCPs would add another $1.2 billion in CSO projects. Lastly, two final LTCPs are currently in development, and are likely to result in additional projects. In addition to the projects selected in the LTCPs, which represent a significant investment of City resources, to date the highly technical LTCPs and related previous rounds of CSO control planning documents have cost $68 million to prepare. Mueller Decl. ¶ 13.

THE CURRENT LITIGATION

On June 29, 2017, Plaintiffs filed this action against Administrator Pruitt, then-Acting Region 2 Administrator McCabe, and EPA, seeking a declaratory judgment that EPA violated the Clean Water Act by failing to promulgate new water quality criteria for New York

State's Class I and SD waters, and an injunction requiring the Agency to issue new standards based on EPA's 2012 Recreational Water Quality Criteria ("RWQC") (Dkt. No. 1).

After the parties agreed to extend Defendants' time to respond to the Complaint to November 14, 2017 (Dkt. No. 28), Defendants filed a motion on November 30, 2017 to stay the litigation until April 16, 2018, to allow EPA to assist NYSDEC in developing updated water quality standards to replace a portion of the 2015 standards that are the subject of this action (Dkt. Nos. 39-41). Plaintiffs opposed the motion on December 8, 2017 (Dkt. Nos. 51-52), and Defendants filed their reply on December 15, 2017 (Dkt. No. 55). As directed by the Court, Defendants filed their Answer to the Complaint on January 17, 2018 (Dkt. No. 57). On February 8, 2018, Plaintiffs wrote the Court seeking leave to file a motion for judgment on the pleadings under FRCP 12(c) (Dkt. No. 58). On February 20, 2018, the Court denied Defendants' motion for a stay (Dkt. No. 60), and on March 1, 2018, the Court set a briefing schedule for Plaintiffs' 12(c) motion and Defendants' anticipated cross-motion to dismiss the Complaint, under which briefing will be completed by May 14, 2018 (Dkt. No. 63).

In order to protect its substantial interests in the outcome of this litigation, the City now moves for leave to intervene as a defendant as-of-right pursuant to FRCP Rule 24(a), or, in the alternative, permissive intervention under FRCP Rule 24(b). Prior to making this motion, the City sought the consent of Plaintiffs and Defendants to its request to intervene. Plaintiffs indicated they will decide their position after reviewing the City's papers, and Defendants have not provided their position on the City's request.

ARGUMENT

THE CITY SATISFIES THE REQUIREMENTS FOR INTERVENTION AS A MATTER OF RIGHT

In order to intervene as of right under FRCP Rule 24(a)(2) "a movant must: '(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action.'" *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 128-29 (2d Cir. 2001) (quoting *New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992)). The City satisfies each of these elements.

A. The City's Application Is Timely

In the Second Circuit, "[t]he determination of the timeliness of a motion to intervene is within the discretion of the district court," and its discretion should be exercised based on the "totality of circumstances." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (internal quotation marks and citation omitted). "Factors to consider in determining timeliness include: '(a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to the applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness.'" *Floyd v. City of New York*, 770 F.3d 1051, 1058 (2d Cir. 2014) (citing *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 390 (2d Cir. 2006)). Among these factors, "[i]t is firmly established that the most significant criterion in determining timeliness is whether the delay in moving for intervention has prejudiced any of the existing parties." *Hartford Fire Ins. Co. v. Mitlof*, 193 F.R.D. 154, 160 (S.D.N.Y. 2000) (citation omitted).

The City's application to intervene is timely, as it is being filed shortly after the Court's decision denying Defendants' motion to stay the litigation and before any substantive developments in the case. Based on the Court-ordered briefing schedule, Plaintiffs' 12(c) motion and Defendants' cross-motion to dismiss will not be fully submitted to the Court until May 14, 2018. If the City's motion to intervene is granted, the City is prepared to adhere to the same schedule. Thus, the timing of the City's intervention would not result in prejudice to the existing parties. *See, e.g.*, *Mortgage Lenders Network, Inc. v. Rosenblum*, 218 F.R.D. 381, 383-84 (E.D.N.Y. 2003) (permitting intervention six months after litigation began, when discovery was in initial stages); *Hartford Fire Ins. Co.*, 193 F.R.D. at 160 (intervenor moved within three months and no parties asserted prejudice based on the delay); *JPMorgan Chase Bank, N.A. v. Nell*, 2012 WL 1030904, *3, 2012 U.S. Dist. LEXIS 42173, *8 (E.D.N.Y. 2012) (approving intervention where party first moved to intervene four months after complaint was filed, and noting that courts in the Second Circuit "have found delays greater than two months to be reasonable in the absence of intervening substantive action").

Although the City is filing its motion approximately eight months after the litigation was initiated, the circumstances of this case warrant a finding of timeliness. The City waited for a determination on Defendants' motion for a stay prior to filing its request to intervene, given that there were no substantive developments while that motion was pending, and a stay may have precluded further substantive developments in the case. In fact, in briefing on the stay motion, both Plaintiffs and Defendants anticipated the City's potential intervention if the motion was denied. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Stay Litigation, dated December 8, 2017 (Dkt. No. 51), at 11 ("…EPA argues that the litigation would become complicated because state or 'municipal dischargers' would seek to

intervene. But even if third parties seek to intervene, and even assuming such intervention would be granted, additional briefing on the question of law presented by Plaintiffs would not complicate the litigation"); *see also* Defendants' Memorandum of Law in Support of Motion to Stay, dated November 30, 2017 (Dkt. No. 40) at 8-9.

Finally, the City acknowledges that Defendants have informed Plaintiffs and the Court that EPA will be making a determination to approve or disapprove the NYSDEC standards by March 7, 2018. Because it is unclear what may happen with the case and the parties' planned motions as a result of that determination, the City's intervention at this stage is appropriate.

B. The City Has Direct, Substantial and Legally Protectable Interests in this Case That Will Be Impaired if Plaintiffs Are Granted the Relief They Seek

For an interest to be cognizable under Rule 24(a)(2), it must be direct, substantial, and legally protectable. *Brennan*, 260 F.3d at 129 (citations and internal quotations omitted). Courts have found the requisite interest where a party's interests arise out of the same transaction and occurrence that is the subject of the lawsuit. *See Mortgage Lenders Network, Inc.*, 218 F.R.D. at 384.

Here, Plaintiffs are seeking to compel a new rulemaking for Class I and Class SD waterbodies for which the City is the primary point source discharger. If they prevail, or if EPA otherwise determines that a new standard is required, it could have significant impacts on DEP's LTCPs and the level of investment required to address CSO discharges. DEP's extensive long-term planning process for CSO abatement uses NYSDEC's existing fecal coliform bacteria standards to select and design appropriate and cost-effective projects to improve water quality. Similarly, NYSDEC's review and approval of the LTCPs relies on the same standards. Changing the standards to be based on the EPA 2012 RWQC could significantly alter the cost-benefit considerations, engineering analyses, and projected water quality attainment results

included in completed LTCPs, seven of which have been approved by NYSDEC and for which DEP is currently expending resources to conduct ongoing planning to meet our commitments under the CSO Order. Mueller Decl. ¶ 15. In addition, DEP, as the developer and implementer of the LTCPs, has unique knowledge that could benefit the Court in its consideration of the issues. Accordingly, the City has a compelling interest in the subject matter of this action.

Furthermore, the City's ability to protect its interests would be impeded if the motion to intervene is not granted, as Plaintiffs seek relief that would directly impact DEP's rights and obligations in the operation of its wastewater and stormwater infrastructure and the development and implementation of its CSO Long Term Control Plans. Moreover, there are several features of the City's urban tributaries that would make it extremely challenging, if not impossible, to meet the EPA 2012 RWQC in these waters. If new standards based on the RWQC are promulgated, DEP's analysis indicates it would likely be impossible to achieve complete attainment in any Class I and SD waterbodies, with the possible exception of Gowanus Canal. Even 100 percent control of CSOs in these waterbodies, which preliminary estimates based on analysis in the LTCPs indicate could cost at least $30 billion, would in many cases not appreciably improve compliance with the EPA 2012 RWQC and could double water bills for the City's ratepayers. Mueller Decl. ¶ 16.

C. The City's Interests Are Not Protected Adequately by the Parties to the Action

Lastly, in order to intervene as-of-right, the moving party need only show that the existing parties' representation of its interests *may* be inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538-39 and n. 10 (1972). The burden of meeting this test should "be treated as minimal." *Id.* Thus, intervention must be permitted unless the existing parties' interests are "so similar to those of [the intervenor] that adequacy of representation [i]s assured." *Brennan*, 260 F.3d at 132-33. It is well established that a property owner has a unique interest

that cannot be represented by other parties. *Town of North Hempstead v. Village of North Hills*, 80 F.R.D. 714, 717 (E.D.N.Y. 1978) ("'[T]here is a likelihood that . . . (property owners) will make a more vigorous presentation of the economic side of [an] argument than would [non-property owners]. . .'") (quoting *New York Public Interest Research Group, Inc. v. Regents of the SUNY*, 516 F.2d 350, 352 (2d Cir. 1975)) (parentheses in original) (other alterations not in original).

In this case, the City is uniquely positioned to defend its interests as the owner of regulated wastewater and stormwater infrastructure and the discharger whose multi-billion dollar CSO control program could be significantly impacted by the rule change that Plaintiffs are seeking. The federal Defendants, whose interests lay with the federal water quality standards review process at issue here, do not have the same interest as the City in ensuring that the City's approved CSO control program remains in compliance with existing standards, while still achieving feasible and cost-effective improvements in water quality and balancing expenditures on CSO controls with other needed investments in the City's wastewater and drinking water system. If the State seeks to intervene, its interests are in its regulations and the process for any potential future rulemaking, and would not be "so similar to those of" the City, which is seeking to defend its existing program and investments, as to ensure adequate representation. *Brennan*, 260 F.3d at 132-33.

In addition, the City has previously articulated its disagreement with Plaintiffs' legal position that the EPA 2012 RWQC apply to Class I and Class SD waters. In a letter to EPA responding to Plaintiffs' notice of intent to sue in this matter, the City explained that NYSDEC's 2015 rule did not change the use designations of Class I and Class SD waters, which remain classified for secondary contact recreation and fishing, respectively. *See* City Letter to

EPA, dated June 9, 2017, annexed as Exhibit B to Declaration of Carrie Noteboom, dated March 6, 2018.

EPA's publication of the 2012 RWQC satisfied its obligation under the Beaches Environmental Assessment and Coastal Health ("BEACH") Act amendments to the Clean Water Act to update criteria for coastal recreation waters – *i.e.*, beaches. *See* EPA, *2012 Recreational Water Quality Criteria,* 77 Fed. Reg. 71191, Nov. 29, 2012 ("The criteria announced today are the new or revised criteria that EPA is directed to publish under section 304(a)(9) of the CWA, as amended by the BEACH Act"). In addition to applying to coastal recreation waters under the Act, EPA recommends the 2012 RWQC for primary contact waters. 77 Fed. Reg. at 71191-92. Class I and SD waters are not coastal recreation waters, and are not designated for primary contact use. Accordingly, Plaintiffs are incorrect when they argue that the NYSDEC standards are inconsistent with the Clean Water Act. Although the City has provided its reading of the relevant law to EPA, it is unclear whether EPA will take a similar position in this proceeding.

Thus, there is no assurance that the current parties will represent the City's interests, and the City's intervention is necessary in order to ensure that its interests are adequately defended.

D. In the Alternative, the City Should Be Permitted to Intervene under Rule 24(b)

In the alternative, the City meets the standards for permissive intervention under FRCP Rule 24(b) because it has a "claim or defense that shares with the main action a common question of law or fact." FRCP Rule 24(b)(1)(B). "Permissive intervention is appropriate in circumstances in which intervention would not 'unduly delay or prejudice the adjudication of the original parties' rights.'" *Freydl v. Meringolo*, 2012 WL 1883349, *2, 2012 U.S. Dist. LEXIS 72647, *5 (S.D.N.Y. 2012) (quoting Fed. R. Civ. P. 24(b)(3)). "Additional relevant factors include: '(1) the nature and extent of the intervenors' interests, (2) the degree to which those

interests are adequately represented by other parties, and (3) whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.'" *Id.* (quoting *Chevron Corp. v. Donziger*, 2011 WL 2150450, at *5, 2011 U.S. Dist. LEXIS 57573, at *5 (S.D.N.Y. May 31, 2011)).

Here, the extent of the City's interest is well established, as discussed above. In addition, the City's participation in the case will contribute to the matter's overall factual development and the Court's understanding of the impact that a change in water quality standards would have on the City, as the primary point source discharger to the affected waterbodies and the developer of the LTCPs. Additionally, as noted above, the City is poised to weigh in on the legal issues before the Court to demonstrate why Plaintiffs' argument that the 2015 New York State water quality standards are inconsistent with the Clean Water Act fails as a matter of law. The City, along with Plaintiffs, participated in the underlying rulemaking proceeding before NYSDEC and would bring its unique perspective and experience to the issues before the Court in this case.

CONCLUSION

For the foregoing reasons, the City meets the requirements for intervention pursuant to FRCP Rule 24 and respectfully requests that this Court grant its motion for leave to intervene as a defendant in this proceeding. The City's proposed Answer to the Complaint is included as Exhibit A to the Declaration of Carrie Noteboom.

Dated: New York, New York
March 6, 2018

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