

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN PETROLEUM INSTITUTE, )  
Plaintiff, )

Civil Action No. 02-2247 (PLF)

v. )

CHRISTINE TODD WHITMAN, )  
Administrator, United States Environmental )  
Protection Agency, *et al.* )  
Defendants. )

PETROLEUM MARKETERS ASSOCIATION )  
OF AMERICA, *et al.*, )  
Plaintiffs, )

Civil Action No. 02-2249 (PLF)

v. )

CHRISTINE TODD WHITMAN, )  
Administrator, United States Environmental )  
Protection Agency, *et al.* )  
Defendants. )

MARATHON OIL CO., )  
Plaintiff, )

Civil Action No. 02-2254 (PLF)

v. )

CHRISTINE TODD WHITMAN, )  
Administrator, United States Environmental )  
Protection Agency, *et al.* )  
Defendants. )

MEMORANDUM OF LAW IN SUPPORT OF  
NEW YORK'S MOTION TO INTERVENE AS A DEFENDANT IN CIVIL  
ACTION NOS. 02-2247 AND 02-2254

PRELIMINARY STATEMENT

The scope of “navigable waters” is the linchpin to jurisdiction under the Clean Water Act (CWA or the Act). In several sections of the Act, Congress authorized the Environmental Protection Agency (EPA) to regulate discharges of pollution into or upon the “navigable waters.” The rule challenged in this case, imposing oil spill prevention, control and countermeasure (SPCC) planning requirements on facilities that could discharge oil into or upon “navigable waters,” conformed the definition of the term “navigable waters” to make it consistent with other CWA programs. As revised, the term “includes” not only “traditional” waters that are navigable-in-fact, but also any interstate waters, intrastate waters that may be used in or the destruction or degradation of which may affect interstate commerce, tributaries of such waters, and wetlands adjacent to any of these waters. 67 Fed. Reg. 47042, 47142 (July 17, 2002).

Plaintiffs challenge this broader definition as contrary to law. Because this attack threatens core New York interests and is contrary to law, New York seeks to intervene as a defendant to support this provision of the revised rule. (The rule also made numerous substantive changes to oil spill prevention requirements, several of which plaintiffs challenge. New York does not seek to address those aspects of the rule.)

Congress itself defined “navigable water” extremely broadly as “waters of the United States.” 33 U.S.C. § 1362(7). For almost three decades, courts, and EPA in other CWA program, have almost uniformly determined that Congress intended these terms to include not only traditional navigable

waters -- those navigable-in-fact -- but any waters that can affect the quality, quantity, or use of such traditional navigable waters. They have reasoned that to ignore pollution in, or destruction of, smaller water bodies that are hydraulically or ecologically linked to navigable-in-fact waters would seriously undermine effective protection of traditional “navigable” waters since pollution would travel from the smaller water bodies into the larger water bodies.

Despite the broad CWA definition, clear Congressional intent, and decades of caselaw and agency interpretation in other programs that have categorically rejected a narrow construction of the term “navigable waters,” plaintiffs claim that the jurisdiction of the CWA is limited to traditional navigable-in-fact waters and adjacent wetlands and that EPA’s definition is thus over-broad. Plaintiffs are advocating an unprecedented and unsupported roll-back of CWA jurisdiction. Given the CWA’s importance in controlling water pollution from oil spills and other sources in New York State and in waters that affect the State, New York has a compelling interest in insuring that state waters receive the full protection Congress intended under the CWA. The State, therefore, appropriately seeks intervention in this case to defend EPA’s definition of “navigable waters.”

Further, EPA has recently indicated that it is reconsidering the scope of CWA jurisdiction. Specifically, as explained below, in an advanced notice of proposed rulemaking and a guidance document published in the Federal Register, EPA articulated an interest in re-examining CWA jurisdiction in a light more consistent with plaintiffs’ arguments here. This dramatic departure from well-established precedent was a primary impetus for New York to intervene in this litigation, to insure proper implementation of the CWA.

## **STATEMENT OF FACTS**

## CWA Background

In adopting the CWA, Congress articulated a very ambitious goal “. . . to restore and maintain the chemical, physical, and biological integrity of the Nation’s water.” 33 U.S.C. § 1251(a). In order to achieve this goal, Congress created several separate programs, including the National Pollution Discharge Elimination System (NPDES) permitting program, CWA § 402, 33 U.S.C. § 1342, the dredge or fill permitting program, CWA § 404, 33 U.S.C. § 1344, and the Oil and Hazardous Substance Liability program, CWA § 311, 33 U.S.C. § 1321, at issue here. All of these programs attack different aspects of water pollution, but all share a unifying component -- all of the programs regulate pollution into or upon “navigable waters.” Thus, the scope of “navigable waters” is the basis for CWA jurisdiction under all of these programs.

The CWA itself defines “navigable waters” as “waters of the United States.” CWA § 502(7), 33 U.S.C. § 1362(7). But that term, “waters of the United States” is not further defined. Thus, because the definition of “navigable waters” is the foundation of CWA jurisdiction, courts have frequently had to interpret the parameters of that definition. Almost uniformly, courts have recognized that Congress intended to exercise expansive federal authority in order to effectuate the goals of the CWA.

For example, two years after the passage of the CWA, the Sixth Circuit thoroughly examined the purposes of the CWA in *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974). The court concluded that Congress intended to provide comprehensive protection not only to traditional “navigable” waters, but to other water bodies that affect such waters. *Id.* at 1325. The court reasoned:

It would . . . make a mockery of . . . [Congressional] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

Such a situation would have vast impacts on interstate commerce. States with cities and industries situated upstream on the nonnavigable tributaries of our great rivers could freely use them for dumping raw sewage and noxious industrial waters upon their downstream neighboring states. There would be great pressure on the upstream states to allow such usage. Reduced industrial costs and lower taxes thus resulting would tend to place industries, cities and states located on navigable rivers at a considerable competitive disadvantage in interstate commerce. In such a situation industrial frontage on a creek which flowed ultimately into a navigable stream would become valuable as an access point to an effective unrestricted sewer.

Approving the analysis of *Ashland Oil*, the Tenth Circuit in *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979), rejected the argument that the traditional meaning of “navigable waters” controlled CWA jurisdiction. The court reviewed the legislative history and found that during the conference resolving differences between the Senate and House versions of the 1972 CWA amendments, the committee deleted the word “navigable” from the definition of the term “navigable waters” under the Act -- leaving it to read expansively “waters of the United States” -- thus expanding CWA jurisdiction beyond traditional navigable-in-fact waters. *Id.* at 375.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Supreme Court squarely considered whether non-navigable wetlands were “navigable waters” for CWA jurisdiction purposes. *Id.* at 131. Given the lofty goals of the CWA, the Court found that the term “navigable” as

used in the statute was of limited import. *Id.* at 430. The Court also recognized that traditional navigable waters could be affected by adjacent wetlands, and that regulation of such wetlands was appropriate for that reason, although wetlands are typically not navigable. *Id.* at 430-431. *See also International Paper Co. v. Ouelette*, 479 U.S. 481, 491 (1987) (under the 1972 CWA amendments, Congress intended to establish an all-encompassing program of water pollution regulation, and through the amendments, the CWA applies to virtually all bodies of water).

Following the lead of *Riverside Bayview Homes*, almost all of the circuit courts have found that the jurisdiction of the CWA extends far beyond traditional navigable-in-fact waters. For example, in *United States v. Cumberland Farms of Connecticut*, 826 F.2d 1151, 1153 (1st Cir. 1987), the First Circuit affirmed that freshwater wetlands were within the scope of the CWA and noted the ecological value of such waters including acting as a natural flood control mechanism by slowing and storing storm water and serving as a biological filter by purifying water as it flows through the wetland. *See also Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990)(tidal wetlands created by the actions of third parties are within the scope of the CWA); *United States v. Eidson*, 108 F.3d 1336, 1341- 42 (11th Cir.1997) (non-navigable manmade ditches and canals are “navigable waters” within the jurisdiction of the CWA where they eventually lead to waters affecting interstate commerce); *Avoyelles Sportsman’s League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983)(CWA jurisdiction extends to wetlands area that is only seasonally flooded because the area serves as a major overflow for flooding from a navigable water); *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979)(CWA jurisdiction extended to wetlands adjacent to an intra-state lake). Literally hundreds of other cases

affirm application of CWA protections to waters that are well beyond the traditional navigable-in-fact waters.

### **The SWANCC Decision and Its Aftermath**

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*), 531 U.S. 159 (2001), – the decision relied upon by plaintiffs to argue that EPA’s definition of “navigable waters” is overly broad – the U.S. Supreme Court decided the very narrow issue of CWA jurisdiction over an abandoned gravel pit. Specifically, the court held that CWA jurisdiction did not extend to an abandoned gravel pit with no hydraulic connection to other waters and over which CWA jurisdiction existed only because of their use by migratory birds.

Since then, many courts have addressed the impact of *SWANCC* on CWA jurisdiction. The vast majority of courts have found *SWANCC* to be a very limited holding that did not alter the decades of caselaw that preceded *SWANCC* except as to its particular facts. *See US. v. Deaton*, 2003 U.S. App. Lexis 11642 (4th Cir. June 12, 2003)(*SWANCC* did not preclude CWA jurisdiction over non-navigable ditch); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001)(even post-*SWANCC*, the purpose of the CWA dictates federal jurisdiction over navigable-in-fact streams as well as all tributaries flowing into such water bodies, because it is incontestable that substantial pollution of one not only may, but very probably will affect the other); *United States v. Krilich*, 303 F.3d 784 (7th Cir. 2002)(*SWANCC* did not represent a significant change in the law regarding the jurisdiction of the CWA); *United States v. Interstate General Company*, 2002 U.S. App. LEXIS 13232 (4th Cir. July 2, 2002) (*SWANCC* did not eliminate jurisdiction over wetlands that are not “navigable” but was limited to one particular application of the regulatory definition in 33 C.F.R. §

328.3(a)(3)); *Colvin v. United States*, 181 F. Supp.2d 1050 (C.D. Cal. (*SWANCC* did not warrant voiding conviction for dumping waste on property adjacent to the Salton Sea which ended up in the Sea); *United States v. Buday*, 138 F. Supp.2d 1282 (D. Montana 2001) (tributaries that are distant from, but connected to, navigable waters are ecologically capable of undermining the quality of the navigable water, and therefore, are within CWA jurisdiction, notwithstanding *SWANCC*).

### **Current Litigation**

On July 17, 2002, EPA published a final rule under § 311 of the CWA that, among other things, revised the definition of “navigable waters” with respect to the Spill Prevention Control and Countermeasure Plan provisions of the CWA (SPCC rule). 67 Fed. Reg. 47042 (Jul 17, 2002). The SPCC rule conformed the definition of “navigable waters” found in the rule to the definition applied in other sections of the CWA. 67 Fed. Reg at 47058. *Compare* 67 Fed. Reg. 47142 (revised definition of “navigable waters” in this rulemaking) to 33 C.F.R. 328.3(a)(3) (definition of “waters of the United States” under § 404 of the CWA) and 40 C.F.R. 122.2 (definition of “waters of the United States” under § 402 of the CWA). In the rulemaking, EPA also revised several substantive provisions of the SPCC Plan requirements. (New York’s proposed intervention would not address those revisions.)

On or about November 14, 2002, plaintiffs filed complaints, challenging the SPCC rule. Despite extensive caselaw holding that “navigable waters” or “waters of the United States” under the CWA extend far beyond traditional navigable-in-fact waters and adjacent wetlands, plaintiffs American Petroleum Institute (API) and Marathon Oil allege that the *SWANCC* decision materially restricted the scope of “navigable waters” and that EPA’s revision of that term in the SPCC rule

impermissibly expanded the definition. By court ordered dated April 17, 2003, the litigation is stayed until July 21, 2003. On July 15, 2003, the parties filed another motion to stay the litigation for an additional 30 days. The Court has not ruled on this request, EPA has not yet filed an answer to the complaints.

### **Advanced Notice of Proposed Rulemaking**

On January 15, 2003, EPA published an Advanced Notice of Proposed Rulemaking regarding CWA jurisdiction (ANPRM). 68 *Fed. Reg.* 1991 (January 15, 2003). In the ANPRM, EPA requested comment on the impact of the *SWANCC* decision on CWA jurisdiction. EPA received approximately 115,000 comments. *See* Exhibit A (fact sheet by Sierra Club regarding the ANPRM). Thirty-four states, including New York, submitted comments encouraging EPA not to read *SWANCC* as requiring a restriction in the scope of the CWA and affirming the need and basis for a broad understanding of CWA jurisdiction. *Id.*

### **SUMMARY OF THE ARGUMENT**

This Court should grant the State intervention as of right because the State satisfies all of the requirements for as-of-right intervention under Fed.R.Civ.Proc. 24(a). Foremost, the State has a compelling interest in this litigation -- and standing to pursue a case of its own accord -- because the State's ability to protect water quality within the State, both from intra-state and inter-state pollution, relies on a broad definition of "navigable waters." This interest would be impaired by an adverse decision in this case that restricted the scope of "navigable waters" since the State's waters would be afforded less protection under federal law and, therefore would be more vulnerable to pollution. Moreover, EPA will not adequately protect the State's interest because EPA's goal is to balance the

competing, and conflicting, interests of the regulated community, the States and environmentalists, not to advance the State's unique interest. In addition, EPA also has indicated in the ANPRM that it may be receptive to limited the scope of CWA jurisdiction, a position that directly conflicts with the State's position in this case. Last, the State's motion is clearly timely, since the litigation is in the very preliminary stages, with no answer even filed.

In the alternative, this Court should grant the State permissive intervention under Fed.R.Civ.Proc. 24(b) because the arguments that the State intends to raise and the current action share common facts and law, including the legality of the 2002 SPCC rulemaking and the scope of EPA's jurisdiction under the CWA, and the State's participation in the suit will not impede or inhibit progression of the suit.

## ARGUMENT

### I. THE STATE IS ENTITLED TO INTERVENTION AS OF RIGHT

In order to intervene in this action, the State must demonstrate that: (1) it has an interest relating to the property or transaction that is the subject of the action; (2) without intervention the disposition of the action may, as a practical matter, impair or impede the State's ability to protect its interest; (3) the State's interest are not adequately represented by EPA; and (4) the State timely filed its intervention motion. Fed.R.Civ.Proc 24(a). Because the State satisfies all of these requirements, this Court should grant the State's intervention motion.

#### A. The State Has A Strong Interest in This Litigation

The State easily establishes that it has an interest in this litigation because one of the main issues in the litigation – the definition of “navigational waters” – is a direct challenge to the jurisdiction of § 311 and could limit which waters within the State are entitled to § 311 protection.

To show it has the requisite interest to support intervention, the State need only establish that it has standing to sue on its own behalf. *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998). Where a party seeks to intervene as a defendant to support a government action, to establish standing it must show that it will be injured in fact by the setting aside of government’s action, that the injury will have been caused by the invalidation of the government’s decision, and that the injury would be prevented if the government’s decision is affirmed. *American Horse Protection Association, Inc. v. Veneman*, 200 F.R.D. 153, 156 (D. D.C. 2001). The “interest” analysis, however, is not the primary focus of an intervention determination and this analysis should be used primarily as a practical guide to disposing of lawsuits by involving as many apparently concerned parties as is consistent with efficiency and due process. *Nuesse v. Camp*, 385 F.2d, 694, 700 (D.C. Cir.1967); *Smuck v. Hobson*, 408 F.2d 175, 178-79 (D.C. Cir. 1969).

Here, the first cause of action of Marathon Oil’s complaint and the first two claims of API’s complaint challenge the definition of the term “navigable waters,” asserting that the definition promulgated by EPA is over-broad and in excess of the Administrator’s authority. Marathon Oil Complaint ¶¶12 - 18; API Complaint ¶¶ 17 - 26. The API complaint goes so far as to claim that the term “navigable waters extends only to waters that are, have been or could reasonably be made, navigable in fact (‘traditional navigable waters’) and wetlands adjacent to traditional navigable

waters.” API Complaint ¶ 19. Thus, the complaints make clear that plaintiffs are attempting to restrict and limit the definition of navigable waters, and therefore, the reach of CWA § 311.

Oil spills have caused extensive – and expensive – environmental damage in New York. Nationally, over 9,000,000 gallons of gasoline escape into the environment annually during the transportation, storage, sale or use of gasoline. *In re: Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation*, 175 F.Supp2d 593, 599 (S.D. N.Y. 2001). In New York, such releases have contaminated private and public drinking water wells, *Id.* at 602 - 05, as well as traditional navigable waters, *see Kara Holding Corp v. Getty Petroleum Marketing, Inc.*, 67 F.Supp.2d 302, 302 (S.D.N.Y.). *See also Oil Spills: Big Problems from Small Leaks*, New York Attorney General’s Office (May 2001) (available at [www.oag.state.ny.us](http://www.oag.state.ny.us)) (brochure describing for the public the problems caused by oil spills and New York’s laws).

If plaintiffs prevail, and EPA’s definition of “navigable waters” is set aside, fewer waters in New York would be afforded protection from oil spills and hazardous waste discharges under CWA § 311. For example, the API complaint alleges that wetlands that are not adjacent to traditional navigable waters are improperly included within EPA definition of “navigable waters.” API Complaint ¶¶ 20, 21. In one New York watershed alone – the eastern shore of Lake Ontario – there are approximately 10, 600 acres of wetlands, 65% of which are not adjacent to “navigable waters.” *See Exhibit B* (National Wildlife fact sheet, “Weakening the Clean Water Act: What it Means for New York”). If plaintiffs prevail, these wetlands would lose CWA 311 protection, making them more vulnerable to oil spills.

Similarly, wetlands that are not adjacent to traditional navigable waters play a crucial role in protecting the water quality of New York City's drinking waters. The New York City Department of Environmental Protection has estimated that approximately 22% of the wetlands in the New York City Watershed – an area of approximately 2,000 square miles north of New York City which contains the rivers, streams reservoirs and lakes that are the source of New York City's potable water – are so called "isolated" because a surface connection to other water bodies is not apparent. These so-called "isolated" wetlands play a crucial role in protecting the water quality of the surface water that flows into the reservoirs. For example, a number of contaminants such as metals, organic compounds, and nutrients are removed from the water column by these wetlands. This occurs because the wetlands exhibit a variety of unique features that improve water quality, such as their physical configuration (longer water retention time induces pollutant settling), hydric soils (that bind pollutants and provide a substrate for microbial degradation and/or transformation) and vegetation (that enhances settling, provides nutrient uptake, transforms pollutants into plant tissue, and presents a substrate for microbial degradation and/or transformation). Contamination of these valuable wetlands by petroleum spills would directly effect the quality and quantity of New York City's drinking water supply.

In addition, New York shares several of its largest and most important navigable waters with other states, including: the Hudson River, shared with New Jersey; Lake Erie, shared with Pennsylvania; Ohio and Michigan, Lake Champlain, shared with Vermont; and the Long Island Sound, shared with Connecticut. Because these are interstate water bodies, water sources outside the geographic boundaries of New York are hydraulically linked to these New York waters, and, therefore, necessarily affect their water quality. If plaintiffs prevail on their arguments, many of these

water bodies in other states -- including wetlands that are not adjacent to a navigable water body, small, non-navigable streams and ditches and tributaries – will not receive the CWA § 311 protections.

Absent such protection, water quality in these non-New York water bodies may significantly deteriorate, creating water quality problems in New York waters that are hydraulically linked. New York, however, has limited options for controlling and regulating water pollution in other states, and relies heavily on the CWA and § 311 to enforce minimal standards that insure New York's waters are not adversely impacted by out-of-state pollution.

As noted above, a decision in this case could also affect federal jurisdiction under the CWA § 404 (wetland dredge and fill program) and CWA § 402 (point source discharge permit program). The federal section 404 program is important both for its protection of wetlands (from other manners of destruction besides oil spills) outside New York, but also of wetlands in New York.. The federal section 402 program is important also both for its impact out-of-state and because the state program is modeled on, and delegated from it. Thus, a restriction in the scope of these two programs could have a significant impact on water quality in New York.

Courts routinely have found that government's interest in protecting natural resources is a sufficient interest to invoke standing. *Douglas County v. Babbitt*, 48 F.3d 1495,1501 (9<sup>th</sup> Cir. 1995)(a county asserting environmental interests in lands adjacent to federal lands has standing to challenge the Secretary of the Interior's failure to comply with the National Environmental Policy Act); *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8<sup>th</sup> Cir. 1992)(State's interests in fish and wildlife, recreational opportunities, and water quality were sufficient to grant the State's motion to intervene as a plaintiff to challenge the U.S. Department of Agriculture's forest management plan); *Sierra Club v. Glickman*, 82

F.3d 106 (5<sup>th</sup> Cir. 1996)(State's interest in agriculture within the state and in the allocation of its natural resources sufficient to support standing and intervention in suit against U.S. Department of Agriculture for over-pumping an aquifer). Moreover, courts have regularly granted states intervention to defend EPA decisions. *See American Corn Growers Association v. EPA*, 291 F.3d 1 (D.C. Cir. 2002)(states intervened as respondents to support and defend EPA's regional haze rule); *National Petrochemical Association v. EPA*, 287 F.3d 1130 (D.C. Cir. 2002)(State of New York intervened as respondent to defend and support EPA's heavy-duty diesel rule); *American Trucking Association, Inc. v. EPA*, 283 F.3d 355 (D.C. Cir. 2002)(States, including New York, intervened as respondents to defend EPA's revised ozone and particulate matter national ambient air quality standards); *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001)(States, including New York, intervened as respondents to defend and support EPA's decision ordering certain utilities to reduce air emissions of nitrogen oxides); *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000)(States, including New York, intervened as respondents to support EPA's order requiring certain states to reduce emissions of nitrogen oxides from sources within the states).

The State also has an interest in the precedential effect of this case on a rulemaking in which the State is actively participating. On January 15, 2003, EPA and the Army Corps of Engineers published an advanced notice of proposed rulemaking soliciting comment on the scope of EPA jurisdiction under the CWA in light of the *SWANCC* decision. 68 Fed. Reg. 1991, 1993 (Jan 15, 2003). The agencies expressly identified jurisdiction under § 311 of the CWA as an area for comment, and possible revision. *Id.* at 1993. The State submitted detailed comments strongly opposing regulations restricting CWA jurisdiction, similar to the restrictions plaintiffs advocate in this

case. If plaintiffs prevail in this case, the outcome of the agencies rulemaking could be significantly affected because the agencies may feel compelled to consider to the directives provided by this Court. At that point, the State's opportunity to influence the rulemaking could be prejudiced.

Finally, the State satisfies prudential standing requirements. The Congressional purpose of CWA § 311 is to eliminate discharges of oil or hazardous substances into or upon navigable waters. 33 U.S.C. § 1321(b). It is clear that the State's interest in this case – protecting water quality and minimizing discharges of oil into “navigable waters” – is directly aligned with the purpose and goals of the CWA and § 311, thereby establishing prudential standing. *See Mova Pharmaceutical Corp.*, 149 F.3d at 1075 (intervener established prudential standing by showing that interest it sought to advance in litigation was within zone of interests of statute).

#### **B. The State's Interest Will Be Impaired By An Adverse Decision**

It cannot be disputed that significant state interests could be impaired by an adverse decision in this case because the protection of state waters from pollution will be jeopardized if plaintiffs succeeded in this litigation.

In determining whether a proposed intervenor's interest may be jeopardized by an adverse decision, a court looks to the practical consequences of denying intervention. *The Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). Significantly, vindication of the interest at a later date through subsequent litigation is not sufficient grounds for denying intervention. *Id.*

As discussed previously, plaintiffs seek to restrict the scope of § 311 to only those facilities that may discharge oil into waters that are, have been or could reasonably be made, navigable-in-fact and wetlands adjacent to such “traditional” navigable waters. API Complaint ¶ 19. This

unprecedented attack on CWA jurisdiction, if successful, would render more waters in New York, and otherwise affecting New York, vulnerable to oil pollution and other forms of pollution or degradation. Thus, the State's interest clearly will be impaired if EPA's rulemaking is vacated.

Finally, as explained previously, the State's right to effectively engage in the *SWANCC* rulemaking likely would be impaired by an adverse decision in this case.

### C. The State's Interest Are Not Adequately Represented by EPA.

The State also can establish that EPA will not adequately protect the State's interests. This requirement is satisfied if the applicant shows that representation of his interests "may" be inadequate, and the burden of making that showing is minimal. *Trbovich v. United Mine Workers Union*, 404 U.S. 528, 538, n. 10 (1972). This Circuit recognizes that the inadequate representation requirement is "not onerous." *The Fund for Animals, Inc.*, 322 F.3d at 735. Further, interests need not be wholly adverse in order to show inadequate representation. *Id.* at 737. Even a shared general agreement does not assure adequacy of representation or preclude an intervenor from participating in the litigation. *Id.*

Courts have found that the United States does not necessarily represent the interests of a state because the federal government's interest can be broader than the state's interests. *Sierra Club*, 82 F.3d at 110. For example, in *Sierra Club*, Texas moved to intervene as a respondent supporting a decision of the U.S. Department of Agriculture (USDA). *Id.* The district court denied the state's motion, and the Court of Appeals reversed, finding, among other things, that the USDA would not adequately represent the state's interests, because the USDA was legally obliged to represent the interests of *all* U.S. citizens, while the state had a more parochial, but vital interest, in representing its residents and the allocation of its natural resources. *Id.*

Similar to *Sierra Club*, EPA here has much broader interests, and represents a much broader constituency than New York. EPA must balance the needs of New York against national policies and needs. Those decisions may not fully address the interests of New York which has no major refineries or oil fields. New York, however, will focus only on protecting the interests of its citizens and the resources of its state. This disparity in interests is sufficient to demonstrate that EPA will not adequately represent New York's interests.

Further, EPA has already indicated a willingness to consider restricting CWA jurisdiction by limiting the scope of "navigable waters." As explained previously, EPA has published an ANPRM in which it posited that SWANCC may have eliminated CWA jurisdiction over non-navigable-in-fact waters and sought comment on CWA jurisdiction post-SWANCC. 68 *Fed. Reg.* at 1993. Further, EPA has limited the practical application of the CWA by instructing its staff not to assert CWA jurisdiction over "isolated," non-navigable intrastate waters where the waters may affect interstate commerce. *Id.* at 1996. Thus, EPA may not share New York's interest in expansive CWA jurisdiction, making it impossible for EPA adequately to represent the State's interests in this litigation.

#### D. The State's Motion Is Timely

Last, the State's motion is clearly timely. Initially, to determine whether a motion to intervene is timely, a court considers the stage of the proceeding at which an applicant seeks to intervene and the prejudice to other parties if intervention is granted. *Pitney Bowes*, 25 F.3d at 70; *United States v. State of Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996). The timeliness requirement is flexible and involves not merely the length of time the litigation has been pending but also all of the circumstances of the case. *United States v. Yonkers Board of Education, et al.*,

801 F.2d 593, 595 (2d Cir. 1986). Applying these factors to this case compels the conclusion that the State's motion is timely.

The State's motion is made in the initial stages of litigation before defendants have even answered the complaints. Because the State's motion is so early in the litigation, no delay in the progression of the suit will ensue from the State's intervention. In fact, at this stage, no discovery has been conducted on the case, settlement negotiations have not completed – indeed, defendants' theories of the case have not even been presented to the Court. Because the motion is filed during the inaugural stages of the litigation, the State's motion is timely.

Moreover, no prejudice to the other parties will result from the State's intervention. Since the motion comes before the case has advanced beyond filing of the complaint, neither party has articulated definite theories or positions that will need revision if the State joins the suit. Nor has either party engaged in extensive discovery or settlement negotiations that will be negated or extended by the State's intervention.

## **II. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT PERMISSIVE INTERVENTION.**

In the alternative the court should grant New York permissive intervention, because the State can demonstrate that there is (1) a common question of law or fact; and (2) the intervention motion is timely. Fed. R. Civ. Proc. 24(b).

The court's decision regarding whether to grant permissive intervention should be primarily guided by the considerations of equity and judicial economy. *E.E.O.C. v. National Children's Ctr.*,

*Inc.* 146 F.3d 1042, 1046 (D.C. Cir. 1998). Thus, Rule 24(b) should be read liberally and failure to come within the precise bounds of Rule 24's provisions does not necessarily bar intervention if there is a sound reason to allow it. *Textile Workers Union v. Allendale Co.*, 226 F.2d 765, 768 (D.C. Cir. 1955). Under this liberal standard, the principal questions in deciding whether to grant permissive intervention is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994).

**A. The State's And The Parties' Positions Share A Common Question Of Law**

Absent a statutory basis for intervention, Rule 24(b) requires that the would-be intervenor advance a "claim or defense" that shares a common question with the claims of the original parties, with the goal of disposing of related controversies together. *E.E.O.C.*, 146 F.3d 1042 (D.C. Cir. 1998); *see also Diamond v. Charles*, 476 U.S. 54, 76 (1986). Here, both New York's intervention and the current litigation seek to answer the common legal issue of the scope of the terms "navigable waters" and "waters of the United States" and thus the appropriate jurisdiction of the CWA, thereby satisfying the first factor in a permissive intervention analysis.

**B. The State's Intervention Will Not Create Undue Delay Nor Prejudice The Rights Of The Existing Parties**

Further, the State can easily show that intervention will not create undue delay or prejudice the rights of existing parties because the pending litigation is still in the preliminary stages. EPA has not even answered the complaints, and the litigation has been stayed almost since its inception. Since the motion comes so early in the litigation, neither party has articulated definite theories or positions

that will need revision if the State joins the suit. Nor has either party engaged in extensive discovery that will be negated or extended by the State's intervention. This Court, therefore, should grant the State's request for permissive intervention so that all of the parties with interests effected by the litigation can fully participate in the process.

### CONCLUSION

For the reasons above, proposed intervenor-defendant requests this Court to grant its motion to intervene as a defendant as a matter of right, or in the alternative, permissively.

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