UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FARM BUREAU FEDERATION, PENNSYLVANIA FARM BUREAU, THE FERTILIZER INSTITUTE, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL CHICKEN COUNCIL, U.S. POULTRY & EGG ASSOCIATION, and NATIONAL TURKEY FEDERATION,	**Case No. 11-cv-00067-SHR (Judge Rambo)**
Plaintiffs,	**FILED ELECTRONICALLY**
v.	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Defendant.	

PLAINTIFFS' CONSOLIDATED OPPOSITION TO MOTIONS FOR LEAVE TO INTERVENE

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Plaintiffs American Farm Bureau Federation, Pennsylvania Farm Bureau, The Fertilizer Institute, National Pork Producers Council, National Corn Growers Association, National Chicken Council, U.S. Poultry & Egg Association, and National Turkey Federation (collectively, "Plaintiffs"), by and through their attorneys, file this Consolidated Opposition to the motions to intervene filed by: (i) the National Association of Clean Water Agencies, the Maryland Association of Municipal Wastewater Agencies, Inc., and the Virginia Association of Municipal Wastewater Agencies, Inc. ("Municipal Group");[1] and (ii) Chesapeake Bay Foundation, Inc., Citizens for Pennsylvania's Future, Defenders of Wildlife, Jefferson County (West Virginia) Public Service District, Midshore Riverkeeper Conservancy, and the National Wildlife Federation ("CBF Group")[2] (both groups collectively, "Proposed Intervenors"). For the reasons set forth below, Plaintiffs respectfully request that the Court deny both motions.

INTRODUCTION

Plaintiffs brought suit in this Court earlier this year seeking vacatur of a regulatory action by the U.S. Environmental Protection Agency ("EPA") known as

[1] The Municipal Group jointly moved to intervene on May 25, 2011. *See* Dkt. No. 27. Plaintiffs previously referred to the Municipal Group as "Proposed Intervenors – Group II." *See* Unopp. Mot. to File Consol. Resp. at 2 (Dkt. No. 55).

[2] The CBF Group also jointly moved to intervene on May 25. *See* Dkt. No. 29. Plaintiffs previously referred to the CBF Group as "Proposed Intervenors – Group I." *See* Unopp. Mot. to File Consol. Resp. at (Dkt. No. 55).

the Final Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment ("Final TMDL"). *See* 76 Fed. Reg. 549 (Jan. 5, 2011). Plaintiffs' dispute with EPA spans two issues – (i) whether the Clean Water Act ("CWA" or "the Act") authorized EPA to issue the Final TMDL and (ii) whether, in doing so, EPA violated the Administrative Procedure Act ("APA"). Now that the pleading phase is complete and the case will now move to summary judgment briefing of the merits, Proposed Intervenors seek to participate and defend the Final TMDL alongside EPA. Their motions articulate a broad range of interests that go far beyond the scope of the core issues Plaintiffs present to the Court, and indeed grossly misapprehend the nature of Plaintiffs' suit. In addition, Proposed Intervenors engage in far-flung and unsubstantiated speculation on what will occur should Plaintiffs prevail. Despite Proposed Intervenors' hyperbole to the contrary, this case is not a referendum on the water quality in the Chesapeake Bay and its upstream watershed, nor does it seek to shift regulatory burdens from agriculture to other industries. In fact, this case seeks judicial intervention in the face of federal overreaching and the unlawful and arbitrary exercise of regulatory authority. All else, including Proposed Intervenors' interests, is peripheral, and no party other than EPA is necessary to this action to resolve Plaintiffs' claims.

Under the Clean Water Act, a TMDL is an informational tool – that is, it identifies the maximum amount of a given substance(s) – here, nitrogen,

phosphorus, and sediment – that will achieve water quality standards in the waterbody at issue. As explained in Plaintiffs' Amended Complaint, TMDLs are to be issued by the states in most cases. Further, they not self-implementing; Congress also entrusted the states with TMDL implementation under the Act.

In disregard of this regulatory scheme, EPA's Final TMDL was improperly issued at the federal level and goes far beyond identifying the maximum amount of nitrogen, phosphorus, and sediment that will achieve water quality standards in the 92 tidal segments of the Chesapeake Bay itself. It assumes specific contributions of those substances from local waterbodies located far from the Chesapeake Bay. It then allocates loads of nitrogen, phosphorus, and sediment to dischargers and land uses located near these local waterbodies. Finally, it requires municipalities, businesses, and the owners of residential, agricultural, and undeveloped lands to undertake specific actions and management practices to reduce those loads. In a nutshell, EPA is asserting the authority not only to issue a Final TMDL for the Chesapeake Bay itself, but also to force all industrial, municipal, and agricultural entities throughout the 64,000-square-mile Chesapeake Bay watershed in Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New York, and the District of Columbia to take actions that EPA believes will reduce the nitrogen, phosphorus, and sediment that eventually reaches the tidal segments of the Bay from these distant sources.

In response to this overreaching by EPA, Plaintiffs are seeking vacatur of the Final TMDL on the following grounds: (i) that the Agency violated the Act by arrogating certain regulatory functions that Congress gave exclusively to the states, *see* Am. Compl. ¶¶ 77-83 (Dkt. No. 16); (ii) that the Final TMDL is not based on scientifically sound modeling and is therefore arbitrary under the APA, *see id.* ¶¶ 85-88 (Dkt. No. 16); and (iii) that the Agency ignored its obligations under the APA by denying members of the public adequate access to the information they needed to constructively comment on the proposed agency action. *See id.* ¶¶ 90-91 (Dkt. No. 16).

Thus, the only issues for the Court to decide in this case are whether EPA exceeded its statutory authority under the Clean Water Act in establishing the Final TMDL and whether EPA violated the Administrative Procedure Act – due to both its reliance on flawed models and its inadequate notice and comment – during the process. Each Proposed Intervenor's purported interest in defending the Final TMDL on these issues is in complete alignment with that of EPA, and not one of these issues requires any input from Proposed Intervenors. Moreover, EPA has extensive experience defending its regulatory efforts under both of the above referenced statutes. That Proposed Intervenors think they have more at stake in this litigation than EPA or that they can more vigorously defend the Final TMDL in the face of Plaintiffs' claims is not a sufficient basis to warrant intervention in

this action. Simply put, the Proposed Intervenors have not, and indeed cannot, overcome the presumption that EPA can adequately defend its actions in the case at hand.

Proposed Intervenors also lack a significant legally protectable interest in this litigation that would be harmed by a judgment in favor of Plaintiffs. Many of the Proposed Intervenors essentially allege a general interest in environmental protection based on their ongoing efforts with the Chesapeake Bay watershed. Further, in an attempt to bolster their purported stake in this action, Proposed Intervenors erroneously assume their interests will be harmed by allocations adopted in subsequent TMDLs properly issued by states, should Plaintiffs prevail in achieving vacatur of the improperly issued federal TMDL. Proposed Intervenors assert interests that are wholly collateral to Plaintiffs' dispute with EPA, which is based on the scope of EPA's authority under the CWA, the scientific integrity of EPA's modeling, and EPA's compliance with public participation requirements. Plaintiffs' grievances are with EPA alone, and the litigation should reflect that reality and preserve that scope. Plaintiffs therefore request that the Court not expand the litigation to create a din on issues and interests that could distract the Court and prejudice the Plaintiffs. The motions for intervention should be denied.

ARGUMENT

The four-part test for intervention as of right under Rule 24(a) is well known: (i) the motion to intervene must be timely; (ii) proposed intervenors must have interests relating to the property or transaction which is the subject of the action; (iii) proposed intervenors must be so situated that the disposition of the action may as a practical matter impair or impede their ability to protect their interests; and (iv) proposed intervenors' interests must not be adequately represented by existing parties to the litigation. *See Cloverland-Green Spring Dairies v. Pa. Milk Mktg. Bd.*, 138 F. Supp. 2d 593, 601 (M.D. Pa. 2001) (Rambo, J.) (citing FED. R. CIV. P. 24(a)). Importantly, where a governmental agency is the defendant in the litigation, Courts presume "subject to evidence to the contrary, that the government will adequately defend its actions, at least where its interests appear to be aligned with those of the proposed intervenor." *Maine v. Dir., U.S. Fish & Wildlife Serv.,* 262 F.3d 13, 19 (1st Cir. 2001) (citing cases).

The standard for permissive intervention under Rule 24(b) is similarly well established: courts may permit intervention upon timely application if proposed intervenors' claim(s) or defense(s) share common questions of law or fact with the main action. *See id.* at 602 (quoting FED. R. CIV. P. 24(b)). In determining whether to permit intervention, courts must consider whether intervention will unduly delay or prejudice adjudication of the rights of the original parties. *See id.*

Both intervention motions attempt to satisfy these tests by starting to argue the merits of Plaintiffs' claims and by mischaracterizing law,[3] facts,[4] and the potential outcome of this litigation.[5] In this response, Plaintiffs will focus on the issues relevant to intervention, and will reserve argument of the merits for summary judgment briefing. As explained further below, Proposed Intervenors' motions to intervene should be denied because they are not entitled to intervene as

[3] Each intervention motion falsely assumes that EPA, and only EPA, can issue and effectively implement a TMDL scheme for the Chesapeake Bay. *See, e.g.*, CBF Mem. at 3, 22 (Dkt. No. 51); Mun. Grp. Mem. at 11-12 (Dkt. No. 29). Indeed, the Proposed Intervenors assume the validity of the core legal issue that Plaintiffs challenge in this Court – whether EPA has the authority to cast aside state authority and issue the Final TMDL.

[4] The CBF Group's papers are replete with factual misstatements and mischaracterizations, most of which are not relevant to the issue of whether intervention should be granted. For example, the CBF Group states that all TMDLs for the Bay and its tributaries were compelled by court orders. *See* CBF Mem. at 6-7 (Dkt. No. 51). In fact, a much smaller subset of TMDLs in Virginia and Washington, D.C. were subject to judicial orders. *See, e.g.,* Am. Compl. ¶ 74 (Dkt. No. 16). The CBF Group further attempts to downplay the scope of EPA's action by only referencing the gross allocations in the TMDL (at Mem. 12-13, Dkt. No. 51), when in fact, EPA did much more, including issuing 276 separate TMDLs (three pollutants for each of the 92 tidal segments), and then further allocating those TMDLs throughout the watershed in thousands of individual allocations. *See* Final TMDL, Appendix Q.

[5] As explained in greater detail in Part I.B, *infra*, Proposed Intervenors contend that pollutant discharges will increase and that wasteload allocations will be re-distributed in a way that harms their interests should Plaintiffs prevail. *See* Mun. Grp. Mem. at 11-12 (Dkt. No. 29); CBF Mem. at 22 (Dkt. No. 51). Proposed Intervenors both protest and assume too much; vacatur of the Final TMDL will place water quality regulation of the individual waterways back into the hands of the states, where it lawfully belongs with substantial water quality protections and programs in place.

of right pursuant to Federal Rule of Civil Procedure 24(a), nor should they be afforded permissive intervention under Rule 24(b). In short, their interests are collateral to Plaintiffs' dispute with EPA, their claimed harm is simply speculative, if not wrong, and any interest they have in this litigation will be more than adequately defended by EPA.

I. Proposed Intervenors Are Not Entitled To Intervene As Of Right.

A. All Proposed Intervenors' Interests In This Case Are Adequately Represented By EPA.

Proposed Intervenors have "failed to meet [their] burden of demonstrating inadequacy of representation" by EPA in this case. *Cloverland-Green*, 138 F. Supp. 2d at 601. In the context of a motion to intervene, courts generally proceed on the assumption, subject to contrary evidence, that government entities will adequately defend their own actions, at least where their interests appear to be aligned with those of proposed intervenors. *Maine*, 262 F.3d 13 at 19; *see also Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498-1499 (9th Cir. 1995); *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976). As the Third Circuit has articulated, this presumption is based on the sound reasoning that "[w]here official policies and practices are challenged, it seems unlikely that anyone could be better situated to defend than the governmental department involved and its officers." *Rizzo*, 530 F.2d at 505. Although there is no "hard-and-fast rule" of what showing must be made to rebut a "presumption" of adequate

representation, circumstances that may rebut the presumption of adequacy include, inter alia, "evidence of collusion, adversity of interest, nonfeasance, or incompetence." *Schaghticoke Tribal Nation v. Norton*, 2006 U.S. Dist. LEXIS 42643, *16 (D. Conn. June 13, 2006).

Consequently, this Court has frequently denied intervention under Rule 24(a) on the ground that a governmental entity adequately represents the would-be intervenor's interests. *See, e.g.*, *Benjamin v. Dep't of Public Welfare*, 267 F.R.D. 456, 464 (M.D. Pa. 2010) (Jones, J.) (holding that a state agency adequately represented residents of intermediate care facilities for the mentally retarded); *Cloverland-Green*, 138 F. Supp. 2d at 601-02 (finding that a state administrative agency adequately represented the proposed intervenor's economic interests in the "continued viability of" a marketing law); *Penn. State Univ. v. U.S. Dep't of Health & Human Servs.*, 142 F.R.D. 274, 275 (M.D. Pa. 1992) (McClure, J.) (concluding that "[t]he Federal Defendants have demonstrated sufficient motivation to defend vigorously the HMO Act").

Specifically, in the context of environmental litigation, many courts nationwide have denied Rule 24(a) motions to intervene upon finding that the proposed intervenors and the government will defend the same interests in the litigation. *See, e.g.*, *Kane County v. United States*, 597 F.3d 1129, 1133-35 (10th Cir. 2010) (finding adequate representation and rejecting arguments that: (i) a

"history of adversarial relations" between the proposed intervenor and the federal government demonstrated that representation may be inadequate; and (ii) the government showed no willingness to defend against a quiet title action); *Maine*, 262 F.3d at 20-21 (concluding that federal agencies adequately represented environmental groups' interests in litigation over the listing of the Atlantic Salmon as an endangered species despite earlier litigation involving the same species); *Great Atlantic & Pacific Tea Co. v. Town of East Hampton*, 178 F.R.D. 39, 42-44 (E.D.N.Y. 1998) ("Even accepting as true the Group's characterization of these differing concerns, the interests of the Group coincide with the interests of the Town in terms of the single legal issue to be determined by this lawsuit, i.e., the validity and constitutionality of the [challenged] [l]aw"); *James City County, Virginia v. EPA*, 131 F.R.D. 472, 474 (E.D. Va. 1990) (holding that proposed intervenors failed to meet their burden of showing inadequate representation in a case involving the defense of EPA's denial of the creation of a reservoir).

In examining whether the Proposed Intervenors have overcome the presumption of adequate representation, the *Maine* decision is particularly instructive. *See* 262 F.3d at 19. There, the State of Maine and several business groups challenged the federal government's[6] designation of the Atlantic Salmon in

[6] The Defendants in that case were the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

part of Maine as an endangered species. *Id.* at 14. Several conservation groups sought to intervene on the side of the federal government, contending that their prior litigation history against the government over protection of the salmon prevented the government from adequately representing their interests. *See id.* In rejecting the prospective intervenors' motion, the court employed an "assumption, subject to evidence to the contrary, that the government will adequately defend its actions, at least where its interests appear to be aligned with those of the proposed intervenor." *Id.* at 19. Specifically, the court observed that the case involved "no statutorily imposed conflict" that would undermine the government's ability to defend the endangered-species designation and the interests of the conservation groups. *Id.* Rather, the government and the proposed intervenors in that case shared a "general alignment of interest . . . in upholding the designation." *Id.* at 18. The court emphasized that "[a]n earlier adverse relationship with the government does not automatically make for a present adverse relationship," particularly because the government had ultimately designated the salmon as endangered "of their own accord." *Id.* at 20-21.

Here, the facts at hand closely resemble the facts in *Maine.* Like in *Maine*, EPA and the Proposed Intervenors here share a "general alignment of interest" to uphold the Final TMDL, notwithstanding any prior adversity from other TMDL-related litigation. Indeed, neither of the Proposed Intervenors' motions articulates

how Proposed Intervenors' "interests and [EPA's] interest diverge concerning the merits of the lawsuit." *Kitzmiller v. Dover Area School Dist.*, 229 F.R.D. 463, 470 (M.D. Pa. 2005) (Jones, J.).

To the extent Proposed Intervenors can articulate any interests that are implicated by this litigation,[7] they are identical to that of EPA: (i) to uphold the Final TMDL; (ii) to defend EPA's assertion of statutory authority;[8] (iii) to defend the scientific validity of EPA's modeling; and (iv) to demonstrate the adequacy of the notice and comment period for the TMDL. It is of no consequence whether potential divergences in interest may arise at some point in the future or did arise in the past between Proposed Intervenors and EPA. Indeed, the relevant case law instructs that this Court should focus on whether there is a congruence of interests regarding the narrow issues before the Court in this case. *See Heffner v. Murphy*, No. 08-cv-990, 2010 WL 2606520, at *3 (M.D. Pa. June 25, 2010) (Jones, J.) (concluding that the interests of the defendants and the proposed intervenors "in

[7] Indeed, as described in Part I.B, *infra*, Proposed Intervenors articulate many interests that are not implicated by this litigation.

[8] The Municipal Group seeks to intervene solely to defend against Plaintiffs' claims that EPA exceeded its statutory authority under the Clean Water Act and that the Final TMDL is *ultra vires*. *See* Mun. Grp. Memo. at 1 (Dkt. No. 29). Thus, the Municipal Group seeks the same ultimate objective as EPA: to uphold the Final TMDL as a lawful exercise of EPA's authority under the Clean Water Act. Because EPA's "only interest is in upholding" the Final TMDL in this case, there is no basis for the Municipal Group to intervene and raise duplicative arguments that EPA had the authority to issue the Final TMDL. *See Humane Soc'y v. Clark*, 109 F.R.D. 518, 520 (D.D.C. 1985).

the instant litigation are identical" after finding that "both entities seek to uphold the regulations [at issue in that case] and therefore vehemently oppose [the] [p]laintiffs' allegations").

Proposed Intervenors collectively offer five reasons why EPA cannot adequately represent their interests in this case, but not one of those reasons sufficiently rebuts the "presumption [that] exists in favor of adequate representation by [EPA]." *Cloverland-Green*, 138 F. Supp. 2d at 601.

The CBF Group sets forth a number of unconvincing generalized and speculative assertions in an effort to demonstrate that EPA cannot adequately represent their interests. Specifically, the group speculates that: (i) political administrations (and their resolve to address environmental issues) change and EPA is subject to external pressures such as Congressional oversight, *see* CBF Mem. at 24-25 (Dkt. No. 51); (ii) EPA may resolve the case not through litigation, but in a manner harmful to Proposed Intervenors, *see id.* at 25-26 (Dkt. No. 51); and (iii) EPA may not appeal an adverse decision in this litigation. *Id.* at 26 (Dkt. No. 51)

Not one of the foregoing contentions is persuasive. *See Kane County*, 597 F.3d at 1135 (rejecting claims of inadequate representation by an environmental group because they relied upon "irrelevant speculation about and critiques of potential litigation strategies by the federal government"). The CBF Group's

arguments regarding potential changes in political climate are speculative and unpersuasive. In this case, the Final TMDL will be defended by the same Administration that issued it.

Moreover, the mere possibility that this litigation could result in a settlement or that EPA may not appeal an adverse decision "does not rise to the level of inadequate representation." *Great Atl. & Pac. Tea Co.*, 178 F.R.D. at 44 (finding assertions of inadequate representation to be "unpersuasive" where the proposed intervenor contended that the defendant might "settle the action on terms that the [proposed intervenor] would not approve, or because the [defendant] might not appeal an adverse decision"). The CBF Group would eviscerate the requirement that a would-be intervenor must show inadequacy of representation in cases where the government is a party because there is always the possibility that administrations change during litigation, Congress can override an executive agency, parties will settle a lawsuit, or would-be intervenors will disagree with trial strategy.

Next, Proposed Intervenors' unsubstantiated assertions that EPA cannot adequately represent their "specific, parochial interests" in light of the federal government's competing concerns fall short. *See* CBF Mot. at 13 (Dkt. No. 25); CBF Memo in Supp. at 25 (Dkt. No. 51); Mun. Assoc. Mot. at 12-13 (Dkt. No. 29). Proposed Intervenors' and EPA's interests in the litigation *sub judice* are identical,

i.e., to uphold the challenged agency action. That EPA's interests may differ as a general matter is not controlling because "the interests of [Proposed Intervenors] coincide with the interests of [EPA] in terms of the [] legal issue[s] to be determined by this lawsuit," *i.e.*, the validity and sufficiency of the Final TMDL under the Clean Water Act and the Administrative Procedure Act. *Great Atl. & Pac. Tea Co.*, 178 F.R.D. at 43.

Not one of the Proposed Intervenors can "demonstrate that it has a legal interest in maintaining the [Final TMDL] that not only differs from [EPA's] interest, but would permit [Proposed Intervenors] to assert a justification for the [TMDL] that could not be equally asserted by [EPA]." *Id.*; *see also James City County*, 131 F.R.D. at 474 ("[Applicants'] only concerns are that EPA had a 'national' perspective, while the applicants maintain a 'local' perspective . . . The Court finds these propositions to be insufficient to support a claim of inadequate representation."). The lack of further specificity as to why EPA cannot adequately represent Proposed Intervenors' "parochial" interests is fatal to Proposed Intervenors' motions.

Last, the CBF Group attempts to carry over its prior disputes with EPA over regulation of the Chesapeake Bay, *see* CBF Mem. at 7, 27 (Dkt. No. 51), but such historical discord is not enough to demonstrate the inadequacy of representation by EPA <u>in this litigation</u>. *See, e.g.*, *Kane County*, 597 F.3d at 1134-35 (finding

adequate representation in the face of arguments regarding "the history of adversarial relations between [the proposed intervenor] and the Bureau of Land Management"); *Maine*, 262 F.3d at 20 ("An earlier adverse relationship with the government does not automatically make for a present adverse relationship."). Nor are past disagreements between certain members of the CBF Group and EPA relevant to the narrow set of issues presented in this litigation, *i.e.*, whether EPA exceeded its Clean Water Act authority in establishing the Final TMDL or whether it violated the Administrative Procedure Act in doing the same. There is a complete unity between the CBF Group and EPA in this case: both believe the Final TMDL is a lawful exercise of EPA's statutory authority, is based on sound modeling, and was established with adequate notice and comment.

The CBF Group claims that it has a unique interest in preserving a prior settlement agreement in a case where some CBF Group members were adverse to EPA, *see* CBF Mem. at 26-27 (Dkt. No. 51), but this is not a valid basis for intervention. *See Maine*, 262 F.3d at 21. The CBF Group members secured, by prior settlement agreement, that EPA would issue the Final TMDL by a particular date. "That bargain was kept, the decision was made, and there is no risk to that completed bargain in this litigation." *See id.* The prior settlement agreement is irrelevant to this litigation. Even if the settlement agreement is relevant, the CBF

Group and EPA are in "perfect alignment" to deny any potential allegation that the settlement prompted an ill-conceived agency action. *See id.* at 21 n. 6.

In sum, Proposed Intervenors' arguments regarding inadequate representation amount to little more than unsupported assertions that EPA cannot be expected to defend its Final TMDL with the same rigor as Proposed Intervenors would. But, courts have rejected similar assertions in other cases, and the same result is warranted here. *See, e.g.*, *Great Atl. & Pac. Tea Co.*, 178 F.R.D. at 43 ("The fact that the [proposed intervenors] and the Town may have different motives behind their joint interest in defending the statute does not lead to the conclusion that the Town will fail to pursue its defense of the [challenged] [l]aw with vigor."); *Humane Soc'y*, 109 F.R.D. at 520-21 (explaining that the proposed intervenors made no showing "that the federal defendants are not fully willing to vigorously support the [agency actions] in question"). Thus, no party is better suited to defend EPA's statutory authority and regulatory decision-making processes than the Agency itself. Accordingly, this Court should deny both motions to intervene as of right.

B. None Of The Proposed Intervenors Has A Legally Protectable Interest Relating To This Action That Would Be Impaired By A Judgment In Favor Of Plaintiffs.

Proposed Intervenors fail to show that they have a direct and significant legal "interest relating to the property or transaction that is the subject of the

action." Fed. R. Civ. P. 24(a)(2); *Kleissler v. U.S. Forest Serv*., 157 F.3d 964, 969 (3d Cir. 1998). The interest asserted "must be a cognizable legal interest and not simply an interest 'of a general and indefinite character.'" *Brody v. Spang*, 957 F.2d 1108, 1116 (3d Cir. 1992) (quoting *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987)). Here, the Municipal Group points to their intervention in prior inapposite litigation and erroneously speculates on the outcome of this case to define their interest and its impairment. *See* Mun. Grp. Mem. at 8-9, 11-12 (Dkt. No. 29). The CBF Group merely states their general goals for promoting the most stringent regulations of all discharges into the waters of the seven state Chesapeake Bay region and also misstates the implications of this suit should Plaintiffs prevail. *See* CBF Mem. at 17-22 (Dkt. No. 51). Neither set of Proposed Intervenors' articulated interests is germane to the narrow legal issues before the Court – namely, (1) whether EPA exceeded its statutory authority, and encroached on the jurisdiction of the states, by issuing the TMDL; and (2) whether EPA's modeling effort was arbitrary and its public participation process was inadequate. Accordingly, Proposed Intervenors fail to meet the interest and impairment prongs of the intervention test.

1. The Municipal Group Lacks An Interest That Would Be Impaired By A Judgment In Favor Of Plaintiffs.

To support its interest in this case, the Municipal Group cites to prior participation in litigation involving the Chesapeake Bay on the side of EPA when

EPA was sued by parties in the CBF Group seeking a court order for more stringent regulation of the Chesapeake Bay watershed. *See* Mun. Grp. Mem. at 8-9 (Dkt. No. 29). In those cases, the Municipal Group parties joined EPA in arguing against further regulation, and it is axiomatic that the Municipal Group had a legally protected interest should CBF Group Plaintiffs prevail, given that it would result in increased regulation of their operations. *See id.* Here, the Municipal Group has literally flipped to the other side of the interest equation, seeking to defend the very type of regulation they advocated against in the prior litigation against the CBF Group. Given that the Final TMDL, which Plaintiffs allege is an unlawful exercise of federal power, seeks to assign maximum pollutant loads and impose management practices on both the point sources in the Municipal Group and the point and nonpoint sources in agriculture, Plaintiffs are simply befuddled as to how the Municipal Group has an interest in defending federal regulatory overreaching that will impose increased costs on the Municipal Group, as they readily admit. *See id.* at 11-12, 18-19 (Dkt. No. 29).

It appears that the Municipal Group is driven by a misconception on the outcome of this litigation should Plaintiffs prevail, in that they believe there will be some sort of shifting of regulatory burdens away from agriculture and onto municipalities should the Final TMDL be vacated. For example, the Municipal Group states that "if Plaintiffs succeed . . . a serious impact would be to shift a

greater burden of water quality protection to point sources . . . [and] Proposed Intervenors cannot risk an adverse outcome that could undermine their authorized allocations in any respect[.]" *Id.* at 2 (Dkt. No. 29). Similarly, the Municipal Group "would likely suffer reductions to their allocations" should Plaintiffs prevail.[9] *Id.* at 11 (Dkt. No. 29).

All Proposed Intervenors read too much from Plaintiffs' Amended Complaint. This litigation does not address or challenge any specific load allocations – the suit in the first instance questions EPA's authority to assign any of the allocations. Should this Court disagree with Plaintiffs' statutory authority claim, Plaintiffs further challenge the accuracy of the models used to derive those allocations. Plaintiffs are interested in ensuring that the information on which the TMDL is based is accurate and reliable, and that TMDL issuance and implementation occurs at the state level in accordance with the Clean Water Act. If Plaintiffs are successful and the TMDL is vacated, the result of any new load allocations issued by states to any sector is not known.[10] At this time, it is purely

[9] The CBF Group also raised the load allocation issue in their statement of interest. *See* CBF Mem. at 21-22 (Dkt. No. 51). ("should the Plaintiffs prevail, the allocations for agriculture will be incorrectly shifted to, for example, urban and suburban stormwater or sewage treatment").

[10] For example, USDA models show more, not less, nitrogen is contributed to the Bay from agriculture operations when compared to the estimates used by EPA. *Compare* U.S. EPA, Chesapeake Bay Program Office, Annapolis MD, 2010 Chesapeake Bay Phase 5.3 Community Watershed Model, EPA903S10002-

speculative to assume that any sector's load will increase or decrease based on the outcome of this litigation, and such speculation is too "indefinite" to qualify for intervention. *Brody*, 957 F.2d at 1116.

2. The CBF Group Lacks An Interest In This Litigation That Would Be Impaired By Judgment In Favor Of Plaintiffs.

In addition to the load allocation issue discussed above, the CBF Group asserts three other areas of interest that they claim are at stake in this litigation: restoration of natural resources, pollutant load reduction, and the *Fowler* settlement agreement. *See* CBF Mem. at 17-21, 22-23 (Dkt. No. 51). None are legally cognizable such as to support intervention here.

First, the CBF Group asserts general interests in the environment that have no bearing on the discrete matters before the Court. They claim, for example, that the "elimination of the Bay TMDL will allow the continued discharge of pollutants harmful to the viability of restored natural resources . . . and [will] harm the

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CBP/TRS-303-10 (Dec. 2010) (estimating nitrogen, phosphorus, and sediment loads from various sectors, including agricultural sources) *with* U.S. Dep't of Agric., Natural Res. Conservation Serv., 2011 Assessment of the Effects of Conservation Practices on Cultivated Cropland in the Chesapeake Bay Region, Final Draft, *available at* http://www.nrcs.usda.gov/technical/nri/ceap/chesapeake_bay/index.html (estimating nitrogen, phosphorus and sediment loads from cropland). The Chesapeake Bay Watershed Model is referenced in the Final TMDL at 5-30. The October 2010 draft version of the 2011 CEAP report is available in the record at: http://www.regulations.gov/#!documentDetail;D=EPA-R03-OW-2010-0736-0482.2). If revised TMDL allocations resulting from a judgment in favor of Plaintiffs are based on USDA's assessment, the Municipal Group may actually benefit from this litigation because the agricultural sector may be required to further reduce nitrogen loadings.

aesthetic and recreational uses of the Proposed Intervenors' members, CBF Mem. at 18 (Dkt. No. 51), and "the organizations and their members have participated in advocacy work designed to restore and protect the Bay and its natural resources." CBF Mem. at 19 (Dkt. No. 51). Courts have held that a general interest in environmental regulation is not a legal interest, but a "political or programmatic one" that is insufficient to support intervention. *See Sierra Club v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004) (denying motion for intervention).

Further, these general statements of interests in environmental protection proceed on a basic mischaracterization of the issues before the Court. The absence of a federal TMDL for the entire Bay watershed does not, of course, authorize the discharge of pollutants or authorize any increase in pollution. Such discharges of pollutants in violation of water quality standards remain regulated by section 402 of the CWA. *See* 33 U.S.C. § 1342. The CBF Group may continue to advocate for stringent environmental regulation within the federal-state balance envisioned by Congress. Moreover, the CBF Group's stated interest in assuring that EPA issue a TMDL that contravenes the cooperative federalism embodied by the CWA is not a legitimate interest. There can be no legitimate interest in assuring that EPA exceeds its statutory authority, no matter how desirable the applicants for intervention may find the result of the Agency's statutory overreach. *Cf. Brody v.*

Spang, 957 F.2d 1108, 1124 (3d Cir. 1992) ("an applicant for intervention can have no interest is assuring [the perpetuation of] unconstitutional conditions").

In addition, the CBF Group's statement that their members "participate in Bay restoration projects" and that elimination of the Final TMDL may "eliminate the impetus" for such projects does not justify intervention. *See* CBF Mem. at 18-19 (Dkt. No. 51). The CBF Group's belief that their projects may be used in the future to offset loadings is pure speculation, and their desire to use the TMDL to coerce farmers into participating in any projects is not at issue before the Court. *See Nat'l Ass'n of Home Builders v. Evans*, No. 00-2799, 2002 U.S. Dist. LEXIS 25521, at *15 (D.D.C. Mar. 24, 2002) ("In considering whether an applicant may intervene as a matter of right under Rule 24(a)(2), courts have noted that an interest that is collateral to the action or contingent on the future occurrence of a sequence of events is insufficient."). The CBF Group's interest or ability to carry out such restoration projects is simply not a legally protectable interest and is not affected by the Final TMDL.

Similarly, preservation of future litigation and enforcement options related to pollutant load reduction is not a sufficient interest to justify intervention. *Cf. id.* at *10-11 (finding that proposed intervenors lacked a "legally protected interest in Plaintiffs' challenge to [an] [essential fish habitat] designation" and explaining that "nothing in this suit will eviscerate [the proposed intervenors'] right to comment

on the agency's [] designation" on reconsideration and that the proposed intervenors "would still have another opportunity to comment on [the] designation, just as they did during the original [] designation"). The CBF Group contends that the Final TMDL "is a significant new means for requiring compliance with pollutant loading limits in the watershed," including pursuit of enforcement litigation against agricultural operations in the watershed. CBF Mem. at 19 (Dkt. No. 51). As stated above, this litigation does not affect CWA regulation of point source discharges of pollutants into waters of the United States, and the CBF Group remains able to allege violations of those regulations as before.

Next, there is no interest nexus between the *Fowler* settlement agreement and this litigation. *See* CBF Mem. at 22-23 (Dkt. No. 51). First, the Final TMDL is not the fruit of the *Fowler* litigation as the CBF Group claims. *Id.* at 22-23, 27 (Dkt. No. 51). As the settlement itself memorializes, EPA was already working on a TMDL for the Bay during that litigation. *See* CBF Ex. A at 2 (Dkt. No. 51-1). Moreover, and importantly, Proposed Intervenors have no legitimate interest in assuring that EPA exceeds its statutory authority. *See supra* at 22-23.

Finally, in one sentence at the end of discussing their environmental interest, the CBF Group states that they "are able to provide valuable insights in response to Plaintiffs' claims concerning the inputs to and adequacy of the Bay Watershed Model and sufficiency of the TMDL public participation process – claims raised in

Plaintiffs' Amended Complaint." CBF Mem. at 19 (Dkt. No. 51). The CBF Group offers no facts to support their claimed interest, nor does the Group assert that they have any particular expertise in developing models such as the Scenario Builder Model or Watershed Model at issue here. They also claim no expertise or knowledge beyond that possessed by EPA.[11]

Moreover, the CBF Group's mischaracterization of the Scenario Builder model calls into question their basic knowledge regarding the development of the models at issue here. They assert, for example, that the Scenario Builder "was developed to determine what changes to water quality . . . would occur when loadings were reduced." CBF Mem. at 11 (Dkt. No. 51). Scenario Builder was not used, however, to determine changes in water quality. Scenario Builder estimates nutrient loads based on assumptions regarding land use in each of the seven Bay jurisdictions, assumptions regarding runoff resulting from different land uses, and assumptions regarding the utilization and efficiency of best management practices employed to reduce that runoff. Final TMDL, at 5-28 to 5-29. The Scenario Builder estimates are inputs to the Bay Watershed Model and are used to generate modeled estimates of the nutrient loads delivered to the Bay. *Id.* at 5-29. The Bay

[11] The CBF Group claims that their experience working with farmers will allow them to assist the Court. CBF Mem. at 18 (Dkt. No. 51). Petitioners do not state how this experience is relevant to the discrete issues before the Court. Plaintiffs are raising legal challenges to EPA's authority under the Clean Water Act, and the adequacy of its actions under the Administrative Procedure Act. CBF's work with farmers is irrelevant to those claims.

Watershed Model then provides inputs to the Chesapeake Bay Water Quality and Sediment Transport Model, which is the model that is used to estimate what changes in water quality would occur in response to changes in nutrient loads. *Id.* at 5-38. The CBF Group's misunderstanding of the model at issue further highlights the tenuous connection between their interests and the actual matters at issue before the Court.

In sum, both sets of Proposed Intervenors' articulated interests are premised on a misapprehension of the relief Plaintiffs seek and pure speculation on what will occur should Plaintiffs prevail. This suit does not seek nor will its outcome result in increased pollution to the Bay, increased regulation of municipalities, or decreased environmental protection. The suit seeks to restore the lawful balance of federal and state regulation in the Clean Water Act and ensure scientific and procedural integrity in the federal regulatory scheme. Proposed Intervenors' interests do not rise to the level of legally protectable interests to warrant intervention as of right.

II. Proposed Intervenors Should Not Be Permitted To Intervene.

Alternatively, Proposed Intervenors seek permissive intervention under Rule 24(b). In making their argument, Proposed Intervenors largely repeat the themes in their Rule 24(a) argument and highlight the fact that they can "present specific

information in response to the claims asserted by the Plaintiffs." *See* CBF Memo. at 29 (Dkt. No. 51).

Under Rule 24(b), a court may permit intervention "when the applicants' claim or defenses in the main action have a question of law or fact in common. Whether to grant permissive intervention is within the Court's discretion, but in making this decision, courts consider whether the proposed intervenors will add anything to the litigation." *Kitzmiller*, 229 F.R.D. at 471; *see also James City County*, 131 F.R.D. at 475 ("Given that this matter centers on review of the administrative process, there appears little that the applicants could add to the existing record at this time."); *cf.* (denying permissive intervention, but allowing the filing of as amicus briefs, even after finding that "Intervenors' extensive familiarity with the issues involved and the likelihood that their participation in this lawsuit would contribute a useful perspective argue in favor of granting intervention").

Importantly, this Court has concluded that, "if the interests of the proposed intervenors are already represented in the litigation, courts deny such application to intervene." *Kitzmiller*, 229 F.R.D. at 471 (citing *Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982)). Other decisions from this Court reinforce that conclusion. *See Heffner*, 2010 WL 2606520, at *4 (observing that "the interests of the Defendants and [the proposed intervenor] in the case at bar are perfectly

aligned" and concluding that "we do not believe that [the proposed intervenor's] participation in the litigation at bar would add anything appreciable to the proceedings and would only cause undue delay"); *Penn. State Univ.*, 142 F.R.D. at 275 (finding that because the proposed intervenor's "potential economic interest in the outcome of this case is identical to that of other federally-qualified HMO's and will be adequately represented by the Federal Defendants," the proposed intervenor's "presence in the action would therefore be superfluous and would not promote the efficient resolution of this litigation").

For the reasons described in Argument Section I.A *supra*, Proposed Intervenors cannot demonstrate that they will "add anything to the litigation, but rather, [Proposed Intervenors'] participation in this litigation will be merely duplicative of [EPA's] efforts." *Id.* Also, as explained above in Argument Section I.B, the interests that Proposed Intervenors articulate are collateral to the specific issues of statutory authority and regulatory process that are before this Court. *See, e.g.*, *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 804 (9th Cir. 2002) (affirming denial of permissive intervention under Rule 24(b) because the proposed intervenors' concerns were "sufficiently different from the issues in the underlying action so as to not meet this factor of the test for permissive intervention"); *Wade v. Goldschmidt*, 673 F.2d 182, 186-87 (7th Cir. 1982) (affirming denial of permissive intervention under Rule 24(b) because the issue in litigation was

"whether or not the governmental defendants have complied with certain federal laws," and the court was "not in a position to act on the questions raised by applicants involving basic value judgments" about the agency's decision).

Proposed Intervenors wish to bring to this case their perspectives and value judgments about how to regulate water quality in the Chesapeake Bay watershed or whether the pollutant allocations established by EPA should be upheld. But, those perspectives are tangential to the issues before the Court and would only serve as a distraction from the core legal issues of this case. *Cf. Great Atl. & Pac. Tea Co.*, 178 F.R.D. at 45 (denying permissive intervention after concluding that the proposed intervenor sought "to transform this lawsuit from a test of the validity of the Superstore Law into a contest over the propriety of commercial development in East Hampton in general and at the proposed A&P site in particular"). This litigation challenges EPA's exercise of statutory authority under the Clean Water Act and its attempts to regulate based on unsound science and without adequate public participation. This challenge does not implicate whether water quality in the Bay should be regulated or whether certain industries should be regulated more stringently than others. "The gravamen of [Proposed Intervenors'] problems relates to [issues] that [are] collateral to the issue currently pending before the Court. To permit [Proposed Intervenors] to permissively intervene would change the contours of the lawsuit and would be unfair to Plaintiffs." *Nat'l Ass'n of Home*

Builders, 2002 U.S. Dist. LEXIS 25521, at *18. Consequently, Proposed Intervenors' request for permissive intervention should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the CBF Group's and the Municipal Group's motions to intervene.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.8(b)(2), the undersigned hereby certifies that Plaintiffs the foregoing Consolidated Opposition to Motions for Leave to Intervene complies with the word count limit and does not exceed the allotted 12,500 words. *See* Order (Dkt. No. 56). This certification is reliant o the word count feature of the word-processing software used to prepare this brief.

Plaintiffs' Consolidated Opposition to Motions for Leave to Intervene contains 7,226 words.

Dated: June 20, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2011, a true and correct copy of the foregoing document was electronically filed and served on the following in accordance with the Rules of the United States District Court for the Middle District of Pennsylvania:

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