

**IN THE 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,)**

Plaintiffs,

v.

**UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)**

Defendant.

**Case No. 11-cv-00067
(Judge Rambo)**

**REPLY TO PLAINTIFFS' CONSOLIDATED OPPOSITION TO THE
PROPOSED INTERVENORS' MOTION FOR LEAVE TO INTERVENE**

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The Chesapeake Bay Foundation, Inc., Citizens for Pennsylvania’s Future, Defenders of Wildlife, Jefferson County Public Service District, Midshore Riverkeeper Conservancy, and the National Wildlife Federation (collectively “Proposed Intervenor” or “movant”), moved for leave to intervene in this action pursuant to [Federal Rules of Civil Procedure 24\(a\)\(2\) and \(b\)\(1\)\(B\)](#). The Plaintiffs have opposed the motion. The United States has taken no position on the motion.

The Proposed Intervenor submit the following reply memorandum in support of their motion for leave to intervene in this action which seeks to vacate the Chesapeake Bay Total Maximum Daily Load (“Bay TMDL”).

INTRODUCTION

“On timely motion, the court *must* permit anyone to intervene who:

...

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

[Fed. R. Civ. P. 24\(a\)\(2\)](#)(emphasis added).

The Plaintiffs do not argue that the motion is untimely. They contend that Proposed Intervenor do not have *any* legally cognizable interests and even if they do, those interests are adequately represented by the federal government. Under Plaintiffs’ view of the law, no citizen can intervene on the same side as the

government unless there is proof of collusion between the government and the opposition. *See* Plaintiffs’ Consolidated Opposition to Motions for Leave to Intervene (“Opp.”) p. 9. This is not the test for intervention in the Third Circuit.

The correct test is whether the government can adequately protect the *interests* of the Proposed Intervenors regardless of whether they share the same ultimate goal. The Third Circuit has recognized that there is no precise definition of the term, that Rule 24 contemplates “elasticity,” that “pragmatism is a substantial factor that must be considered,” and that the central purpose of the 1966 amendment is to allow intervention by those who might be practically disadvantaged by resolution of the action. [*Kleissler v. U.S. Forest Service*, 157 F.3d 964, 970 \(3d 1998\)](#). Thus, this circuit relies more on the pragmatic concern of consolidating disputes into one proceeding tempered by concerns for unduly dissipating the focus of the litigation or increasing the complexity of case management. *Id.* Those countervailing concerns do not apply here given the scope of the issues presented and the nature of this proceeding – administrative record review.

Here, Proposed Intervenors have unique and varied interests relating to their own property and to the legal viability of the Bay TMDL. Those interests will be impaired if Plaintiff’s succeed and the government cannot adequately represent those interests.

ARGUMENT

A. Proposed Intervenors Have Legally Cognizable Interests That May Be Impaired If the Plaintiffs are Successful

Plaintiffs assert that Proposed Intervenors' interests in education, membership, the restoration of natural resources, the reduction of pollution into the Bay watershed, and the settlement agreement in *Fowler v. EPA* are not legally cognizable. Opp. p. 21. According to Plaintiffs, these are simply "general interests in the environment that have no bearing on the discrete matters before the Court." *Id.* As explained in Proposed Intervenors' motion and below, Plaintiffs misrepresent the nature of the movants' interests.

Moreover, the Rule requires consideration of the practical consequences of the litigation, not those of a purely legal nature. [*Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 162 \(3d Cir. 1995\)](#); [*Harris v. Pernsley*, 820 F.2d 592, 601 \(3d Cir. 1987\)](#). If Plaintiffs are successful in vacating the Bay TMDL, water quality in the Bay and its tributaries will be harmed impairing the Proposed Intervenors' interests in both the "property" (*e.g.*, restoration projects and waterfront properties owned by the Proposed Intervenors and their members) and the "transaction that is the subject of [this] action." (the Bay TMDL).

1. *Chesapeake Bay Foundation* (CBF)

CBF and its members have unique interests that may be impaired by this litigation. For example, CBF funds and operates 15 different outdoor education

programs in the District of Columbia, Maryland, Pennsylvania, and Virginia.

Annually, over 30,000 students, administrators, and teachers from over 100 counties in the watershed participate in CBF's student and teacher training.

Participants engage in hands-on investigations of their local waterway and its water quality in a boat or canoe or at a CBF island education center. The program allows participants to learn about their local waterway and the Bay by measuring water quality and studying fish, crabs, and oysters they catch. Exhibit 1, Declaration of Charles Foster ¶¶ 5, 14-19, Exhibit A.

CBF operates oyster restoration programs in Maryland and Virginia. Oyster larvae are grown by CBF until they are large enough to be planted. CBF also provides immature oysters to "gardeners" who grow them under their docks. CBF staff work with state agencies to identify planting locations and use CBF vessels to transport and spread the oysters on the bottom of tidal rivers or in the Bay. Since 2001, CBF has spent over \$4 million on oyster restoration. Foster ¶¶ 22-26, Exhibit B.

CBF operates an aquatic grass planting program on the James and Potomac Rivers. CBF provides seed kits to participants who grow the seeds in equipment furnished by CBF. Once the seeds have sprouted, the participants, under CBF's direction, plant the grasses in a variety of locations identified by CBF staff. Under

CBF supervision, participants plant the grasses in the rivers. CBF has spent \$48,000 over the last 9 years on grasses. Foster ¶¶ 27-30.

CBF designs and helps implement best management practices (BMPs) (*e.g.*, vegetated streamside buffers and fencing livestock out of waterways) on private land in Maryland, Pennsylvania, and Virginia that reduce the flow of nutrients and sediment into Bay tributaries. In Pennsylvania, CBF manages projects at a cost of over \$18 million to install BMPs on 130 farms. CBF also provides assistance on a manure composting demonstration project and a cattle feeding project to reduce nutrients in manure. Since 1997, CBF has directly invested more than \$25 million in helping over 5,000 landowners, primarily farmers, to implement conservation measures. Foster ¶¶ 33-35.

The Bay TMDL and the resulting state Watershed Implementation Plans (WIPs) require that additional BMPs be installed on farmland. CBF's programs will enable farmers to meet and exceed Bay TMDL allocations. Without the Bay TMDL there will be no impetus for the success of existing or new BMP projects. Foster ¶ 34.

If the Bay TMDL is set aside, water quality will continue to degrade harming natural resources that are essential to CBF's educational and restoration programs impairing CBF's and its members' interests. Foster ¶¶ 6, 9-13, 20-21, 36-37. While the government has an interest in preserving the Bay TMDL, it has no specific

interest in preserving CBF's education program or in the success of the oysters and grasses planted or BMPs installed by CBF and its members.

Plaintiffs contend that CBF's interests in the *Fowler v. EPA*, No. 1:09-CV-00005-CKK (D.D.C. Jan. 5, 2009) settlement agreement are not legally cognizable and there is no "interest nexus" between this suit and the settlement agreement. Plaintiffs suggest that this litigation can have no impact on the settlement because the Bay TMDL has already been developed. Opp. pp. 21 and 24.

Plaintiffs ignore the fact that this suit could end the benefit of CBF's legal agreement with EPA that it develop and administer a Bay wide TMDL. Exhibit A to Proposed Intervenor's Memorandum in Support, ¶ III.A,1-4. They further ignore paragraphs III.B, 5-7 of the settlement agreement which provide that *after* issuance of the Bay TMDL, EPA will: oversee the development of and review the Bay jurisdictions' Phase II WIPs;¹ review each jurisdiction's progress in meeting its Bay TMDL allocations; review pollution discharge permits for consistency with the Bay TMDL; and take appropriate action should a jurisdiction fail to meet its obligations under the Bay TMDL. *See also id.* at ¶¶ C. 9(a) and (f) and 11. Each of these actions hinges on the existence of the Bay TMDL. Thus, should Plaintiffs' suit be successful, CBF will lose the benefits of its agreement to dismiss its suit against the United States. *Id.* at ¶ V.B; Exhibit 1, Foster ¶ 39.

¹ Those plans set forth how each local jurisdiction will meet its discharge allocations for nutrients and sediment.

Moreover, the nexus between this suit and *Fowler* is the most direct imaginable. CBF dismissed its suit against EPA in exchange for a settlement agreement requiring EPA to undertake a Bay TMDL. Plaintiffs seek to destroy that bargain. There can be no greater interest in the “transaction that is the subject of the action.” [Rule 24\(a\)\(2\)](#).

2. *Citizens for Pennsylvania’s Future* (PennFuture)

PennFuture is an environmental organization that has invested significant resources on behalf of itself and its members in trying to protect and restore the Chesapeake Bay. Exhibit 2, Declaration of John Detweiller (Detweiller) ¶¶ 3-9. PennFuture’s members own property along the Chesapeake Bay or its tributaries and kayak, sail, raise oysters, and catch and eat fish there. *Id.* at ¶¶ 2, 12-18, 22; Exhibit 3, Declaration of Pat Reilly (Reilly) ¶¶ 2, 4-8, 22-24; Exhibit 4, Declaration of Judd Pittman (Pittman) ¶¶ 2, 7-8, 20. They intend to continue these activities as long as water quality permits. Detweiller ¶ 19; Reilly ¶ 9; Pittman ¶ 9. However, they have seen Bay waters, fish, and oysters impaired by too much sediment, debris, and excessive algae blooms. Detweiller ¶¶ 20-22, 26, 28-30; Reilly, ¶¶ 12, 15-17, 19-24; Pittman ¶¶ 10, 12-13, 17, 19.

One PennFuture member is an educator who uses Pennsylvania’s Bay tributaries as an outdoor classroom for students to learn about the importance of

clean water. Pittman ¶ 5. The member and his students take canoe trips to learn about water quality and the local ecology. *Id.*

PennFuture's members are concerned that without a Bay TMDL nutrient and sediment pollution will destroy stream beds, cause fish kills due to a lack of oxygen, decrease water clarity, and cause a general decline in fish populations to the detriment of their enjoyment and that of their families of the Bay and its tributaries. Detweiller ¶¶ 32-35; Reilly ¶¶ 25-28; Pittman ¶¶ 21-24.

3. *Defenders of Wildlife* (Defenders)

Defenders is a national, non-profit membership organization with more than one million members and supporters nationally, including 46,000 in Pennsylvania, 21,000 in Maryland, and 24,000 in Virginia. Exhibit 5, Declaration of James Lyons, ¶ 3; Exhibit 6, Declaration of Aimee Delach, ¶ 3. Defenders is dedicated to protecting native animals and plants in their natural communities. Defenders assists land trusts in the Chesapeake Bay watershed to develop strategic plans for conserving land and obtaining financing for those lands. Lyons ¶ 3; Delach ¶ 3. Defenders works to pass laws that protect natural resources in the Bay region, files legal actions against polluters, and protects lands critical to water quality within the Bay and to the protection of its natural resources. Delach ¶ 3.

Members of Defenders own property along and use waters of the Bay and its tributaries for bird watching, crabbing, fishing, kayaking, sailing, and swimming.

Lyons ¶¶4-5; Delach ¶ 4. They are personally involved in restoration of Bay tributaries through participation in local watershed groups and waterfront cleanups. Lyons ¶ 5; Delach ¶ 5. Defenders' members are concerned about pollution from sewage treatment facilities and runoff from agriculture and development harming the Bay and the tributaries they use for aesthetic and recreational pursuits, decreasing their property values, and harming their health and the health of their families and pets that use these waters. Lyons ¶¶ 6-8; Delach ¶ 6-9. One member is concerned about this pollution impairing her ability to teach her children about the natural environment. Delach, ¶¶ 7 and 9. To them, the Bay TMDL is a means to solve the pollution problems they experience and are concerned that if the Plaintiffs are successful in their litigation, the Bay and the tributaries they reside near and use will be further impaired to their personal detriment. Lyons ¶ 9; Delach ¶ 7-10.

4. Jefferson County Public Service District (JCPSD)

For a fee, JCPSD collects sanitary sewage from 2,255 residential, commercial, public, and industrial customers. JCPSD sends the sewage to a treatment plant owned by the City of Charles Town, West Virginia. Exhibit 7, Declaration of Susan Lawton (Lawton) ¶ 4.

In response to the draft Bay TMDL, the West Virginia Department of Environmental Protection submitted a draft WIP to EPA. Because the WIP's

proposed controls for the agricultural and wastewater sectors did not meet the pollution allocations for nutrients and sediment, EPA revised the allocations to require point sources, including Charles Town, to treat sewage to the limit of technology. Lawton ¶ 5.

In the final Bay TMDL, EPA shifted a portion of the proposed load allocations for non-point sources like agriculture to the waste load allocations for point sources like the Charles Town plant. Thus, JCPSD is at risk of having greater restrictions imposed upon it if Plaintiffs are successful and the agricultural sector is relieved of some or all of its obligations under the TMDL. Lawton ¶ 6.

At a cost of over \$1.5 million, JCPSD has designed, obtained funding, and received an NPDES permit for a treatment plant (the “District Plant”) that is designed to remove nutrients. As a new point source, the District Plant is required to offset its nutrient discharges. JCPSD has negotiated an agreement to obtain offsets from a farmer once the District Plant is operational. Lawton, ¶ 8.

Should the Court set aside the TMDL, EPA could, as it has before, reassign the loads allocated to agriculture to point sources like JCPSD. If that were to happen, JCPSD would incur greater costs to reduce the discharge from the District Plant. Lawton, ¶ 9. In addition, JCPSD’s investment in the District Plant project may be negated, propelling JCPSD into uncertainty regarding what facilities it should construct to meet the service needs of its residents. Lawton, ¶ 11. Because

EPA may take action in response to the Plaintiffs' suit that adversely affects the interests of JCPSD and its customers, the federal government cannot adequately represent its interests. Lawton, ¶ 12.

5. Midshore Riverkeeper Conservancy (MRC)

MRC is a nonprofit organization, supported by over 700 members, with the mission to restore, preserve, and protect the Choptank, Miles and Wye Rivers on Maryland's Eastern Shore of the Chesapeake Bay. Exhibit 8, Declaration of Drew Koslow at ¶¶ 4-5.

Agriculture and poultry production comprise roughly 60% of the land use in the watershed. Water quality monitoring over the past several decades has demonstrated increased nitrogen and phosphorus pollution that has impaired these rivers. Koslow ¶ 7.

MRC members live on or near these waterways, use them for aesthetic, recreational activities such as boating, swimming, crabbing, fishing, observing wild animals and hunting. MRC members would suffer injury if the Plaintiffs are successful as the most promising environmental restoration effort of the Chesapeake Bay and its tributaries would be eliminated. Koslow ¶¶ 8 and 12-13.

MRC and its members participate in Bay or related tributary restoration projects, *e.g.*, oyster restoration and the creation of vegetated stream side buffers.

MRC and its members are concerned with the viability of these projects and their ability to protect Bay water quality. Koslow ¶¶ 9 and 13.

Elimination of the Bay TMDL will reduce the need for these projects as there will be no load caps for states to achieve through projects such as stream buffers. Also, elimination of the Bay TMDL will allow the continued discharge of pollutants harmful to the viability of natural resources like oysters and will harm the aesthetic and recreational uses of MRC's members. Koslow ¶¶ 10 and 14-16.

MRC works with farmers to identify BMPs for their farms and the funding to install them. This work allows MRC to provide detailed responses to Plaintiffs' claims – responses EPA cannot provide. Koslow ¶ 11.

6. *National Wildlife Federation (NWF)*

NWF is a not-for-profit corporation with headquarters in Reston, Virginia. Exhibit 9, Declaration of Anthony Caligiuri at ¶ 8. NWF has approximately 4 million members and supporters nation-wide, and about 1 million in the Bay watershed. Caligiuri ¶ 9. NWF's mission is to inspire American's to protect wildlife for our children's future. Caligiuri ¶ 4. NWF operates a Chesapeake Mid-Atlantic Regional Center ("CMRC") in Annapolis, Maryland. The CMRC undertakes advocacy and education efforts in the Bay watershed focusing on the protection and restoration of the Bay and its tributaries. Caligiuri ¶¶ 2, 4, and 8-10.

NWF works with other groups to further these efforts so its members can continue to enjoy the recreational, aesthetic, and economic opportunities a clean Bay watershed provides. Caligiuri ¶¶ 18-19. NWF has made a significant financial and institutional investment in the furtherance of these efforts. Caligiuri ¶ 20.

For example, NWF has: created a network of habitats around the Bay to encourage resource protection and raise awareness of land-use impacts on the Bay and its tributaries; provided school children in economically challenged communities a meaningful outdoor experience; and partnered with parks and private organizations to deploy a network of geocache units to encourage children to get outdoors and experience recreational opportunities on the Bay and its tributaries that depend on clean water. Caligiuri ¶¶ 11-12.

Working with the sporting community, NWF has advocated for the protection of the Bay and its tributaries and the vast array of fish, game, and other wildlife that depend on these resources and the critical habitat role that they provide. Caligiuri ¶¶ 13-16.

The pollutants targeted by the Bay TMDL harm NWF and its members in several ways. These pollutants harm wildlife, such as fish and waterfowl, by reducing the quality of habitat and forage for many species. NWF members hunt, fish, or observe a variety of wildlife and depend on a healthy and diverse system

for this enjoyment. These pollutants also reduce or prohibit the enjoyment of recreational opportunities like swimming or boating by creating unpleasant or even toxic water conditions. They further degrade the natural experience and connection with nature that NWF seeks to foster in its members and in its younger generation. Caligiuri ¶ 23.

Should the Plaintiffs prevail in this action, the interests of NWF and its members will continue to be harmed by the continued discharge of too much nitrogen, phosphorous and sediment into the air, soil and water of the Bay and its tributaries, and the resulting pollution of these waters. If the Bay TMDL is vacated its pollutant allocations will disappear. Without the allocations, there is no pollution limit for the states to meet and the practices necessary to reduce pollution to a scientifically acceptable level will be removed. Without implementation of those practices, Bay clean up and restoration will come to a standstill and water quality will not improve sufficiently to remove the Bay and its tributaries from the impaired waters list. Caligiuri ¶¶ 24-25.²

7. These Interests Are Relevant And Sufficient

Plaintiffs challenge the relevance of the work Proposed Intervenors have performed with actual farmers. Opp. p. 25, fn 11. But it was Plaintiffs who raised the issue of how farmers will allegedly be injured by the Bay TMDL. Amended

² Additional information concerning the interests of each of the Proposed Intervenors and their members can be found in Exhibits 1-9.

Complaint ¶¶ 8 and 9. To the extent that Plaintiffs assert these issues in the prosecution of their action, Proposed Intervenor is prepared to provide specific responses based upon their personal knowledge.

Plaintiffs argue that Proposed Intervenor's interests in preserving the Chesapeake Bay Watershed Model is insufficient because the movant purportedly mischaracterized a model known as Scenario Builder. Plaintiffs argue that Proposed Intervenor's explanation of what the model was used for – to determine changes in water quality - was incorrect so the connection between their interests and the matters at issue before this Court are tenuous. Opp. pp. 25-26.³ Plaintiffs miss the point of movant's argument.

Unlike Plaintiffs, Proposed Intervenor has participated on the Chesapeake Bay Program Water Quality Goal Implementation Team (formerly called the Water Quality Steering committee) since 2007. This committee oversaw the development of the technical and policy decisions regarding the Bay TMDL, including the Chesapeake Bay watershed model and Scenario Builder. This effort

³ Plaintiffs argue that Scenario Builder was not used to determine water quality improvements based upon various scenarios. But, EPA's website provides that the linked models help "evaluate the response of Chesapeake Bay water quality to a multitude of pollutant control management scenarios and programmatic approaches (Figure 5-8)." Bay TMDL at 5-18. Figure 5-8 identifies Scenario Builder as one of the models.

http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/CBayFinalTMDLSection5_final.pdf.

included numerous meetings where the model was reviewed and discussed.

Exhibit 1, Foster ¶ 38. Thus, Proposed Intervenors can provide specific insight into the development, accuracy, and use of the model challenged by Plaintiffs. *See* Amended Complaint ¶¶ 56-61.

B. The Government Cannot Adequately Represent the Proposed Intervenors' Interests

Plaintiffs base their claim that EPA adequately represents Proposed Intervenors' interests on the presumption that a government entity will adequately defend its actions. Opp. p. 8. Plaintiffs ignore the rule that, notwithstanding this presumption, "when an agency's views are necessarily colored by its view of the broader public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden is comparatively light." [Kleissler, 157 F.3d at 972](#). Here, Proposed Intervenors have extensive aesthetic, economic, educational, recreational, and resource interests that would be harmed by elimination of the Bay TMDL. Because these are narrow, parochial interests not shared by the general public, EPA may not adequately represent these interests. *See* [Trobvich v. United Mine Workers of Amer., 404 U.S. 528, 538 n.10 \(1972\)](#) (Rule 24(a) is satisfied "if the applicant shows that representation of his interest 'may be' inadequate").

While EPA's and Proposed Intervenors' goal may be mutual—preservation of the Bay TMDL—EPA and the Proposed Intervenors have different interests or

reasons for attaining that goal. The varied interests of the Proposed Intervenor are identified in the section above and in their motion. The interests of EPA relevant to this proceeding are found in Section 303 of the CWA, [33 U.S.C. § 1313](#). When a state, or in this case EPA, determines that point source effluent limitations are not sufficient to meet water quality standards, a TMDL must be developed at a level necessary to meet those standards. [Id. at \(d\)\(1\)\(C\)](#). In setting those standards for specific bodies of water, the government must take into “consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and ... their use and value for navigation.” [Id. at \(c\)\(2\)\(A\)](#). Thus, in developing a TMDL, the Administrator must consider interests, *e.g.*, industry, that conflict with those of the Proposed Intervenor, *e.g.*, recreation.

This is the exact type of conflict the United States Supreme Court has determined requires intervention as of right. In *Trbovich*, a union member sought to intervene in an enforcement action brought by the Secretary of Labor. [404 U.S. 528](#). The lower courts denied intervention. In its review, the Supreme Court considered the “adequacy of representation” prong of [Rule 24\(a\)\(2\)](#). The Secretary argued that the union member’s ultimate goal in the litigation—democratic union elections—was no different than the Secretary’s, and that intervention was improper unless the court found the Secretary had failed to perform a statutory

duty. However, the court found that the law required the Secretary to serve two distinct interests that were related but not identical: one as the union member's lawyer to enforce his rights and the other to protect the public interest in free and democratic elections. [*Id.* at 636](#). The court recognized that these functions "may not always dictate precisely the same approach to the conduct of the litigation." [*Id.*](#) Thus, the court held that intervention was warranted.

Here, EPA's interests are similarly "colored by its view of the broader public welfare." [*Kleissler*, 157 F.3d at 972](#). Here, EPA must consider broad public interests such as economic growth, industry, and agriculture. [33 U.S.C. § 1313\(c\)–\(d\)](#). Though EPA's ultimate objective in the litigation is to uphold the Bay TMDL, EPA does not share prospective intervenors' interest in preserving pollution load allocations at a level necessary to avoid impairment of their aesthetic and recreational interests or their education, oyster, aquatic grass, and BMP programs. These are the very narrow, parochial interests the rule is intended to protect. [*Kleissler*, 157 F.3d at 974](#).

Plaintiffs contend that EPA adequately represents Proposed Intervenors because EPA and movants share a "general alignment of interest." Opp. p. 11. In doing so, plaintiffs ignore the Third Circuit's warning that the "interest" and "representation" prongs should not be conflated. [*Kleissler*, 157 F.3d at 972](#). The dispositive question is not whether EPA and Proposed Intervenors share the same

general position in the litigation; it is whether the applicant's interests, "though similar to an existing party, are nevertheless sufficiently different that the representative cannot give the applicant's interests proper attention." Hoots v. Com. of Pa., 672 F.2d 1133, 1135 (3d Cir. 1982).

As Proposed Intervenors describe in their supporting memorandum, their interests may further differ from EPA's interests due to the possibility that the leadership of the Executive Branch, and its commitment to the Bay TMDL, will change. Mem. in Supp. of Joint Mot. for Leave to Intervene pp. 26–27.⁴ In response, Plaintiffs assert that "the final TMDL will be defended by the same Administration that issued it." Opp. p. 14. As Plaintiffs have no special power to accurately predict the outcome of future elections or the period of time this litigation may cover, their claim is purely speculative.

Transitions from one presidential administration to the next frequently result in the abandonment or modification of the previous administration's priorities. For example, during the first term of the Bush Administration, EPA shifted its policy with respect to the New Source Review provisions of the Clean Air Act, issuing a "dramatic" rule change that increased the scope of an exemption from pollution control requirements. EPA Office of Inspector Gen., "New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-Fired Electric Utilities,"

⁴ See "Local officials worry that TMDL actions are much too costly," Bay Journal, July/August 2011 at <http://www.bayjournal.com/article.cfm?article=4146>.

Sept. 30, 2004 at p. ii, <http://www.epa.gov/oig/reports/2004/20040930-2004-P-00034.pdf>. For this reason, where “it is not realistic to assume that the agency’s programs will remain static or unaffected by unanticipated policy shifts”—in relation to a proposed intervenor’s interest that remains constant—Third Circuit courts have granted intervention. *See Kleissler*, 157 F.3d at 974.

Furthermore, EPA does not share Proposed Intervenors’ interest with respect to the *Fowler v. EPA* settlement agreement. As the plaintiff in *Fowler*, CBF has an interest in preserving the terms of the settlement agreement that the *Fowler* litigation achieved—an interest that EPA may not share as the party obligated to fulfill the terms of the agreement.

Intervention has been granted in similar circumstances. For example, EPA was repeatedly challenged by environmental groups including NWF for failure to fully institute the CWA’s TMDL program. *See, generally*, Oliver A. Houck, *The Clean Water Act TMDL Program: Law, Policy and Implementation* (Env’tl L. Inst. 2000), <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/lawsuit.cfm> (TMDL litigation by state). In 2000, EPA sought to revise the TMDL regulations in an attempt to strengthen the TMDL program, [65 Fed. Reg. 43586 \(July 13, 2000\)](http://www.federalregister.gov/doc/65/235/2000/07/13/43586), and was challenged in court by some of the Plaintiffs here. *American Farm Bureau Federation et al. v. Browner*, No. 00-1320 (D.C. Cir. filed July 18, 2000). NWF and SELC, counsel for Defenders here, were allowed, over the objection of the

plaintiffs, to intervene as a defendant. *Id.* Order, Dec. 19, 2000 (attached as Exhibit 10).

Moreover, CBF has taken administrative and judicial actions to force EPA to undertake the very actions challenged by Plaintiffs. Exhibit 11, Petition for Review of Chesapeake Bay Foundation, *In re District of Columbia Water and Sewer Authority*, Appeal No. 07-10 (EAB May 7, 2007); *Fowler*. Thus, Proposed Intervenor and EPA have not always shared the same interests in Bay restoration.

Plaintiffs claim that “historical discord” between a prospective intervenor and a government agency is not relevant to the question of adequate representation. Opp. p. 15. In fact, where an adversarial relationship between a prospective intervenor and an agency has existed concerning the issue at hand, courts have given weight to that factor in granting motions to intervene. [*Mausolf v. Babbitt*, 85 F.3d 1295, 1303 \(8th Cir. 1996\)](#) (granting motion to intervene where prospective intervenor “sued the Government in an earlier case concerning snowmobiling in the Park precisely because it thought the Government was not adequately representing [prospective intervenor]’s interests . . . in fact, this earlier lawsuit is probably the reason for the current regulations”); [*Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1398 \(9th Cir. 1995\)](#) (granting motion to intervene where agency “delayed its decision . . . for years and took action only after [prospective intervenor] filed suit to compel [agency] to make a decision.”).

Rather than using a mechanical approach, courts should examine the facts of each case when applying the test for intervention as of right. [*Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 225 \(3d Cir. 2005\)](#). This case differs in several critical respects from other cases where the Third Circuit and the Middle District have denied intervention as of right. In [*Cloverland-Green Spring Dairies v. Pa. Milk Mktg. Bd.*, 138 F. Supp. 2d 593 \(M.D. Pa. 2001\)](#), the only interests asserted by proposed intervenors were economic interests, which, standing alone, are generally insufficient to support intervention as of right. See [*Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder*, 72 F.3d 361, 366 \(3d Cir. 1995\)](#). Additionally, in *Cloverland*, proposed intervenors possessed no interests that were not shared by the agency. [*Cloverland*, 138 F.Supp. 2d at 601](#). Here, Proposed Intervenors assert not just economic interests, but extensive educational, recreational, and resource interests not shared by EPA. Moreover, in *Cloverland* only the constitutionality of a state law was at issue. [*Id.* at 596](#). In the case at hand, Proposed Intervenors not only seek to uphold the Bay TMDL, but to preserve load allocations at a level sufficient to protect their interests.

In [*Penn. State Univ. v. U.S. Dep't of Health & Human Servs.*, 142 F.R.D. 274 \(M.D. Pa. 1992\)](#), the Court denied intervention as of right because the movant lacked a private right of action under the relevant statute, and possessed only an economic interest, [*id.* at 275](#), neither of which apply here.

In [*Kitzmiller v. Dover Area School Dist.*, 229 F.R.D. 463 \(M.D. Pa. 2005\)](#), the Court found that proposed intervenors were unable to provide a “coherent statement of what [they] intend[] to prove or demonstrate if the Court were to permit intervention, as well as specific reasons as to why defendants are not adequately protecting [their] interests.” [*Id.* at 470](#). The Court was also concerned that granting the motion would complicate the hearing of the case. [*Id.*](#) Neither of these concerns apply here.

In [*Heffner v. Murphy*, No. 08-cv-990 \(M.D. Pa. June 25, 2010\)](#), the Court ruled that proposed intervenors lacked a sufficient interest that would be impaired by the outcome of the litigation, because finding the regulations at issue unconstitutional would not affect their members’ interests. [*Id.* at *3](#). In the instant case, the pollution impacts that would result from invalidating the Bay TMDL would have a direct effect on Proposed Intervenors’ interests. Additionally, in *Heffner*, the Court conflated the parties’ “interest” with the goal of the litigation. (“Consequently, since the interests of Defendants and [the movants] ... are identical, we do not believe there is any risk that Defendants will not devote sufficient attention to ... [movants’] interests” [*Id.*](#)). However, this is not the test for intervention as of right. See [*Trbovich*, 404 U.S. at 636](#) (granting motion to intervene despite the fact that proposed intervenor and defendants shared the same

ultimate goal in litigation); [*Kleissler*, 157 F.3d at 972](#) (“courts must be careful not to blur the interest and representation factors together”).

[*Benjamin v. Dep’t of Public Welfare*, 267 F.R.D. 456 \(M.D. Pa. 2010\)](#), should not apply to this case because the Court applied an incorrect test. There, the Court based its ruling on a presumption that a government body will adequately represent the interests of proposed intervenors unless there is a showing of “gross negligence.” [*Benjamin*, 267 F.R.D. at 464](#). However, no support for this rule can be found in either of the cases cited by the Court. [*Brody v. Spang*, 957 F.2d 1108, 1124 \(3d Cir. 1992\)](#) (finding that proposed intervenors’ divergence of interests argument is “a strong one,” and not mentioning “gross negligence”); [*Del. Valley Citizens’ Council for Clean Air v. Com. Of Pa.*, 674 F.2d 970, 973–74 \(3d Cir. 1982\)](#) (ruling that proposed intervenors were adequately represented on divergence of interest grounds, and not mentioning “gross negligence”).

Plaintiffs rely heavily on cases outside the Third Circuit that ultimately provide Plaintiffs no support. In two of these cases, the circuit court expressly distinguished the case from cases similar to this matter. [*Maine v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 20 \(1st Cir. 2001\)](#) (denying intervention, but noting that the case involved a mere tactical disagreement between proposed intervenors and defendants, and expressly distinguished the case from those where proposed intervenors had “direct private interests”); [*Kane County v. United States*, 597 F.3d](#)

[1129, 1135 \(10th Cir. 2010\)](#) (denying intervention, but distinguishing the case, a property matter, from those that involved challenges to administrative action under the APA). Contrary opinions can be found in both circuits. [Conservation Law Found. v. Mosbacher, 966 F.2d 39 \(1st Cir. 1992\)](#) (intervention granted due to lack of adequate representation) and [Utah Association of Counties v. Clinton, 255 F.3d 1246, 1255 \(10th Cir. 2001\)](#) (intervention granted because environmental interests were not represented by the government).

In [James City County v. EPA, 131 F.R.D. 472 \(E.D. Va. 1990\)](#), intervention was denied where prospective intervenors failed to show *any* adversity of interest, and merely claimed that EPA had a national perspective while they had a local perspective. [Id. at 474.](#)

[Great Atl. & Pac. Tea Co. v. Town of East Hampton, 178 F.R.D. 39 \(E.D.N.Y. 1998\)](#), cited by Plaintiffs, does not control the outcome of this case. That decision was based on the Second Circuit's rule that prospective intervenors must be able to assert an argument that cannot equally be asserted by the defendant. [Id. at 43.](#) See [NRDC v. DEC, 834 F.2d 60, 62 \(2d Cir. 1987\)](#). As discussed above, that is not the test in the Third Circuit. [Hoots, 672 F.2d at 1135](#) (proposed intervenors need only show that their interests, "though similar to an existing party, are nevertheless sufficiently different that the representative cannot give the applicant's interests proper attention."). See also [Kleissler, 157 F.3d at](#)

[972–74; *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1255–56 \(10th Cir. 2001\); *Mille Lacs Band of Chippewa Indians v. Minn.*, 989 F.2d 994, 1001 \(8th Cir. 1993\); *Sierra Club v. Glickman*, 82 F.3d 106, 110 \(5th Cir. 1996\); *Conservation Law Found*, 966 F.2d 39 \(1st Cir. 1992\).](#)

Plaintiffs assert that Proposed Intervenors’ arguments amount to little more than the claim that EPA would not defend the TMDL with the same rigor as Proposed Intervenors would. Opp. p. 17. This statement mischaracterizes Proposed Intervenors’ position and confuses the test for intervention. Proposed Intervenors have established that they possess economic, educational, recreational, and resource interests that EPA, as an agency whose “views are necessarily colored by its view of the broader public welfare,” *see* [33 U.S.C. § 1313\(c\)\(2\)\(A\)](#), may not adequately represent. Thus, it is not the vigor of the government’s representation that is at issue but the nature of the government’s interests which conflict with the Proposed Intervenors’.

C. Proposed Intervenors Should be Granted Permissive Intervention

In the alternative, Proposed Intervenors have requested permissive intervention pursuant to [Rule 24\(b\)](#).⁵ Plaintiffs oppose this request. Opp. pp. 26-30. Plaintiffs argue that movants’ interests are already represented in the litigation

⁵ Rule 24(b) is to be construed liberally “with all doubts resolved in favor of permitting intervention.” [*Koprowski v. Wistar Inst. of Anatomy & Biology*, No. 92-CV-1132, 1993 WL 332061 at *2 \(E.D. Pa. Aug. 19, 1993\).](#)

and those interests are collateral to the issues before the Court. In support of their argument, Plaintiffs fire a barrage of decisions from multiple jurisdictions that either are factually dissimilar to this action or apply the incorrect standard for intervention.

The *piece de resistance* is Plaintiffs' assertion that "[t]his challenge does not implicate whether water quality in the Bay should be regulated...." Opp. p. 29. This case is about whether the Bay TMDL should survive and the legal authority of EPA to issue a TMDL for seven jurisdictions. Without a Bay TMDL, there is no uniform way to improve water quality in the Bay because one state may not require another state to act. Thus, this case has everything to do with whether water quality in the Bay should be regulated by the federal government.

The linchpins of permissive intervention are not whether the applicant's interests are the same as or collateral to those raised in the litigation but, whether the applicant's defenses have a question of law or fact in common with the main action and whether intervention "will unduly delay or prejudice" the Plaintiffs.

[Rule 24\(b\)](#); [Cloverland](#), 138 F.Supp. 2d at 602. Undoubtedly, the defenses Proposed Intervenors would raise in response to the Plaintiffs' allegations have common questions of law (authority for the Bay TMDL) and fact (adequacy of the model and public participation).

The only remaining question for the Court to consider is whether granting intervention will unduly delay the proceedings. As stated in movants' opening motion and memorandum, they do not intend to raise issues not germane to the case and the Court's scheduling order prevents them from delaying the litigation or duplicating arguments made by the government. Order of June 28, 2011 at ¶¶ 6 and 9. Thus, there is little likelihood that granting permissive intervention will delay the resolution of this action or prejudice Plaintiffs.

CONCLUSION

Proposed Intervenors have substantial and legally cognizable interests that may be practically impaired by this litigation and may not be adequately represented by the government. Thus, intervention as of right should be granted.

Should the Court disagree, it is respectfully requested that permissive intervention be granted as Proposed Intervenors have claims and defenses common to the action and intervention will not unduly delay resolution of the Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.8(b)(2) for the Middle District of Pennsylvania, I hereby certify that Proposed Intervenor's Reply to Plaintiffs' Consolidated Opposition to Motions for Leave to Intervene complies with the word-count limit and does not exceed the allotted 6,500 words. *See* Order (Dkt. No. 56).

Certification is reliant upon the word count feature of the word-processing system used to prepare this brief.

Proposed Intervenor's Reply to Plaintiffs' Consolidated Opposition to Motions for Leave to Intervene contains 6,207 words.

_____/s/_____
Jon A. Mueller

CERTIFICATE OF SERVICE

I certify that on July 7, 2011, a copy of the foregoing Reply to the Consolidated Opposition to Proposed Intervenors' Motion for Leave to Intervene was served by electronic service via the Court's ECF system pursuant to Standing Order 03-1, ¶ 12 upon:

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