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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SENATOR GENE YAW, *et al.*,

Plaintiffs,

v.

THE DELAWARE RIVER BASIN
COMMISSION,

Defendant,

and

DELAWARE RIVERKEEPER
NETWORK and MAYA K. VAN
ROSSUM, THE DELAWARE
RIVERKEEPER,
925 Canal Street, Suite 3701
Bristol, PA 19007

Proposed Intervenors-Defendants.

Civil Action No. 2:21-cv-00119

Honorable Paul S. Diamond

REPLY IN SUPPORT OF
MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

I. INTRODUCTION

Plaintiffs’ opposition falls far short of refuting the right of Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper (collectively, “DRN”), to intervene in this matter pursuant to Rule 24(a)(2). DRN has shown a clear link between its substantial legal interest in the protections provided by the Delaware River Basin Commission’s (“Commission’s”) regulation of fracked gas extraction—preventing the degradation of the Delaware River Basin’s natural resources—and the impairment of that interest that would occur should Plaintiffs prevail in this lawsuit. DRN has also established that its interests diverge sufficiently from that of the Commission, such that the Commission’s representation in this action is inadequate to protect DRN’s interests. Plaintiffs have also failed to explain why this Court should not exercise its discretion to allow DRN to permissively intervene pursuant to Rule 24(b)(1)(B).

II. PROCEDURAL HISTORY OF THE CASE

On January 11, 2021, Senator Gene Yaw, Senator Lisa Baker, the Pennsylvania Senate Republican Caucus, and Damascus Township (“Plaintiffs”) filed the Complaint in this action. *See* Pls.’ Compl., ECF No. 1. The Delaware River Basin Commission (“Defendant” or “the Commission”) waived service of process on January 26, 2021. *See* Stip. Of Waiver of Serv. Of Summons, ECF No. 4. DRN filed its Motion to Intervene as Defendant on February 12, 2021. *See* DRN’s Mot.

to Intervene, ECF No. 9. On February 23, 2021, in accordance with this Court's order of February 16, 2021, Plaintiffs filed their Response in Opposition to DRN's Motion to Intervene. *See* Pls.' Resp., ECF No. 12.

III. STATEMENT OF FACTS

DRN relies on the statement of facts set out in its Memorandum of Law in Support of its Motion for Leave to Intervene. *See* ECF No. 9 at 1–5.

IV. ARGUMENT

A. DRN has established a sufficient interest warranting intervention as of right.

1. DRN has a substantial legal interest sufficient for intervention.

Plaintiffs argue in opposition to DRN's intervention that DRN "asserts a general and vague interest in the protection, preservation, and enhancement of the Basin." *See* ECF No. 12 at 5. Plaintiffs' base their argument on language that, while uttered by a court of law, is wholly divorced from the question of whether a party has a legal interest sufficient to support intervention.

Plaintiffs first cite to a Fifth Circuit case wherein that court simply acknowledges in describing steam-electric power plant operations that those operations produce pollution, which "everyone regards as bad." *Sw. Elec. Power Co. v. U.S. Env't'l Prot. Agency*, 920 F.3d 999, 1007 (5th Cir. 2019). Next, Plaintiffs borrow language from the Court of Appeals of the State of Washington used to explain why water and sewer fees are not "special assessments" benefitting specific

properties within a locality. *See Smith v. Spokane Cty.*, 948 P.2d 1301, 1310 (Wash. Ct. App. 1997). Finally, Plaintiffs assert that “[e]veryone is interested in clean air,” a statement made by a California Court of Appeal before its finding that the injunctive relief sought by plaintiffs (a cessation of all emissions) was beyond the court’s institutional capabilities. *See Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639, 644 (Cal. Ct. App. 1971). None of these cases address the issue of intervention under Rule 24.

Next, Plaintiffs compare DRN’s interest in the Special Protection Waters to the interests of a Pennsylvania legislator as co-sponsor of a challenged law. This comparison is inapt for two reasons. First, the validity of DRBC’s Special Protection Waters designation is not at issue in this case, rather DRN has an interest in protecting the waters themselves, as evidenced by its efforts in obtaining this designation. Second, in the case cited by Plaintiffs, *Roe v. Casey*, this Court found the legislators failed to assert they were intervening to protect their votes from nullification, which is the only valid interest that they could have possibly sought to protect in their legislative capacity. 464 F. Supp. 483, 486 (E.D. Pa. 1978) (citing *McRae v. Mathews*, 421 F. Supp. 533, 540 (E.D.N.Y. 1976) (“[T]he right to sue derives from the legal injury done to the legislator’s vote as integral to the process of enactment the litigation is addressed to establishing the efficacy of the legislator’s vote to be counted in the legislative process.”)).

Far from failing to “contend that the Commission has ever drawn a link between [the Special Protection Waters] regulations and the moratorium,” ECF No. 12 at 6–7, DRN clearly set forth in its motion to intervene that the Commission’s moratorium on natural gas drilling activities was designed to protect the Special Protection Waters from alteration of their physical, biological, chemical, and hydrological characteristics. *See* ECF No. 9 at 2.

Finally, Plaintiffs criticize DRN’s citation to *Friends of the Earth v. Laidlaw Environmental Services (TOC)*, 528 U.S. 167 (2000), and attempt to undermine DRN’s interest by applying the traditional Article III standing analysis to DRN. *See* ECF No. 12 at 7–8. However, DRN need not meet that rigorous test to intervene as of right in this matter, as it seeks no additional relief from this court. *See Pennsylvania v. President of the U.S.*, 888 F.3d 52, 57 n.2 (3d Cir. 2018); *see also McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 233 (2003), overruled on other grounds by *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). Instead, DRN must show that it, as a membership organization representing its members, “will be directly affected in a substantially concrete fashion by the relief sought” by Plaintiffs. *Pennsylvania*, 888 F.3d at 58.

DRN has done so by establishing its interest in the protection, preservation, and enhancement of the Delaware River, its tributaries, and the habitats and communities of the Basin. That interest is exemplified and illustrated by DRN’s

advocacy before the Commission resulting in the creation of the Special Protection Waters, which is the basis of the Commission's determination that natural gas extraction projects "may individually or cumulatively affect the water quality of Special Protection Waters by altering their physical, biological, chemical or hydrological characteristics." Del. River Basin Comm'n, Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formations Within the Drainage Area of Special Protection Waters, at 2 (May 19, 2009).

Indeed, the Third Circuit has recognized that Rule 24 was revised in 1966 "to allow intervention by those who might be *practically disadvantaged* by the disposition of the action." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 970 (3d Cir. 1998) (emphasis added) (quoting 7C Wright, et al., *Federal Practice and Procedure: Civil 2d* § 1908, at 301 (1986)). DRN's mission, as well as the interests of its members who live, work, and recreate within the watershed, would be practically disadvantaged by the removal of the Commission's regulatory authority over fracked gas drilling activities.

2. *DRN's interest may be affected or impaired if this Court grants Plaintiffs the injunctive and declaratory relief they seek.*

Plaintiffs argue that judgment in their favor will not affect DRN's interests because the Commission will still retain its authority to "regulate the use of water in the Basin, effectuate plans and policies relating to water resources in the Basin, and

adopt policies for water conservation and control” and because DRN will be still able to engage in the Commission’s regulatory processes. *See* ECF No. 12 at 8–9. Plaintiffs add that any fracked gas drilling will be regulated by Pennsylvania law, and that the harm to resources caused by fracked gas drilling is too speculative to warrant DRN’s intervention in this matter. *See id.* at 9–10.

In evaluating whether DRN’s interest may be affected or impaired by the relief sought by Plaintiffs, this court focuses on the “‘practical consequences’ of the litigation, . . . ‘consider[ing] any significant legal effect on the applicant’s interest,’ including a decision’s stare decisis effect or a proposed remedy’s impact on the applicant for intervention.” *Pennsylvania*, 888 F.3d at 59 (quoting *Brody by and through Sugzdinis v. Spang*, 957 F.2d 1108, 1122–23 (3d Cir. 1992)). Were Plaintiffs to prevail in this case, the Commission’s authority and ability to protect water resources from the effects of fracked gas extraction would be substantially weakened, if not eliminated. DRN has established a substantial legal interest in the continued regulation and protection of the Basin’s resources, regulation that prevents degradation of those resources and the diminishment of the recreational and aesthetic values of the Basin.

In *Pennsylvania*, the Third Circuit evaluated a claim by the Little Sisters of the Poor Saints Peter and Paul Home (“Little Sisters”) that they were entitled to intervene as of right in a lawsuit filed by the Commonwealth of Pennsylvania to

invalidate the federal government’s interim final rules providing religious and moral exemptions from the Affordable Care Act’s requirement that health plans cover costs of contraception. The Little Sisters sought to intervene to defend the federal government’s exemption, arguing that the relief requested by Pennsylvania would “harm them by . . . invalidating the regulatory protection afforded to them” by the interim final rule. *Pennsylvania*, 888 F.3d at 58. The Third Circuit agreed, noting that the litigation

poses a tangible threat to the Little Sisters’ regulatory protection because it *has the potential* to declare that exemptions . . . are not required by [the Religious Freedom Restoration Act]. Such a determination *could affect* how the government proceeds in future rulemakings This, in turn, *could affect* whether the Little Sisters will remain exempt from the mandate.

Id. at 60 (emphases added). Thus, contrary to Plaintiffs’ assertion, *see* ECF No. 12 at 9–10, this Court *should* grant intervention where a “chain reaction of events” triggered by the litigation has the potential to affect DRN’s interests.

Here, the chain reaction is not so attenuated. If Plaintiffs are granted the relief requested in their complaint, then the Commission will immediately cease to have the ability to prohibit fracked gas extraction within the Basin. This will almost certainly lead to fracking within the Basin, which will then degrade the natural resources of the Basin. Thus, DRN’s interests will be affected by the outcome of this litigation.

3. *DRN's interest is not adequately represented by the Commission*

Plaintiffs incorrectly assert that “the Commission’s purpose in developing plans, policies, and projects for water resources in the Basin and uniform policies for the same, . . . is essentially indistinguishable from the interests espoused by the DRN in its motion.” ECF No. 12 at 12. DRN simply does not develop plans, policies, and projects for water resources in the Basin, rather, it is a nonprofit group established to protect, preserve and enhance the Delaware River, its tributaries, and habitats. *See* ECF No. 9 at 3.

The Commission consists of the Governors of the signatory states, *ex officio*, and one commissioner appointed by the President. *See* Del. River Basin Compact at § 2.2. The interests that Commission members represent are broad and varied, not only focused on environmental preservation and enhancement, thus its “views are necessarily colored by its view of the public welfare” and DRN’s burden of establishing inadequate representation is “comparatively light,” rather than requiring a “compelling showing,” as Plaintiffs argue. *See Pennsylvania*, 888 F.3d at 60–61 (first quoting *United States v. Territory of Virgin Islands*, 748 F.3d 514, 525 (3d Cir. 2014); and then quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998)). DRN has met that comparatively light burden.

Furthermore, DRN’s involvement in advocacy before the Commission does not render the two interests identical—to the contrary, DRN’s petitioning of the

Commission illustrates its need to advance its unique interests, which “diverge sufficiently” from those of the Commission. *See Virgin Islands*, 748 F.3d at 519–20. Plaintiffs’ suggestion that the proper forum for DRN’s interests is before the Commission is nonsensical, as advocacy before the Commission to ban fracking would be useless should this court rule in favor of Plaintiffs. Plaintiff’s suggestion also illustrates the lack of adequate representation here—if the Commission’s representation were adequate to protect DRN’s interests, then advocacy before the Commission would not be necessary at all. This lawsuit is the appropriate forum for DRN to defend the moratorium on fracked gas extraction within the Basin. DRN has thus overcome the presumption of adequate representation and is entitled to intervene under Rule 24(a)(2).

B. In the alternative, DRN should be permitted to intervene because it has a defense that shares with the main action a common question of law and/or fact.

Although DRN’s reasons for requesting permission to intervene are based on the same reasons it seeks intervention as of right, Plaintiffs fail to acknowledge that the standard for permissive intervention is “more liberal” than the standard for intervention as of right, *Halderman v. Pennhust State School and Hosp.*, 97 F.R.D. 522, 525 (E.D. Pa. 1983), and that “denial of intervention as of right does not automatically mandate a denial of permissive intervention.” *Hoots v. Commw. of Pennsylvania*, 672 F.2d 1133, 1135–36 (3d Cir. 1982).

DRN seeks to defend its interest in the continued regulation and protection of the Basin's resources, regulation that prevents degradation of those resources and the diminishment of the recreational and aesthetic values of the Basin. Those interests will be affected should this Court grant the relief Plaintiffs seek. As a nonprofit organization dedicated to the protection, preservation, and enhancement of the Delaware River, its tributaries, and habitats, and whose members have substantial recreational, commercial and aesthetic interests in the Basin's resources, DRN's interests are not adequately represented by the Commission in this litigation.

Nevertheless, should this Court find that DRN fails to meet an element required to establish a right to intervene, DRN respectfully requests that it be granted permission to intervene to defend its interests in maintaining the Commission's ban on fracked gas extraction within the Basin.

V. CONCLUSION

Plaintiffs' response in opposition to DRN's Motion to Intervene has failed to refute the reasons why DRN is entitled to intervene as of right, or, in the alternative, by permission in this matter. Accordingly, DRN respectfully requests that this Court grant its Motion to Intervene.

Dated: February 24, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

Kacy C. Manahan hereby certifies that on the date set forth below, she caused a true and correct copy of the attached Reply in Support of Motion for Leave to Intervene as Defendants to be served on all counsel of record through the Court's electronic notification system.

Dated: February 24, 2021

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