

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

LOIS ALT d/b/a EIGHT IS ENOUGH,)
))
Plaintiff,)
))
AMERICAN FARM BUREAU and)
WEST VIRGINIA FARM BUREAU,)
))
Plaintiff Intervenors)
))
V)
))
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
))
Defendant.)

Case No. 2:12-cv-00042-JPB

**MEMORANDUM OF LAW IN SUPPORT OF POTOMAC
RIVERKEEPER, WEST VIRGINIA RIVERS COALITION, WATERKEEPER
ALLIANCE, CENTER FOR FOOD SAFETY AND FOOD & WATER WATCH'S
MOTION TO INTERVENE**

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INTRODUCTION

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the Potomac Riverkeeper, West Virginia Rivers Coalition, Waterkeeper Alliance, Food & Water Watch, and the Center for Food Safety (collectively “Proposed Intervenor”) move to intervene jointly¹ as Defendant-Intervenor in the above-referenced action. Plaintiff Lois Alt, the owner of a concentrated animal feeding operation (“CAFO”) in the Potomac River watershed, challenges the U.S. Environmental Protection Agency’s (“EPA”) authority to issue an Administrative Compliance Order requiring Ms. Alt to apply for a National Pollutant Discharge Elimination System (“NPDES”) permit under Sections 301 and 402 of the Clean Water Act (“CWA”), 33 U.S.C. §§1311(a) and 1342, for the discharge of manure and other pollutants from her CAFO into the navigable waters of the United States.

As organizations dedicated to protecting the health and safety of local water ways and the food and drinking water they supply through litigation, engagement, and advocacy, Proposed Intervenor have a significant interest in the effective monitoring and regulation of pollutants discharged from CAFOs. Affidavit of Brent Walls (hereinafter “Walls Aff.”) ¶ 8; Affidavit of Marc A. Yaggi (hereinafter “Yaggi Aff.”) ¶¶ 5-7; Affidavit of Andrew Kimbrell (hereinafter “Kimbrell Aff.”) ¶ 3; Affidavit of Wenonah Hauter (hereinafter “Hauter Aff.”) ¶ 5 Affidavit of Ed Gertler (hereinafter “Gertler Aff.”) ¶¶ 4-6, 16-17. Cumulatively, CAFOs produce an estimated 300 million tons of untreated manure per year, much of which flows into the nation’s navigable waters, contaminating waters with fecal coliform bacteria and causing algal blooms which foul and deoxygenate the water, endangering human health and aquatic life. Yaggi Aff. ¶ 10; Gertler Aff. ¶16. The Potomac River and the interconnected creeks and streams into which

¹ Proposed Intervenor intend to participate as one party, submitting only one pleading and brief on behalf of intervenors collectively.

run-off from the Plaintiff's CAFO discharges are already experiencing large fish kills and algal blooms. Walls Aff. ¶¶ 9, 11, 12; Gertler Aff. ¶16. These events adversely impact the ability of many of Proposed Intervenor's members to pursue their livelihoods, fish, swim, recreate, and obtain drinking water from their local waterways. Walls Aff. ¶¶ 9, 12, 16; Gertler Aff. ¶¶ 13, 16, 18.

Plaintiff and the Plaintiff Intervenor, American Farm Bureau Federation and West Virginia Farm Bureau, have asserted an impermissible interpretation of the CWA's "agricultural stormwater exemption" that, if accepted by this court, would substantially undermine the EPA's statutorily mandated obligation to regulate discharges from CAFOs. For 40 years, Proposed Intervenor have relied on the extent of the EPA's regulatory authority over CAFOs in order to monitor the discharge of waters into the rivers, to advocate for strong regulatory policies at the EPA, to work with CAFOs to mitigate the impact of discharges, and to initiate citizen-suits against CAFOs that violate the CWA. Yaggi Aff. ¶¶ 14, 15; Walls Aff. ¶ 19; Kimbrell ¶ 7. The outcome of this action will directly impact the ability of the Proposed Intervenor to pursue their core missions and advocate on behalf of their members.

For these reasons, the Court should grant the Proposed Intervenor's motion to Intervene in this action to protect their interests.

BACKGROUND

Facts and Procedural History

The Alt CAFO raises more than 125,000 chickens each year. Complaint ¶ 23. These chickens produce substantial volumes of urine and feces, which fall to the floor of the poultry houses, contaminating the bedding (wood shavings and saw dust) that lines the

floor. *Id.* According to Plaintiff, the excrement-contaminated bedding, known as “litter,” remains in place for about a year. Complaint ¶¶ 23, 25. Because of the buildup of large amounts of fecal matter and other waste inside the poultry houses, and the resulting toxic gases, the houses are ventilated by large fans, which blow out the interior air. November 14, 2011 *Findings of Violation and Order for Compliance* (“Order”) ¶ 23. Waste-contaminated litter blown from these fans, along with spilled manure, accumulated on the ground outside the henhouses where it was exposed to stormwater runoff. Order at ¶¶ 23, 24. As EPA found in its Order, and which Plaintiff does not contest, the manure and associated pollutants generated and deposited on the ground at the Alt CAFO end up in nearby surface waters. Order at ¶ 23, 24.

In the Order, the EPA found that Plaintiff had violated Section 301 of the CWA, 33 U.S.C. § 1311, and its implementing regulations at 40 CFR § 122.12, by discharging pollutants from a point source, through manmade ditches, into Mudlick Run, a water of the United States. Order 30, 33 ¶ 1. Based on these findings, the EPA concluded that Plaintiff was violating Section 301 of the CWA and required Plaintiff to apply for a NPDES permit.

Plaintiff refused to apply for a permit and—although the EPA has not sought to enforce the Administrative Compliance Order—on June 14, 2012, Plaintiff Alt filed this action challenging EPA’s authority to issue the order. Plaintiff seeks a declaration that EPA’s actions are arbitrary and capricious, or contrary to law and in excess of EPA’s authority on the basis of its assertion that discharges of pollutant from the Alt CAFO are “agricultural storm water,” exempt from NPDES permitting requirements. *Id.* ¶ 51-53. Plaintiff has advised the Court that she “does not intend to challenge the EPA’s factual conclusion in the [Order] concerning the runoff of manure and other pollutants from Plaintiff’s facility, via storm water, to waters of the United States without an NPDES permit[.]” Joint Mtg. Rpt. 2. Rather, Plaintiff and Plaintiff

Intervenors have advised the Court that they “solely intend[] to challenge EPA’s legal conclusion that such runoff constitutes a regulated discharge under the CWA, and that Plaintiff must therefore apply for an NPDES permit.” *Id.*, and *id.* at 1 n.1.

On October 9, 2012, pursuant to Fed. R. Civ. P. 24, this Court permitted the American Farm Bureau Federation and the West Virginia Farm Bureau to intervene. Order Granting American Farm Bureau Federation and West Virginia Farm Bureau’s Motion to Intervene (hereinafter “Intervention Order”). In doing so, the Court recognized that its final ruling in this case is likely to determine the “legal obligations” of “virtually every large CAFO,” which the court found “would arise automatically from [its] ruling in this case, and “would not depend on other facts unique to their operations.” *Id.* at 9. Proposed Intervenors now move to intervene because their local and national interests are impacted by this Court’s determination of these legal obligations.

Proposed Intervenors

Proposed Intervenors have a strong and direct interest in ensuring that the CWA continues to provide protection for waterways and that the EPA retains jurisdiction to regulate discharges from highly polluting large-scale agricultural operations, such as the Alt CAFO and other CAFOs that may be affected by the court’s ruling in this matter. CAFOs are defined as point sources of pollution under Section 502(14) of the CWA, 33 U.S.C. § 1362(14). The large volume of waste generated by these operations has caused widespread pollution of adjacent waterbodies across the country, including the Potomac River watershed, and has significantly impaired the value and use of the waterbodies for recreation, drinking water, aesthetic enjoyment, commercial and recreational fishing, aquatic life propagation, and other valuable public uses. *Walls Aff.* ¶ 9. These impacts are of great concern to all Proposed Intervenors,

whose interests range from protecting the Potomac Watershed for affected businesses, drinking water, fishing, and recreation, to ensuring that the food we eat is safe for consumption. Walls Aff. ¶ 8; Yaggi Aff. ¶¶ 5-7; Gertler Aff. ¶¶ 4-5; Kimbrell Aff. ¶ 3; Hauter Aff. ¶ 5.

The Potomac Riverkeeper is a non-profit organization dedicated to the preservation and protection of water quality in the Potomac River and its watershed. Walls Aff. ¶ 8. The organization seeks to protect the health and safety of the watershed's roughly five million residents, to preserve the health of the aquatic life in the river and its tributaries, and to preserve the scenic and recreational resources throughout the watershed. *Id.* The organization has over 2500 members throughout the four states and the District of Columbia that comprise the Potomac watershed. *Id.* ¶ 13. The Potomac River Watershed is a source of drinking water for nearly five million people. *Id.* ¶ 6. It provides habitat for aquatic life such as crabs, oysters and smallmouth bass, all of which are threatened by pollution. *Id.* ¶¶ 9, 18. Many of Potomac Waterkeepers members rely on the Potomac watershed for business, recreational activities such as boating and swimming, and drinking water. *Id.* ¶ 14. For example, Brent Walls, the manager of the Potomac Riverkeeper, routinely paddles the South Branch Potomac along with many other tributaries of the Potomac River. *Id.* ¶ 5. Specifically, he participates in a biannual paddle to assess the conditions of the river for the presence of algal blooms and the habitat conditions of the stream bed. *Id.* He has also participated in stream cleanups in this section of the river in summer of 2011 and 2012. *Id.* Similarly, Jeff Kelble, the Shenandoah Riverkeeper, a program of the Potomac Riverkeeper, is a former professional fishing guide on the Shenandoah River. Affidavit of Jeff Kelble (hereinafter "Kelble Aff.") ¶¶ 2, 14. After a large fish kill in the Shenandoah River in 2004 and 2005, he found it unfeasible to continue his guide business. *Id.* ¶¶ 14, 16.

The West Virginia Rivers Coalition (WVRC) is an organization whose mission is to seek the conservation and restoration of West Virginia's Rivers and Streams. Gertler Aff. ¶ 4. There are over 2,500 supporters, many of whom live in West Virginia and use the waterways to fish paddle and swim. *Id.* ¶ 7. The coalition keeps its supporters and the general public aware of water conditions, fishing conditions and consumption advisories. *Id.* ¶ 5. Additionally, WVRC seeks to achieve clean water by improving public participation in the permitting process and helping dischargers better comply with their existing permits. *Id.* ¶ 6. WVRC also supports watershed organizations and the public by answering questions and helping with permit reviews, focusing specifically on National Pollutant Discharge Elimination permits for discharges into the state's waterways. *Id.* Members of WVRC often use the Potomac Watershed. *Id.* ¶ 7. For example Ed Gertler, a member of WVRC since its inception and a board member for the past 10 years, has canoed in the Potomac for 50 years. *Id.* ¶ 10. He has canoed in various parts of the river as recently as this past summer and specifically he has canoed in the "Trough" near the Alt farm within the last ten years. *Id.* ¶¶ 10-11.

Waterkeeper Alliance is an international environmental membership organization with over 7,500 individual members and more than 200 organizational members--including Potomac Riverkeeper--who are individual river-, bay-, and sound-keeper organizations that collectively protect more than 1.5 million square miles of watersheds across the globe. Yaggi Aff. ¶¶ 4-6. Some of Waterkeeper Alliance's individual members live, work, and recreate near and on the Potomac River. *Id.* ¶ 8. A key part of the mission of Waterkeeper Alliance and its members is to protect watersheds from the pollution discharged by large-scale industrial livestock production facilities, such as the Alt CAFO. *Id.* ¶ 12. The Clean Water Act is the primary tool on which Waterkeeper Alliance and its members rely to protect waterways from CAFO pollution. *Id.* ¶ 14.

Waterkeeper Alliance and its member organizations often bring litigation to ensure, among other things, that: regulations implemented under the CWA are as stringent as the statute intends; facilities, like the Alt CAFO, that discharge pollutants into waterways operate under NPDES permits; and discharging facilities comply with the terms of their permits. *Id.* ¶ 15. Waterkeeper Alliance has participated in all of the key litigation relating to the scope of federal regulation of CAFOs. *Id.* See *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (Waterkeeper Alliance was an intervenor); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) (Waterkeeper was a petitioner). In addition, Waterkeeper Alliance and some of its member organizations are currently parties in several lawsuits against particular CAFOs, where the legal question – as in this case – is whether the CAFO must operate under a NPDES permit because it is discharging pollutants into navigable waters. *Id.* See, e.g., *North Carolina Environmental Justice Network v. Taylor Finishing Inc.*, No. 4:2012cv00154 (pending E.D.N.C.) (Waterkeeper Alliance and one of its member organizations, the Neuse River Foundation, are plaintiffs in Clean Water Act litigation against CAFO); *Waterkeeper Alliance v. Hudson Farm*, No. 1:10-cv000487-WMN (pending D. Md.) (Waterkeeper Alliance is a plaintiff); *Rose Acre Farms, Inc. v. Department of Environment and Natural Resources*, No. 12 CVS 10---- (pending N.C. Superior Court Hyde County) (Waterkeeper Alliance and one of its member organizations, Pamlico-Tar River Foundation, are intervenors). Waterkeeper Alliance and its members have a direct interest in the outcome of this case, as a legal determination about the scope of the agricultural stormwater discharge exemption – the legal issue presented here – could have precedential effect on the other related cases to which it is currently party and which are pending within this Circuit. *Id.* ¶ 16. Moreover, given the participation of Waterkeeper Alliance in so much litigation related to the regulation of CAFOs under the CWA, it has, as this Court observed

with respect to the Farm Bureaus, particular expertise in the legal issues at hand and is “in a position to provide a comprehensive view of the legal and factual context” of the issues presented in this case. *Id.* See Intervention Order, at 14.

The Potomac Riverkeeper, The West Virginia Rivers Coalition and the Waterkeeper Alliance, and their members who live, work and recreate in the Potomac River watershed have a critical interest in participating in a case that may affect the levels of pollution in waters they use and protect, define the extent of their ability to challenge discharges through citizen suits under the CWA and constrain EPA’s authority and jurisdiction to regulate the discharge of of manure and other pollutants from CAFOs.

Proposed Intervenor Center for Food Safety is a non-profit public interest organization dedicated to protecting consumers from harmful food-production operations. Kimbrell Aff. ¶ 3. Center for Food Safety focuses on educating the public, petitioning the government, and bringing legal actions to ensure that food production operations meet all applicable health and safety requirements. *Id.* ¶¶ 6, 7, 13. Center for Food Safety and its members are impacted by CAFO operations through the destructive effects of pollution discharge into public waterways which affects the suitability of fish in these waterways for consumption. *Id.* ¶¶ 10-12. Thousands of Center for Food Safety members live, work, recreate, grow food in, and consume food and water from the Potomac Watershed. *Id.* ¶ 8.

Proposed Intervenor Food & Water Watch is a consumer advocacy non-governmental organization dedicated to ensuring that food, water, and fish consumed by Americans is safe and accessible. Hauter Aff. ¶ 4. To this end, Food & Water Watch regularly lobbies lawmakers, participates in administrative rule-making, and brings citizen suits to protect the quality of and

access to safe food and water. *Id.* ¶¶ 5, 10. Food & Water Watch has taken a particular interest in defending sources of drinking water from the same forms of nutrient pollution produced and discharged by CAFOs both in West Virginia and nationally. *Id.*

There is abundant scientific evidence that the discharge of animal waste into surface waters is a serious local and national problem. Yaggi Aff. ¶¶ 10, 11. CAFOs are a substantial source of pollutants, such as nitrogen, phosphorus, pathogens, and organic enrichment (low dissolved oxygen), that are contributing to surface water quality impairment across the county. Kelble Aff. ¶ 6; Walls Aff. ¶ 9. The adverse impacts associated with CAFO-caused discharges include fish kills, algal blooms, and fish advisories, contamination of drinking water sources, and transmission of disease-causing bacteria and parasites associated with food and waterborne diseases. Kelble Aff. ¶ 16, 19; Walls Aff. ¶¶ 9-11; Yaggi Aff. ¶¶ 10, 11.

The section of the Potomac into which discharges from Plaintiff Alt's CAFO ultimately flow has been designated as impaired by nitrogen and phosphorous resulting in algal blooms and adversely affecting public water supplies and recreation. Walls Aff. ¶ 11. Animal waste in waterways also increases levels of fecal coliform bacteria, some of which can be antibiotic resistant, posing risks to human health. Yaggi Aff. ¶ 11; Walls Aff. ¶¶ 9-11. The tributary of the Potomac, Anderson Run, where Plaintiff Alt's CAFO discharges, has also been designated by the State of West Virginia as biologically impaired and the tributary that feeds Anderson Run, Mudlick Run, is designated as impaired by fecal coliform. Walls Aff. ¶ 11. These water quality impairments make the water unsafe for human recreation and consumption, as well as negatively affect the aquatic life. *Id.* More broadly, in the Chesapeake Bay Watershed in which the Alt facility operates, agricultural facilities are by far the largest source of nitrogen and phosphorus pollution in the Bay, resulting in the slow death of a waterbody that was historically one of the

the most productive and biologically diverse estuaries in North America. Yaggi Aff. ¶10, 11; Gertler 15, 16.

Altogether, Proposed Intervenors represent not only their organizations, whose express goals are threatened by the potential de-regulation of discharges from CAFOs under the CWA, but also thousands of individual members, whose use and enjoyment of the water for their business, recreation, swimming, fishing, and consumption are--and will continue to be--impaired by discharges from CAFOs like the Plaintiff's.

ARGUMENT

POINT I

PROPOSED INTERVENORS SHOULD BE GRANTED INTERVENTION AS OF RIGHT

Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, “the court must permit anyone to intervene who: (1) makes a timely motion to intervene; (2) claims an interest relating to the subject of the action; (3) is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect that interest; and (4) whose interest is not adequately represented by the existing parties. Fed. R. Civ. P. 24(a); *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991).

A. The Proposed Intervenors’ Motion is Timely

In determining whether a motion to intervene has been timely filed, courts consider (1) the purposes for which intervention is sought; (2) whether the [party] seeking intervention moved promptly when [it] knew or should have known of [its] interest in the case; (3) prejudice, if any, to the existing parties if the intervention is allowed; (4) existence of special circumstances

militating for or against the particular intervention sought. *Geico Gen. Ins. Co. v. Shurak*, No. 5:05-CV-179, 2006 WL 1210324, at *2 (N.D. W. Va. May 3, 2006) (citing *Lane v. Bethlehem Steel Corp.*, 93 F.R.D. 611, 616 (D. Md. 1982)). The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties. *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970); Wright and Miller, § 1916. The absence of prejudice supports finding the motion to be timely. See *Hill v. Western Elec. Co.*, 672 F.2d 381 (4th Cir. 1982). While the court will necessarily consider the element of time, the mere lapse of time by itself does not make an application untimely. *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994); Wright and Miller, § 1916.

Here, Proposed Intervenors seek intervention to protect their significant interests in public health and the quality of local and national waterways for drinking water, recreation, food production, aquatic life, aesthetics, and other beneficial uses; and to preserve the full scope of the CWA and the EPA's authority thereunder to address pollution from CAFOs. Proposed Intervenors moved promptly upon the Farm Bureaus' interventions and upon the parties' narrowing of the issues at stake to a strictly legal question affecting the regulation of discharges from CAFOs throughout the country. No parties will be prejudiced by the proposed intervention, as the litigation is in its early stages and intervention will not cause any delay.

B. The Proposed Intervenors Have an Interest Related to the Subject of this Action

The "interest" described in Rule 24(a)(2) is a "significantly protectable interest." *United States v. Exxonmobil Corp.*, 264 F.R.D. 242, 243 (N.D. W. Va. 2010). To determine whether a proposed intervenor has such an interest, the Fourth Circuit has emphasized that "liberal

intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

Proposed Intervenors qualify as "apparently concerned persons" because the central issue in this case is a legal one, the resolution of which will reach a broad range of future actors, including farmers, fishermen, residents, and environmental groups. Proposed Intervenors, as citizen-based environmental and food-safety groups, are entitled to intervention in this action as a matter of right so they may represent their members and all residents of the watershed by protecting their environmental, recreational, and economic interests in maintaining clean, usable waterways and a healthy food and water supply.

As this Court noted in its Order granting the Farm Bureau's intervention, the law in this district favors liberal intervention.² Intervention Order at 8. In *Ohio Valley Env'tl. Coalition v. Horinko*, 279 F.Supp.2d 732, 739 n.4 (S.D. W.Va. 2003), the court allowed 15 defendant intervenors, and nearly 20 plaintiff-side intervenors. Intervenors included West Virginia Rivers Coalition, Inc. (a movant here) and Greenbrier River Watershed Association. *Id.* Municipal intervenors were also granted intervention specifically because they would "suffer injury in fact from a reduction in water quality in West Virginia's rivers." *Id.* at 745. Under this liberal standard, Proposed Intervenors' motion should be granted. Here, as in *Ohio Valley*, degradation of water quality is at issue. Proposed Intervenors have a right to intervene in this action to protect their interests in maintaining the quality of waterways impacted by CAFOs and ensuring that the water and fish in these waterways are safe for consumption. If the EPA and CWA

² The Court should also note that Congress provided citizens with a statutory right to intervene in any enforcement action brought by the EPA Administrator. See 33 U.S.C. § 1365(b)(1)(b). This strongly suggests that Proposed Intervenors have a right to intervene in a pre-enforcement challenge brought by a regulated party, where the very same interests are implicated.

delegated states are unable to regulate manure and litter discharge from CAFOs, the waters of the Potomac River and throughout the country will be severely degraded, thus compromising Proposed Intervenor's "significantly protectable interest". *United States v. Exxonmobil Corp.*, 264 F.R.D. at 243. Moreover, because their primary goal—protecting the Potomac River and other waterways from pollution—will be undermined if this Court decides as a matter of law that these types of pollution discharges from CAFOs do not require a NPDES permit, the Proposed Intervenor has a specific interest in the litigation at hand.

C. The Disposition of This Action may Impair or Impede Proposed Intervenor's Ability to Protect Their Interest

The relevant inquiry is whether the Proposed Intervenor "will be practically disadvantaged if not permitted to intervene." *Shenandoah Riverkeeper v. Ox Paperboard, LLC*, No. 3:11-CV-17, 2011 WL 1870233, at *3 (N.D. W. Va. May 16, 2011); Intervention Order at 10-11. As this Court noted in its Order granting intervention to the Farm Bureau Intervenor, several courts have held that "stare decisis by itself supplies the practical disadvantage that is required for intervention under Rule 24(a)(2)." Intervention Order at 10-11 (citation omitted).

Proposed Intervenor has regularly engaged in litigation as plaintiff in citizens suits and intervenors in enforcement actions against CAFOs in order to advance their organizations' interest in minimizing the pollution of local waterways. *Yaggi Aff.* ¶ 15; *Walls Aff.* ¶ 19; *Kimbrell Aff.* ¶ 13; *Hauter Aff.* ¶ 10. In the present case, Plaintiff and Plaintiff Intervenor urge an expanded view of the agricultural stormwater exemption that would remove a significant portion of CAFO discharges from the EPA's regulatory jurisdiction and, accordingly, result in increased pollution of waterbodies that are already impaired by CAFO pollution. Proposed Intervenor would plainly be practically disadvantaged by *stare decisis* if this court embraces a broad interpretation of the exemption. As this Court has recognized, its ruling here on the legal

issue presented may impact the legal obligations of “every large [CAFO]” in the country. Intervention Order at 9. This interpretation would deprive Proposed Intervenors and other citizens of a significant advocacy tool for challenging a major source of water pollution across the country.

Furthermore, Proposed Intervenors’ efforts to monitor and raise awareness about pollution by CAFOs relies in part on the present scope of the EPA’s jurisdiction to fully investigate all areas of CAFOs and make factual findings of noncompliance with regulations. Curtailment of the EPA’s regulatory authority over discharges originating from large portions of these operations is likely to undermine Proposed Intervenors’ access to essential information for their efforts.

D. Proposed Intervenors’ Interests Are Not Adequately Represented by the Existing Parties.

As recognized in this Court’s order granting AFBF and WVBF intervention:

“[t]he most important factor in determining adequacy of representation is how the interest of the [proposed intervenors] compares with the interests of the present parties.” *Shenandoah Riverkeeper*, 2011 WL 1870233, at *3, (citing *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001)); Intervention Order at 12. The burden of demonstrating inadequate representation under Rule 24 “should be treated as minimal.” *Teague v. Bakker*, 931 F.2d at 262 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); see also *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (observing that the burden of showing that existing parties to litigation will not adequately represent a prospective intervenor’s interests is “not onerous,” and an applicant need only show that “representation of [its] interest ‘may be’ inadequate, not that representation will in fact be inadequate”). Intervention Order at 12.

Courts have recognized a number of ways in which the kinds of interests asserted by the Proposed Intervenors may not be adequately represented. For example, the Fourth Circuit has found representation to be inadequate when an existing party's assertion of its claims "might be less vigorous" than the intervenors' assertion of their claims. *Teague*, 931 F.2d at 262 (observing that financial constraints on another party's ability to defend a position may weigh in favor of finding that intervenors' interests are not adequately represented). Similarly, the Fourth Circuit has found intervention to be appropriate where a defendant-intervenor environmental group would not have its interest adequately represented by the administrative agency defendant despite sharing some objectives. *In re Sierra Club*, 945 F.2d 776 (4th Cir. 1991) (recognizing the environmental group was opposed to the issuance of the permit whereas the state agency should, on theory, represent the interests of all citizens of the state, including those who might be proponents of new hazardous waste facilities).

Moreover, a mere "tactical similarity" to the "present legal contentions" of a party and a proposed intervenor does not assure adequacy of representation or preclude an intervenor from the opportunity to appear. *See Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992) at 85 (allowing the state of Arkansas to intervene as a plaintiff where the other plaintiffs were private individuals and environmental organizations). In *Robertson*, the court explained that the state had a duty to all citizens, an interest in protecting its tourism industry, and a duty to protect its tax revenues, whereas the environmental groups had a specific duty to their individual members and their group mission. *Id.*

As a government entity, EPA serves additional constituencies who may have interests that differ from those of the Proposed Intervenors. *See Dimond*, 792 F.2d at 192-93 (finding a government entity "would be shirking its duty were it to advance [an individual's] narrower

interest at the expense of its representation of the general public interest”). Proposed Intervenor’s expectation that EPA will enforce the CWA, based in part on its environmental mission and the specific duties entrusted to EPA by law, *see, e.g.*, 33 U.S.C. §§ 1251(d), 1344; 42 U.S.C. § 7609, does not require Proposed Intervenor to rely solely on EPA to defend their interests. “Although there may be a partial congruence of interests, that does not guarantee the adequacy of representation.” *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003) (granting intervention where federal defendant and movant’s interests “might diverge during the course of litigation”). This is especially true in this case because Proposed Intervenor has independent authority to enforce the CWA themselves under the citizen suit provision.

More importantly, no existing party to this action represents the perspective and knowledge brought by movants and their members within the Potomac Watershed. Courts have often found that the government does not adequately represent intervenors because “government entities are usually charged with ‘representing the interests of the American people,’ whereas aspiring intervenors . . . , are dedicated to representing their personal interests or the interests of their members.” *County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C. 2007) (quoting *Fund for Animals*, 322 F.3d at 736; *see also Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996) (holding that the USDA would not adequately represent the Farm Bureau’s members’ interests, as the government must represent the broad public interest, not just concerns of one industry). In the present case, Proposed Intervenor has specific knowledge about the Potomac Watershed and significant experience in CWA litigation involving CAFOs. *See Yaggi Aff.* ¶ 15; *Walls Aff.* ¶¶ 19, 20; *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005).

Finally, Proposed Intervenor's interests are not fully aligned with those of the EPA. As an agency of the federal government, the EPA represents the broad interests of the United States, whereas Proposed Intervenor is specifically concerned with how the instant action will impact their local members' health, wellbeing, and safety, as well as their organizations' ability to carry out their organizational missions. Although Proposed Intervenor and the EPA share a common interest in upholding the CWA and EPA regulations requiring discharging CAFOs to apply for a NPDES permits, that shared interest does not provide assurance that Plaintiff Intervenor's particular interests will be adequately represented. Indeed, Proposed Intervenor have often found themselves at odds with the EPA over their regulation of the CAFO industry, and at times, have even proceeded as Plaintiffs against the EPA on CAFO-related rulemakings. *See Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). In addition, Proposed Intervenor are in a position to provide a comprehensive view of the legal and factual context of the actions taken by EPA in this matter and to fully articulate how a ruling contrary to their interests will have an adverse impact on the food and water supply.

Therefore, because the outcome of this action is likely to impede Proposed Intervenor's "significantly protectable interest[s]" in protecting public health and the quality of local and national waterways, and because these interests are not adequately represented by government Defendant, this Court should grant Proposed Intervenor's motion to intervene as of right. *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

POINT II

IN THE ALTERNATIVE, PROPOSED INTERVENORS SHOULD BE GRANTED PERMISSIVE INTERVENTION.

Proposed Intervenor satisfy the prerequisites for permissive intervention under F.R.C.P.

24 (b). Rule 24 (b) states, in relevant part:

(1) On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact. . . .

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

The Fourth Circuit has held that a motion for permissive intervention “lies within the sound discretion of the trial court.” *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003). In exercising this discretion, however, a court is guided by established standards. *Hill v. Western Electric Co, Inc.*, 672 F.2d at 386. These standards support the granting of Proposed Intervenor’s motion in this case.

As detailed above, Proposed Intervenor share with the existing parties an interest in the legal question presented here: namely, the scope of the agricultural stormwater discharge exemption from NPDES permit requirements. Proposed Intervenor seek resolution on the exact same legal issue the Plaintiff has raised as her defense, with no additional questions for the court. *See, Wright & Miller*, Civil 3d § 1911 Common Question of Law or Fact (“If there is a common question of law or fact, the requirement of the rule has been satisfied and it is then discretionary with the court whether to allow intervention”).

Most importantly, Proposed Intervenors' participation in this case would not "unduly delay or prejudice the adjudication of the Original parties' rights." Fed. R. Civ. P. 24 (b). Potential prejudice to either of the original parties has been described as "the most important consideration" in a trial court's consideration of a Rule 24 (b) motion. *Hill v. Western Electric*, 672 F.2d at 386. In particular, courts will look to whether intervention would delay relief for "long-standing iniquities." *Id.* Here, this case is at the earliest of stages, and no party would be prejudiced by Proposed Intervenors' participation.

Defendant EPA plainly will not be prejudiced by intervention, and they do not oppose Proposed Intervenors' motion. Neither will the Plaintiff be prejudiced by permissive intervention here. Plaintiff did not oppose the intervention of either the American Farm Bureau or the West Virginia Farm Bureau, which this court has granted. Intervention here will not expand the scope of this litigation farther than it is at present. *Cf. Rich v. KIS California, Inc.*, 121 F.R.D. 254, 260 (M.D.N.C. 198) (denying permissive intervention when intervenors would unduly expand scope of litigation). The same concerns for judicial economy which supported the Farm Bureau Intervenors support intervention here.

Intervention is further supported because this case deals with a pure question of law. Proposed Intervenors would not seek discovery, nor would they complicate the course of litigation. *See Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 179 F.R.D. 505, 509 (W.D.N.C. 1998) (granting permissive intervention over opposition, noting that mere addition of set of attorneys would not unduly prejudice original parties). Plaintiff Alt will not suffer any delay in seeking the relief requested should intervention be granted.

CONCLUSION

For the foregoing reasons, the Proposed Intervenors respectfully request that this Court grant them leave to intervene as a matter of right or, alternatively, grant them permissive intervention to assert the claims set forth in the attached proposed Answer of Intervenors.

Respectfully submitted,

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