IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION Plaintiffs, and LOWER SUSQUEHANNA RIVERKEEPER ASSOCIATION Plaintiff-Intervenor-Applicant, v. CAPITAL REGION WATER, and THE CITY OF HARRISBURG, PA Defendants.	Civil Action No. 1:15-cv-00291-CCC (Judge Christopher C. Conner)

LOWER SUSQUEHANNA RIVERKEEPER ASSOCIATION'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. Lower Susquehanna Riverkeeper Association Has a Right to Intervene as Per Federal Rule of Civil Procedure 24(a)(1) and the Clean Water Act, 33 U.S.C. 1365(b)(1)(B) 3

A. Lower Susquehanna Riverkeeper Association's Motion is Timely. 4

1. The Parties' Contentions that LSRA Should Not Be Allowed to Intervene at this Stage of the Litigation are Unavailing. 6

2. The Parties' Claims of Prejudice are Unavailing. 12

3. LSRA Did Not Delay in Moving to Intervene 14

II. The Parties' Other Arguments in Opposition to Lower Susquehanna Riverkeeper Association's Motion are Without Merit. 16

A. Requests to Limit LSRA's Intervention are Inappropriate. 16

B. If Intervention is Granted, LSRA Has the Right to be a Signatory to Future Consent Decrees and the Right to Request that this Court Enforce All Requirements in Consent Decrees in this Matter. 19

C. Intervening Parties May Reopen Administratively-Closed Cases. 21

CONCLUSION 22

CERTIFICATE OF COMPLIANCE 23

CERTIFICATE OF SERVICE 24

ED_006335_00000539-00002

TABLE OF AUTHORITIES

Cases

Alvarado v. J.C. Penny Co.,
997 F.2d 803 (10th Cir. 1993) 17

Cal. Dep't of Toxic Substances Control v. Com. Realty Projects, Inc.,
309 F.3d 1113 (9th Cir. 2002) 12

Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.,
974 F.2d 450 (4th Cir. 1992) 18

Del. Valley Citizens' Council for Clean Air v. Pennsylvania,
674 F.2d 970 (3d Cir. 1982).....12

Fla. Med. Ass'n, Inc. v. Dep't of Health, Educ., & Welfare,
No. 78-00178, 2011 WL 4459926 (M.D. Fla. May 18, 2011) 22

Frew ex rel. Frew v. Hawkins,
540 U.S. 431 (2004).....20

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000).....10

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,
484 U.S. 49 (1987).....6

Hodgson v. UMW,
473 F.2d 118 (D.C. Cir. 1972).....9

In re Bayshore Ford Trucks Sales, Inc.,
471 F.3d 1233 (11th Cir. 2006) 17

In re Fine Paper Antitrust Litigation,
695 F.2d 494 (3d Cir. 1982).....5

Marcaida v. Rascoe,
569 F.2d 828 (5th Cir. 1978) 17

ED_006335_00000539-00003

Montcalm Publ'g Corp. v. Virginia,
199 F.3d 168 (4th Cir. 1999) 17

Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.,
72 F.3d 361 (3d Cir. 1995).....5, 14

Nehmer v. U.S. Dep't of Veterans Affairs,
494 F.3d 846 (9th Cir. 2007) 20

Peacock v. Thomas,
526 U.S. 349 (1996).....20

PIRG of New Jersey v. Yates Indus., Inc.,
757 F. Supp. 438 (D.N.J. 1991) 10

Schneider v. Dumbarton Developers, Inc.,
767 F2d 1007 (D.C. Cir. 1985).....17

SEC v. Dollar Gen. Corp.,
378 F. App'x 511 (6th Cir. 2010) 20

Sierra Club v. Espy,
18 F.3d 1202 (5th Cir. 1994) 3, 6, 13, 15

Sierra Club v. Hamilton County Bd. Of Cty. Comm'rs,
504 F.3d 634 (6th Cir. 2007) 20

Stallworth v. Monsanto Co.,
558 F.2d 257 (5th Cir. 1977) 3, 15

Tursom v. United States,
No. 20-20811, 2021 WL 1647888 (S.D. Fla. Apr. 27, 2021).....21

United States v. Arch Coal Inc.,
No. 11-0133, 2011 WL 2493072 (S.D. W. Va. June 22, 2011) 18

United States v. City of Baton Rouge,
No. 01-978, 2012 WL 1392980 (M.D. La. Apr. 20, 2012) 17

United States v. Colo. Organic Chem. Co., Inc.,
No. 98-01600, 2015 WL 4932200 (D. Colo. Aug. 19, 2015).....21

United States v. Ketchikan Pulp Co.,
74 F.R.D. 104 (D. Alaska 1977) 6, 18

United States v. Metro. Dist. Comm'n,
679 F. Supp. 1154 (D. Mass. 1988) 11, 12

United States v. Metro. St. Louis Sewer Dist.,
No. 07-1120 (E.D. Mo. Apr. 27, 2012) 19

United States v. Oregon,
745 F.2d 550 (9th Cir. 1984) 7

United States v. Territory of Virgin Islands,
748 F.3d 514 (3d Cir. 2014) 4

United States v. Washington Suburban Sanitary Comm'n,
No. 04-3679 (D. Md. June 27, 2005) 19

Utah Ass'n of Ctys. v. Clinton,
255 F.3d 1246 (10th Cir. 2001) ..... passim

Wilton Miwok Rancheria v. Salazar,
No. 07-02681, 2010 WL 693420 (N.D. Cal. Feb. 23, 2010) 22

Statutes

33 U.S.C. § 1365(b)(1)(B) 1, 4

Other Authorities

7C Charles Alan Wright et al., Federal Practice & Procedure
§ 1920 (2d ed. 1986) 17

7C Charles Alan Wright et al., Federal Practice and Procedure
§ 1922 (2d ed. 1986) 18

H.R. Rep. No. 92-911 (1972) 18

Memorandum from Lawrence E. Starfield, EPA Acting Assistant Administrator
Re: Using All Appropriate Injunctive Relief Tools in Civil Enforcement
Settlements (Apr. 26, 2021) 5

ED_006335_00000539-00005

INTRODUCTION

As explained in the opening brief, Lower Susquehanna Riverkeeper Association ("LSRA") has the right to intervene in this action under Federal Rule of Civil Procedure 24(a)(1). None of the parties contest that the Clean Water Act ("CWA") confers upon LSRA a statutory right to intervene. 33 U.S.C. § 1365(b)(1)(B). Instead, the primary objection to LSRA's intervention through Rule 24(a)(1) is that the motion is untimely. However, the parties' protestations fail for several overarching reasons.

First, contrary to the parties' wishcasting, remedial measures are not proceeding as planned and the outstanding claims in this lawsuit are far from resolved. The parties originally anticipated "another round of negotiation following the submission of the [Long Term Control Plan ("LTCP")] for the combined sewer," asserting that "[i]f negotiations are successful, the Parties' expectation is that the second settlement will fully resolve the remaining claims alleged in the Complaint." Joint Status Report at 8–9, ECF No. 18; *see also* Partial Consent Decree ("Partial CD") ¶ 80, ECF No. 4 (stating that the Partial CD "does not resolve any claims for injunctive relief relating to [Capital Region Water's ("CRW's")] alleged failure to implement an LTCP . . . and does not resolve any claims for civil penalties").

Instead of a *final* consent decree that would implement a LTCP along with an enforceable schedule to stop combined sewer overflows ("CSOs"), the parties are negotiating another version of the *Partial* CD to incorporate only deferred maintenance work. *See* United States' Br. at 5–6, ECF No. 44 (citing Maslowski Decl. ¶¶ 6, 8, ECF No. 44-1). In fact, the parties have not and cannot factually state that they are close to reaching an approved LTCP or final consent decree.

Second, because there has been no real progress to abate the CSOs and the parties are not currently negotiating the final consent decree to resolve the outstanding claims, the parties would neither be prejudiced nor suffer delay. LSRA seeks to prompt action that requires both near- and long-term measures to address the unacceptable frequency and volume of CSOs as well as the public health and water quality concerns they create. Despite the parties' consternations, LSRA does not want to rehash already settled provisions of the Partial CD. *See, e.g.,* United States' Br. at 11–12. And LSRA's intervention will not halt the deferred maintenance work that CRW should already be performing in the first place, which is the subject of the modification to the Partial CD that the parties assert they are working on.

Third, the parties' delay in reaching a final consent decree and stopping the CSOs is what triggered LSRA to realize that the original plaintiffs do not and cannot protect LSRA's interests or the interests of its members. Despite the parties'

focus on the length of time between the entering of the Partial CD and LSRA's motion, courts have "rejected the notion that the date on which the would-be intervenor became aware of the pendency of the action should be used to determine whether it acted promptly." *See, e.g., Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) (gauging promptness from when the would-be intervenor "became aware that its interests would no longer be protected by the original parties" (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264 (5th Cir. 1977))). Further, although CRW argues that "LSRA's alleged injuries have been mitigated by the Parties' progress towards implementation of the [Partial CD]," CRW's Br. at 14, ECF No. 45, CRW's own data show the parties have failed to lessen the large volume of CSOs into the Susquehanna River and Paxton Creek. *See infra* p. 9, Table A.

For the reasons set forth in this reply brief and LSRA's opening brief, this Court should reject the original parties' opposition and grant LSRA's motion to intervene.

ARGUMENT

I. Lower Susquehanna Riverkeeper Association Has a Right to Intervene as Per Federal Rule of Civil Procedure 24(a)(1) and the Clean Water Act, 33 U.S.C. 1365(b)(1)(B).

The parties do not contest that the CWA grants LSRA the unconditional statutory right necessary to intervene pursuant to Federal Rule of Civil Procedure 24(a)(1). *See, e.g.,* United States' Br. at 6 ("The [CWA] allows 'citizens' to

intervene 'as a matter of right' in an action brought and diligently prosecuted by the United States or a State 'to require compliance with [a] standard, limitation, or order.'" (quoting 33 U.S.C. § 1365 (b)(1)(B))). Instead, Plaintiff Pennsylvania Department of Environmental Projection ("DEP") argues that LSRA cannot intervene because the original plaintiffs adequately represent LSRA's interests. DEP's Br. at 17–21, ECF No. 46. This argument is irrelevant because no party—including DEP—challenges that the CWA confers upon LSRA a statutory unconditional right to intervene in this matter, which is the primary basis LSRA advances for intervention. LSRA only needs to show inadequacy of representation to intervene under Rule 24(a)(2). Because the statutory right to intervene applies here, the Court need not address intervention through Rule 24(a)(2).[1]

A. Lower Susquehanna Riverkeeper Association's Motion is Timely.

The primary objection to LSRA's intervention relates to timeliness. To reiterate, courts analyze three timeliness factors: "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay."

[1] In any event, LSRA has demonstrated inadequate representation in order to satisfy its request to intervene through Rule (24)(a)(2). "Inadequate representation can be based on . . . [the] grounds . . . that the representative party is not diligently prosecuting the suit." *United States v. Territory of Virgin Islands*, 748 F.3d 514, 519–20 (3d Cir. 2014). As LSRA has reiterated, it is LSRA's position that intervention is necessary because it is unsatisfied with the original plaintiffs' delays in stopping the overflows from the Harrisburg sewer system.

Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 370 (3d Cir. 1995) (citation omitted).

To begin, LSRA seeks to intervene at this juncture—not to prejudice or cause further delay—but to offer its own resources and expertise to stop CRW's ongoing and significant CSOs as expeditiously and effectively as possible. So far, LSRA has already reviewed and provided recommendations from other comparable consent decrees and has hired an engineering consultant with experience addressing CSOs at publicly owned treatment works. *See* Exhibits to Compl. in Intervention, Ex. E, ECF No. 30-2. If granted intervention, LSRA will push for an independent third-party auditor to complete a remedial investigation and feasibility study—recognized by the new presidential administration as an important tool to obtain injunctive relief—to determine the most cost-effective and impactful projects to include as part of the injunctive relief yet to be addressed. *See* Memorandum from Lawrence E. Starfield, EPA Acting Assistant Administrator Re: Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements (Apr. 26, 2021) (attached hereto as Exhibit A). Accordingly, "citizen groups" such as LSRA "are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests."

United States v. Ketchikan Pulp Co., 74 F.R.D. 104, 108 (D. Alaska 1977) (citation omitted).[2]

1. The Parties' Contentions that LSRA Should Not Be Allowed to Intervene at this Stage of the Litigation are Unavailing.

The original parties' objections that LSRA did not intervene until six years after entry of the Partial CD lack persuasion and gloss over several important points as to why LSRA's intervention should be granted. *Utah Ass'n of Ctys. v. Clinton,* 255 F.3d 1246, 1250 (10th Cir. 2001) ("The analysis is contextual; absolute measures of timeliness should be ignored." (quoting *Espy*, 18 F.3d at 1205)) .

First, the post-Partial CD negotiations have not been successful, despite the parties' recent assertions. In their last Joint Status Report, the parties stated that "[i]f that negotiation is successful, the Parties will lodge a second and *final* Consent Decree with the Court" that will "require CRW to implement the LTCP" and "require CRW to pay a civil penalty, which was deferred in the Partial Consent Decree." Joint Status Report at 9 (emphasis added). However, the parties now propose that the second partial consent decree will instead incorporate deferred

[2] The statement that citizen suits are meant to "supplement rather than to supplant governmental action" simply refers to the notion that independent citizen suits may not be brought "when governmental enforcement action is under way," and that citizen suits may not be brought for "wholly past violations." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

maintenance work *before* the parties even begin to tackle an approvable LTCP—the actual remedial work needed to abate the lion's share of the overflows—and a final consent decree. *See* United States' Br. at 5–6 ("CRW, however, continues to face challenges in developing an approvable LTCP because its system requires repairs to function as designed. . . . The Parties are currently negotiating these projects as part of a potential modification to the [Partial Consent] Decree." (citing Maslowski Decl. ¶¶ 6, 8)). Courts have granted intervention in long-standing cases when the litigation was "entering a new stage." *See United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). In *United States v. Oregon*, the State of Idaho moved to intervene after the existing parties stated they intended to renegotiate a settlement plan. *Id.* The Ninth Circuit ruled that Idaho's intervention was timely, accepting "the possibility of new and expanded negotiations—as [Idaho's] major reason for its attempted intervention at this time." *Id.* Here, LSRA's intervention is timely for the same reason—the second partial consent decree the parties are working on will only include deferred maintenance work and not serve as a final consent decree to stop or substantially minimize CRW's CSOs. It is an entirely inadequate, stop-gap measure that is inappropriate six years into what is in fact only a partial solution to a very large problem.

Second, contrary to the parties' arguments, there has not yet been a final disposition in this matter. *See Utah Ass'n of Ctys.*, 255 F.3d at 1250–51 (in which

the court rejected opponents' argument to deny intervention "because the case is ready for disposition" as "[t]he record indicates, to the contrary, that the case is far from ready for final disposition"). In *Utah Association of Counties*, the Tenth Circuit ruled that intervention was timely because "while some discovery had occurred[,]" "no scheduling order has been issued, no trial date set, and no cut-off date for motions set." *Id.* Here, the Partial CD did not resolve claims for injunctive relief and civil penalties for CRW's CSO violations; it required CRW to submit a LTCP to prevent or substantially minimize these overflows that would be implemented through a final consent decree that would presumably resolve these claims. This has not happened. Instead of working on a final consent decree, as previously raised, the parties still have not been able to develop an approvable LTCP. Thus, this case is far from ready for final disposition. And in the absence of a final consent decree, the parties have failed to mitigate the incredibly large volume of both wet- and dry-weather CSOs, as displayed below in Table A.

Table A. Volume of Combined Sewage Overflows By Year[3]

Year	Volume of Wet-Weather CSOs (gallons)	Volume of Dry-Weather CSOs (gallons)
2020	584 million	52,538
2019	902 million	579
2018	1.4 billion	77,727
2017	899 million	3,811
2016	789 million	62,980

In addition, courts allow intervention when proposed intervenors seek to participate in the unsettled remedial phase of the litigation and not to reopen any already settled claims. *See Hodgson v. UMW*, 473 F.2d 118, 129 (D.C. Cir. 1972) ("Timeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved."). In *Hodgson*, the D.C. Circuit granted intervention to movants to participate in the remedial stages of a lawsuit even though seven years had passed since the case was first filed, recognizing that for movants, "the litigation [was] now in its most critical phase" since they "will have to live with whatever remedies the District Court fashions." *Id.* at 129–30. Here, even though six years have passed since entry of the Partial CD, LSRA's intervention was prompted by the complete lack of progress towards the final consent decree and CRW's inability to provide an acceptable LTCP, which LSRA uncovered after receiving documents in

[3] CRW, Semi-Annual Report on Consent Decree Implementation (Mar. 2021).

October and December 2020 in response to public records requests. Meanwhile, LSRA members continue to see "brown, fuzzy, raw sewage collecting on the banks of the Susquehanna River," finding it "extremely distressing," and "worry that the sewage pollution will scare away customers" from their businesses. *See* Exhibits to Compl. in Intervention, Ex. B at 1, Ex. C. at 2. For these reasons, LSRA seeks to participate in this "most critical phase" to ensure the overflows are resolved as quickly and effectively as possible through use of its own expert, third-party auditor, and the findings of a remedial investigation and feasibility study.

And contrary to the parties' suggestions, the outstanding claims for injunctive relief and civil penalties are the pivotal mechanisms by which the CWA is used to both prevent and abate pollution. *PIRG of New Jersey v. Yates Indus., Inc.*, 757 F. Supp. 438, 455 (D.N.J. 1991) ("[E]njoining defendant from further violations will directly serve the purposes of the Act and the purpose of this litigation; ensuring that improper effluent discharges are not entered into the nation's waterways."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("Congress has found that civil penalties in [CWA] cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations. This congressional determination warrants judicial attention and respect.").

Third, the case relied upon by the parties to make the argument that LSRA is both "too late" and "too early" to intervene is clearly distinguishable from the instant matter. In *United States v. Metropolitan District Commission*, the court issued "a long-term scheduling order establishing milestones and target dates for the reconstruction effort" to remedy underlying effluent violations. 679 F. Supp. 1154, 1156 (D. Mass. 1988). Here, there is no final consent decree implementing enforceable deadlines to resolve the underlying and continuing CSO violations. *See supra* Table A. In *Metropolitan District Commission*, the court order required the construction of an outfall as a remedy, prompting two communities to seek intervention under the CWA because they opposed "the impact of the placement of the outfall on the quality of the water in the Bay." *Metro. Dist. Comm'n*, 679 F. Supp. at 1156. But the court found intervention "too early" because "[n]o such clear connection . . . has been drawn between the proposed siting of the outfall and violation of water quality standards so as to justify intervention at this time." *Id.* at 1159. In contrast, LSRA is not "too early" because the violations alleged by LSRA are the same as those alleged in the underlying lawsuit, and the claims for injunctive relief and civil penalties to resolve the violations are still outstanding, ongoing, and substantially unaddressed. Further, the communities were "too late" because they sought intervention after a settlement was finalized that resolved all underlying claims with a court-enforced schedule that included construction of the

work meant to stop the violations. *Id.* at 1162. Here, LSRA is not "too late" because there is not yet a consent decree to implement the work and schedule to resolve the underlying CSOs due to CRW's failure to provide an acceptable LTCP and the parties' general stagnation.

2. The Parties' Claims of Prejudice are Unavailing.

The parties' complaints that LSRA's intervention would cause prejudice are disingenuous for two reasons. *First*, LSRA seeks to stop the CSOs polluting the Susquehanna River as expeditiously and effectively as possible by ensuring that there is an enforceable, detailed rehabilitation and upgrade plan and schedule that would adequately address the outstanding claims related to those violations. Contrary to the parties' assertions, LSRA is *not* seeking to void or otherwise undo the existing provisions in the current Partial CD. The cases cited by the parties to establish prejudice largely involve intervenors seeking to void final consent decrees. *See, e.g., Metro. Dist. Comm'n*, 679 F. Supp. at 1161 (denying intervention as movants "stated directly that they 'may request re-examination' of milestones erected" under a final order); *Del. Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 975 (3d Cir. 1982) (denying intervention as movants "seek to vacate the consent decree."); *Cal. Dep't of Toxic Substances Control v. Com. Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002) (denying intervention as movants sought to challenge aspects of a consent decree).

Instead, LSRA seeks the full resolution of the underlying lawsuit as expeditiously and effectively as possible by ensuring that the outstanding claims are adequately addressed.

Second, as the parties are working towards a modification to the Partial CD to incorporate deferred maintenance work, *see e.g.*, United States' Br. at 5–6, there would be no prejudice from LSRA's involvement to resolve the outstanding claims to ultimately stop or significantly curb the CSOs. *See Utah Ass'n of Ctys.,* 255 F.3d at 1250 ("The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention where no one would be hurt and greater justice could be attained." (quoting *Espy*, 18 F.3d at 1205)) . LSRA does not oppose this deferred maintenance work as the sewer system should have been properly maintained all along.

The prejudice prong of the timeliness inquiry "measures prejudice caused by the intervenors' delay—not by the intervention itself" and courts have rejected opposing parties' arguments that fail to make that distinction. Contrary to the United States' protests, this case is analogous to *Mountain Top* as LSRA does *not* intend to "unwind[] a settlement on which the Parties have relied for six years." United States' Br. at 15. In *Mountain Top*, the court ruled that the existing parties would not be prejudiced even though "some . . . settlement negotiations had

occurred between [the parties] prior to [intervenor's] motion." *Mountain Top*, 72 F.3d at 370. The court rejected the original parties' claims of prejudice, stating:

> The heart of the [opposition's] objection is that intervention would essentially 'deep six' any possible settlement. Even if we were to accept the [opposition's] argument that intervention would prejudice settlement negotiations, that prejudice would not be attributable to any time delay. Indeed, the only threat to settlement negotiations between the [original parties] that the intervention might pose would be that the [original parties] might have to consider the [intervenors'] legitimate interest in the funds at issue.

Id. (internal quotation marks omitted).

Here, LSRA intends to participate in negotiations going forward to ensure a proper LTCP is developed and implemented so as to return CRW to compliance with the CWA. The parties will not be prejudiced as they are allegedly working towards modifying the Partial CD to incorporate deferred maintenance work and are neither working on nor close to reaching an approved LTCP or final consent decree. *See also Utah Ass'n of Ctys.*, 255 F.3d at 1251 (in which the court rejected opponents' arguments that the parties "would be prejudiced by allowing intervention because adding additional parties would double the work load and add issues" and instead, concluded that "[t]hese factors . . . are a function of intervention itself rather than the timing of the motion to intervene.").

3. <u>LSRA Did Not Delay in Moving to Intervene.</u>

As stated in the opening brief, LSRA's interest in this matter is tied to the original parties' delay in reaching a final consent decree that would eliminate or

greatly curtail the underlying CSOs. According to the parties, LSRA should have tried to intervene in 2015. However, it is unclear how LSRA could have anticipated this delay—*i.e.,* the utter lack of progress in reducing CSOs—at the time of the Partial CD. *See Espy*, 18 F.3d at 1206 ("Courts should discourage premature intervention that wastes judicial resources." (quoting *Stallworth*, 558 F.2d at 265)). Courts have "rejected the notion that the date on which the would-be intervenor became aware of the pendency of the action should be used to determine whether it acted promptly" as "[a] better gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties." *Id.* (citing *Stallworth*, 558 F.2d at 264). In *Espy*, "the movants legitimately believed that the Forest Service would defend its timber sales and planning" and when the Service's actions made the movants realize that it would not protect their interests, the Fifth Circuit granted their intervention. *Id.*

Here, in addition to the evidence uncovered by LSRA as referenced in the opening brief, Mem. in Supp. at 14–17, ECF No. 30, LSRA further realized the extent of the parties' delay when it learned that the second consent decree being considered by the parties is not a final consent decree, but instead another interim partial consent decree to incorporate the deferred maintenance work. Meanwhile, despite assertions that LSRA injuries "have been mitigated by the Parties' progress

toward implementation of the [Partial CD]," CRW Br. at 14, the volume of both wet- and dry-weather CSOs has not been abated. *See supra* Table A.

The parties' assertions that the consent decree process is going as planned and that the Partial CD implementation is mitigating LSRA's injuries are refuted by the parties' statements to the Court and CRW's own data showing that the CSOs remain unabated. *Compare* Joint Status Report *with* United States' Br. at 8–9; *see supra* at pp. 2–3, 6–7; *see also supra* Table A & note 2. The clear facts support LSRA's decision to move to intervene at this time; the decision was prompted by the parties' ongoing delay to reach a final plan to stop the CSOs, and stems from LSRA's realization that its interests are no longer being protected by the original plaintiffs.

II. The Parties' Other Arguments in Opposition to Lower Susquehanna Riverkeeper Association's Motion are Without Merit.

The parties' other requests and arguments aimed at curtailing LSRA's involvement in this matter should be rejected for the reasons stated below.

A. Requests to Limit LSRA's Intervention are Inappropriate.

The Court should reject the parties' requests to limit LSRA's intervention, *see* United States' Br. at 17–20; CRW's Br. at 17–18, as these proposed limitations upon LSRA amount to "just an offer to let the proposed intervenors file a memorandum, and perhaps present oral argument should the court request it."

United States v. City of Baton Rouge, No. 01-978, 2012 WL 1392980, at *2 (M.D. La. Apr. 20, 2012) (rejecting proposed limitations on intervention under the CWA). Limiting the scope of LSRA's intervention would seriously inhibit LSRA's ability to participate in crafting injunctive relief that will actually result in the elimination of the CSOs.

To begin, in the absence of limiting conditions on the scope of intervention, the "general rule" is that "the intervenor is treated as if he were an original party" to the suit. *Montcalm Publ'g Corp. v. Virginia*, 199 F.3d 168, 172 (4th Cir. 1999) (quoting 7C Charles Alan Wright et al., Federal Practice & Procedure § 1920 (2d ed. 1986)); *see also, e.g., In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1246 (11th Cir. 2006) ("Once a court grants intervention, whether of right or by permission, the 'intervenor is treated as if [it] were an original party and has equal standing with the original parties.'" (per curiam) (alteration in original) (quoting *Marcaida v. Rascoe*, 569 F.2d 828, 831 (5th Cir. 1978))); *Alvarado v. J.C. Penny Co.*, 997 F.2d 803, 805 (10th Cir. 1993) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." (quoting *Schneider v. Dumbarton Developers, Inc.*, 767 F2d 1007, 1017 (D.C. Cir. 1985))).

Further, where a party has a right to intervene—as LSRA does here, the courts lack authority to impose conditions on intervention. *See Columbus-Am.*

Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 469 (4th Cir. 1992) (remarking that "historically most courts and commentators have held that conditions cannot be imposed on such intervention [as of right]" (citing 7C Charles Alan Wright et al., Federal Practice and Procedure § 1922, at 505 (2d ed. 1986)); *Ketchikan Pulp Co.*, 74 F.R.D. at 108 (noting that "[n]othing in the" CWA "supports this theory of limited intervention" and declining the Government's request to impose limitations); *see also United States v. Arch Coal Inc.*, No. 11-0133, 2011 WL 2493072, at *13 (S.D. W.Va. June 22, 2011) (noting that "[t]he leading commentators on the Federal Rules of Civil Procedure . . . take a dim view of the" court's authority to impose restrictions on intervenors as of right).

The proposed limitations are inconsistent with the CWA, which recognizes the importance of citizen group participation. Indeed, Congress enacted the Clean Water Act's citizen suit provision in response to "inadequate recognition on the part of the administrative agencies as to the proper role of the public," and sought "to open wide the opportunities for the public to participate *in a meaningful way* in the decisions of government." H.R. Rep. No. 92-911, at 132 (1972) (emphasis added). And with the new presidential administration, the Environmental Protection Agency has reaffirmed its commitment to transparency and greater public access. Ex. A at 2. The Court should therefore reject the proposed

limitations as inconsistent with the nature of intervention as of right and the purpose of the CWA's citizen suit provision.

B. If Intervention is Granted, LSRA Has the Right to be a Signatory to Future Consent Decrees and the Right to Request that this Court Enforce All Requirements in Consent Decrees in this Matter.

The parties assume that even if LSRA is granted intervention in the underlying litigation, it is prohibited from joining a modified or final consent decree, and therefore also enjoined from enforcing their terms. This ignores precedent from other municipal sewage consent decrees in which environmental groups have not only intervened in the underlying litigation but were also parties to the consent decrees. *See* Consent Decree, *United States v. Metro. St. Louis Sewer Dist.,* No. 07-1120 (E.D. Mo. Apr. 27, 2012) (in which the plaintiff-intervenor Missouri Coalition for the Environment Foundation was a signatory to the consent decree); Consent Decree, *United States v. Washington Suburban Sanitary Comm'n*, No. 04-3679 (D. Md. June 27, 2005) (in which plaintiff-intervenors Anacostia Watershed Society, Audubon Naturalist Society, Friends of Sligo Creek, and NRDC were signatories to the consent decree).

Moreover, even though LSRA is not a party to the existing Partial CD, LRSA can seek to request judicial enforcement of the Partial CD. As the Sixth Circuit has explained, "although the Sierra Club was not a party to the consent decree, as an intervening party in the underlying litigation, it can inform the Court

of unenforced violations of the Consent Decree and request that the Court enforce the terms of the decrees and this Court's Order." *Sierra Club v. Hamilton County Bd. Of Cty. Comm'rs*, 504 F.3d 634, 644 (6th Cir. 2007) (internal quotation marks omitted). This ability to request enforcement of a consent decree is consistent with the notion that "the district court . . . is the principal and proper arbiter with the responsibility to interpret the decree and oversee the litigation. . . . [A] party may *ask* the district court to issue an order clarifying, enforcing, or modifying a decree and *suggest* a favored interpretation . . . ." *Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846, 860 (9th Cir. 2007). The District Court unquestionably has jurisdiction to enforce the Consent Decree of its own accord. *See, e.g., Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."); *Peacock v. Thomas*, 526 U.S. 349, 356 (1996) (explaining "a federal court's inherent power to enforce its judgments"); *Shillitani v. United States*, 384 U.S. 364, 370 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders . . . ."); *SEC v. Dollar Gen. Corp.*, 378 F. App'x 511, 517 (6th Cir. 2010) ("We acknowledge the district court's inherent authority to enforce the Consent Judgment.").

C. Intervening Parties May Reopen Administratively-Closed Cases.

CRW's argument that LSRA cannot reopen the case also lacks merit. To start, LSRA moved to intervene as a plaintiff in the case, and if granted, LSRA will become a party to the case and CRW's argument is moot. Nevertheless, CRW failed to cite to any cases in which courts have analyzed and ruled that a non-party cannot move to reopen a case. In *Tursom,* cited by CRW, the court denied a motion to intervene, not because the court considered and concluded that a non-party cannot re-open an administratively closed case, but because the movant did not cite to any cases supporting the proposition that a proposed intervenor, as a non-party, can move to reopen a case. *Tursom v. United States*, No. 20-20811, 2021 WL 1647888, at *1 (S.D. Fla. Apr. 27, 2021) ("Absent any support for the proposition that a proposed intervenor, as a non-party, can move to reopen a case . . . the Court concludes that the Intervenor's Motion is due to be denied."). However, courts have unreservedly reopened cases after granting motions to intervene. *See United States v. Colo. Organic Chem. Co., Inc.*, No. 98-01600, 2015 WL 4932200, at *2 (D. Colo. Aug. 19, 2015) (rejecting defendant's argument that a proposed intervenor cannot reopen a case that had been administratively closed for 15 years and granting intervention as "[the] [c]ourt has retained jurisdiction over this matter since this case was terminated in 2000 for the purpose of interpreting and enforcing the terms of the Consent Decree."); *Fla. Med. Ass'n, Inc. v. Dep't of Health, Educ.,*

& Welfare, No. 78-00178, 2011 WL 4459926, at *3 (M.D. Fla. May 18, 2011) (granting a motion to intervene and re-opening a case marked as closed on the court's electronic case filing system); *Wilton Miwok Rancheria v. Salazar*, No. 07-02681, 2010 WL 693420, at *1 (N.D. Cal. Feb. 23, 2010) (granting a motion to intervene and reopening a case). Therefore, the Court should reject CRW's argument that only a party can reopen a case.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, this Court should grant LSRA's Motion to Intervene.

Dated: June 16, 2021

Respectfully submitted,

/s/ Sylvia Lam
Sylvia Lam
Environmental Integrity Project
1000 Vermont Avenue NW, Suite 1100
Washington, DC 20005
Phone: (202) 888-2701
Fax: (202) 296-8822
slam@environmentalintegrity.org

Counsel for Plaintiff-Intervenor LSRA

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word-count limit of Local Rule 7.8(b) because, excluding the exempted parts of the document (*i.e.*, caption, tables, signature block, and footnotes), it contains no more than 5,000 words.

/s/ Sylvia Lam
Sylvia Lam

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2021 the foregoing motion and accompanying brief in support and attachments were filed using the CM/ECF system, which will provide service to the counsel of record registered on the CM/ECF system in this case.

/s/ Sylvia Lam
Sylvia Lam