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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, **Plaintiff,** **v.** **EXXON MOBIL CORP.,** **Defendant.**	SUPERIOR COURT OF NEW JERSEY LAW DIVISION UNION COUNTY **Docket No. UNN-L-3026-04** CIVIL ACTION REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE

Through intervention, Applicants seek a fair opportunity to question whether the settlement the parties are scheduled to propose to this Court tomorrow is fair, reasonable, in the public interest, and in furtherance of the Spill Act and other laws. The Court cannot count on the existing parties, who are aligned in favor of settlement approval, to raise such questions. The questions are serious, for reasons Applicants described in their opening brief and public comments on the parties' draft settlement: the Department has proposed surrendering the lion's share of its $8.9 billion natural-resource-damage claim at Bayway

and Bayonne, along with natural-resource-damage claims at more than eight hundred other sites and under other laws that were not (until now) part of this litigation. The Department has not explained—let alone justified—its decision to give up so much, for so relatively little. The Court must now do an independent review of the settlement's merits. It should not rush to judgment simply because the existing parties want it to.

Applicants satisfy New Jersey's liberal tests for as-of-right and permissive intervention, and their participation in settlement-review proceedings will foster closer and more critical review of the terms on which the Court should resolve this case—without undue delay or prejudice to the existing parties. The Court should grant Applicants' motion.

I. Applicants Need Not Demonstrate Independent "Standing" to Enforce the Spill Act Against Exxon, and Could Meet that Requirement if It Applied

Exxon's theory that Applicants cannot intervene because they "lack the standing" to sue the company under the Spill Act, Exxon Opp'n 2, ignores the plain language of the intervention rules and Appellate Division precedents on the application of those rules in Superior Court cases. The rules, on their face, do not condition intervention on any showing that the movant could independently pursue the same case in which it seeks to intervene. See R. 4:33-1, R. 4:33-2. New Jersey courts routinely grant intervention as of right based on a movant's timely showing that it has an interest in the case that the existing parties no longer (or may no longer) adequately represent. See, e.g., Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 571-72 (App. Div. 1998); Warner Co. v. Sutton, 270 N.J. Super. 658, 665 (App. Div. 1994). Similarly, courts permit intervention based on a prompt showing that a movant wishes to pursue a question of law or fact common to the main action, and can do so without causing undue delay or prejudice to existing parties. See Applicants' Opening Br. in Supp. of Intervention (filed June 10, 2015) (hereinafter "Opening Br.") 14 (citing

Meehan, supra, 317 N.J. Super. 563, and other cases). The intervention tests are "liberally construed." Am. Civil Liberties Union of N.J., Inc. v. Cnty. of Hudson, 352 N.J. Super. 44, 67 (App. Div.) (quoting Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 341 (1996)), certif. denied, 174 N.J. 190 (2002).

Exxon's argument is also misplaced because Applicants can pursue Spill Act claims. New Jersey's Environmental Rights Act empowers private persons to pursue claims under laws the Department is primarily responsible for enforcing, when those persons assert that the Department has "failed in its mission, neglected to take action essential to fulfill an obvious legislative purpose, or . . . not given adequate or fair consideration to local or individual interests." Howell Twp. v. Waste Disposal, Inc., 207 N.J. Super. 80, 96 (App. Div. 1986). The gist of Applicants' complaint-in-intervention is that the Department has done just that: breached its duty to act as a trustee of New Jersey's natural resources and public fisc, by agreeing to a settlement that undermines the Spill Act's purposes and does not adequately or fairly account for the public's interests in resource restoration and replacement. See Opening Br. 13; Complaint (filed June 10, 2015) ¶¶ 29-44. Thus, even if Exxon were right that Applicants need some independent basis for enforcing the Spill Act in order to intervene in this case, Applicants have that basis.

II. Applicants Have Interests the Department Cannot Adequately Represent

A. Applicants Have Clear, Cognizable Interests in this Case

In contending that Applicants' interests are too "indirect," Exxon Opp'n 6, "general," id. 10; or varied, Dep't Opp'n 6, to support intervention as of right, the parties misconstrue the law and the evidence Applicants have submitted. All Rule 4:33-1 says is that Applicants must have "an interest relating to the property or transaction" at issue in this case that "may"

be impaired, as a practical matter, by its resolution. R. 4:33-1. Applicants have worked for decades to protect and restore New Jersey's natural resources, including resources at Bayway and Bayonne. Opening Br. 2-6 (citing Certifications). Their members include more than 100,000 New Jersey citizens who will be harmed if the Department does not collect the funds necessary to restore and replace the resources Exxon has damaged and destroyed.[1] See, e.g., Certification of David Pringle (filed June 10, 2015) ¶ 8. Although Exxon insists that Applicants' and their members' interests in this case are not cognizable, Exxon Opp'n 7-8, New Jersey's courts have recognized that movants' ecological, aesthetic, and recreational interests are legitimate bases for intervention, see Opening Br. 12 (citing cases).

That other members of the public share Applicants' concerns about the parties' settlement proposal, see Exxon Opp'n 9-10; see infra note 2, has no bearing on Applicants' formal intervention rights under the language of Rule 4:33-1, and underscores the practical value of their intervention. In deciding whether to approve the settlement, the Court must weigh not only the interests of its proponents, but also those of nonparties and the broader public. See, e.g., Builders League of S. Jersey, Inc. v. Gloucester Cnty. Util. Auth., 386 N.J. Super. 462, 469-70 (App. Div. 2006) (describing purposes of fairness hearings on proposed settlements); United States v. Kramer, 19 F. Supp. 2d 273, 280 (D.N.J. 1998) (reviewing proposed Spill Act and CERCLA settlements and noting court's duty to consider the interests of "the public at large," as well as those of the settling parties and any nonsettlors).

[1] Contrary to Exxon's contention, see Exxon Opp'n 7, Applicants' concerns about the proposed dollar amount alone are sufficient grounds for finding that the Department does not adequately represent Applicants. See In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 712 F. Supp. 1019, 1024 (D. Mass. 1989) (disagreement between movant-intervenors and governments concerning the appropriate quantum of natural resource damages defeated adequate representation, notwithstanding governments' and movant-intervenors' general shared interest in environmental restoration).

The public's interests deserve especially careful consideration here, given the scope of the natural-resource-damage liabilities and restoration and replacement obligations from which the Department now proposes releasing Exxon. It would undermine the purposes of the intervention rules, and be deeply ironic, for the Court to deny intervention to Applicants because there has already been so much public outcry about the settlement.[2]

B. The Department Cannot Adequately Represent Applicants' Interests

Both parties claim that the Department adequately represents (or should be presumed to adequately represent) Applicants' interests—even as the Department prepares to join Exxon in asking the Court to approve a settlement Applicants will ask the Court to reject. As common sense dictates, and authority Applicants cited earlier confirms, once a government party proposes a settlement a movant-intervenor opposes, the governmental party and movant are adverse for purposes of that litigation, and the governmental party can no longer adequately represent the movant. See, e.g., Warner, supra, 270 N.J. Super. at 665 (government defendants' and movant-intervenor citizens' interests diverged when defendants agreed to a settlement the groups viewed as inadequate to protect the environment, and sought to invalidate).

Given the adversity that now exists between the Applicants and the Department, the Court need not assume the Department has acted in bad faith or colluded with Exxon to find that the Department does not adequately represent Applicants. Cf. Dep't Opp'n 12-13 (citing cases that recognize representation of adverse interests and lack of diligent prosecution as independent bases for defeating any presumption of adequate

[2] Based on Applicants' initial review of electronic copies provided on CD by the Department's counsel, the Department received about 15,000 comments; virtually all urged it to reject the settlement. Opposing petitions garnered approximately 75,000 signatures.

representation). In deciding whether to allow private intervenors to join agency-enforcement cases, courts are mindful of the reality that agencies are beholden to broad policy mandates and thus often face different constraints than intervenors.[3] For example, the Department may hesitate to present otherwise reasonable and relevant interpretations of the Spill Act and other laws its proposed settlement invokes because of positions it has taken earlier in this case, or elsewhere.[4] The Department and its counsel, which answer to the Governor, may also face political pressure not to insist that settlement money be reserved for the kind of natural-resource-restoration and -replacement work the Department pursued this case to fund. The Court need not cast aspersions—or prejudge anyone's arguments, see infra Part IV—to recognize that the Department is not in a position to present the full range of reasonable arguments about the merits of a settlement it already publicly supports.

Because Applicants have already lodged a complaint against the Department, supra Part I, and anticipate asking this Court to reject the same settlement the Department wants approved, this case has little in common with those where movant-intervenors sought to fight alongside the government enforcer, and thus slightly expand on or refine the terms of the government's chosen remedy. Cf. City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 11-12 (App. Div. 2006) (municipal plaintiff in condemnation case presumed to adequately represent developer who shared goal of paying no more than fair market value). Cases about judicial deference to agencies acting in their regulatory capacities, see, e.g.,

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[3] See, e.g., Kleissler v. U.S. Forest Serv., 157 F.3d 964, 973-74 (3d Cir. 1998) (recognizing the potential for divergence between the plaintiff agency's complex and shifting policy interests and the narrower and more-fixed interests of private applicant-intervenors).

[4] See, e.g., Sierra Club v. Glickman, 82 F.3d 106, 110 (5th Cir. 1996) (recognizing, as a basis for allowing a trade group that shared some common concerns with party agency to intervene, that the agency was constrained in its argument by a prior court judgment).

Exxon Opp'n 10, are also inapposite: this is an enforcement case that the Court must resolve based on its independent review of the facts and law underlying the settlement and application of the settlement-review standards.[5]

In light of the clear conflict between the Department's current litigation position and Applicants' interests, the Department cannot adequately represent Applicants. Applicants are entitled to intervene and try to protect their interests by challenging the settlement.

III. Applicants' Motion is Timely

Applicants moved to intervene three business days after the close of public comment on the draft settlement, two weeks before this Court's deadline for intervention motions, and more than a month before the date the Court first set for a settlement-merits hearing (before accounting for interventions). See June 9, 2015 Scheduling Order 1-2; Opening Br. Ex. A [Public Notice]. Exxon does not dispute that Applicants' motion is timely for purposes of intervention as of right, and prompt for purposes of permissive intervention. The Department overlooks that timeliness and promptness are measured by reference to the time at which it became clear no existing party could represent the movant's interests—not the time the movant first became aware of the litigation.[6] See Dep't Opp'n 13-14. The reason for this rule is obvious: it would be inefficient for concerned citizens to intervene in

[5] See, e.g., Builders League, supra, 386 N.J. Super. at 465 (considering whether settlement that implicated significant public interests was "fair and reasonable and in compliance with controlling law"); Kramer, supra, 19 F. Supp. 2d at 280 (reviewing Spill Act and CERCLA settlement to determine whether it was "fair, reasonable, and faithful to the objective[s] of the governing statute[s]").

[6] See, e.g., Warner, supra, 270 N.J. Super. at 665-66 (promptness of intervention measured against time when plaintiff agency proposed specific settlement terms that threatened movant's interests—notwithstanding movant's earlier awareness of litigation and participation in public hearings); cf. Meehan, supra, 317 N.J. Super. at 571-72 (timeliness evaluated by reference to entry of a consent judgment that confirmed divergence in plaintiff's and prospective intervenors' interests).

each new enforcement case the Department files, just to guard against the possibility that the Department's interests may, a decade down the road, diverge from their own. See, e.g., In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 712 F. Supp. 1019, 1023-24 (D. Mass. 1989). Applicants filed their motion promptly after learning—following announcement of the draft settlement—that the Department no longer adequately represents their interests. This is the right time for them to seek intervention.

IV. Applicants' Participation in Settlement-Review Proceedings Will Not Unduly Delay the Case or Prejudice the Existing Parties

Applicants seek to intervene to address the sole question now before the Court: does the settlement the Department and Exxon will file tomorrow meet the relevant approval standards?[7] Questioning the merits of settlement terms proposed by existing parties, to inform the Court's independent review, is an established and constructive role for intervenors to play in cases that implicate substantial public interests. See, e.g., Warner, supra, 270 N.J. Super. at 666-67; In re Acushnet River, supra, 712 F. Supp. at 1023-25. The parties' claims that there is nothing for the Court to understand that the trial record does not already explain obscures that their settlement covers more than 800 sites, and includes releases under several statutes, that were never part of this case. See Opening Br. 8 & Ex. C [Comments] at 22-23. It would be clear error for the Court to approve the settlement without gathering adequate information about these new sites and releases.[8] But the

[7] The Department does not dispute that Applicants satisfy the commonality test for permissive intervention. Applicants respond to Exxon's claim that they fail the test because they lack "standing" to sue under the Spill Act. Exxon Opp'n 14; see supra Part I.

[8] See, e.g., In re MTBE Prods. Liab. Litig., 33 F. Supp. 3d 259, 269, 271 (S.D.N.Y. 2014) (rejecting proposed settlement that released defendant's prospective environmental liabilities at thousands of gas station sites, most on which the Department had provided no site-specific analysis, and about which the court had "little or no[]" information).

settlement would warrant close and critical review even if it were limited to the $8.9 billion Spill Act claim the parties tried last year, because the Department has nearly abandoned that claim. See Opening Br. 6-7 & Ex. C [Comments] 6-21. The Department owes the Court and public an explanation for forsaking, at the eleventh hour, its effort to restore and replace the natural resources lost at Bayway and Bayonne. Applicants want a chance to probe that explanation before the Court decides whether to accept it.

That it may take some extra time and work for the Court to consider the perspectives of movant-intervenors who do not support the parties' chosen resolution does not make intervention prejudicial, as other courts have recognized. See, e.g., Chesterbrooke Ltd. P'ship v. Planning Bd. of Twp. of Chester, 237 N.J. Super. 118, 125-26 (App. Div. 1989) (finding neighbors of proposed subdivision were entitled to intervene and appeal judgment defendant planning board had accepted, even though this meant plaintiff developer would have to defend the appeal, because this kind of delay was "inherent in" intervenors' efforts to protect their interests and thus "cannot alone form the prejudice necessary to defeat [intervention]"). Nor, for the same reasons, does the possibility of appeal. Ibid. Any incidental delay Applicants' intervention may cause here is warranted by the unique and divergent perspective they will bring to settlement-review proceedings. See In re Acushnet River, supra, 712 F. Supp. at 1023-25 (characterizing intervention to challenge and possibly appeal a settlement on natural resource damage and other issues as "quite limited," in the context of the whole case, and noting the value of adversarial debate on the settlement).

The parties' claims that public comments already include all the settlement critiques the Court may find useful are patently premature. They have yet to tell the Court what settlement terms they want it to consider, and to supplement the Department's bare public-

comment notice with substantive explanation and argument on those terms' merits. See June 9, 2015 Scheduling Order (July 9 deadline for settlement proposal). Once Applicants receive and review this information, they will be able to present a more fully formulated position on the role they wish to play in settlement-review proceedings. The Court can use its discretion to manage those proceedings in a way that honors the interests of both existing parties and intervenors, without sacrificing judicial economy. For now, Applicants seek only a ruling that they are entitled to intervene (or in the alternative, are permitted to), so they can question and promote more searching review of the parties' settlement proposal.

CONCLUSION

The environmental and economic issues at the heart of this litigation and the parties' proposed settlement touch millions of people. The Court should not act on the settlement without considering a range of views on what terms are fair, reasonable, in the public interest, and in furtherance of the Spill Act and other relevant laws. Applicants meet the liberal tests for mandatory and permissive intervention, and will add a fresh, unrepresented perspective and adversarial sharpness to settlement-review proceedings. The Court should allow them to join as full parties as it decides how to bring this important case to a close.

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Dated: July 8, 2015

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