

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

FILED WITH THE COURT

JUL 13 2015

PREPARED BY THE COURT

Michael J. Hogan, J.S.C., ret. Recall

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	SUPERIOR COURT OF NEW JERSEY
	:	UNION COUNTY
	:	LAW DIVISION
Plaintiff,	:	
v.	:	DOCKET NO.: UNN-L-3026-04
	:	(Consolidated with UNN – L-1650-05)
	:	
EXXON MOBIL CORPORATION,	:	DECISION
	:	
Defendant.	:	

For the Plaintiff:

John J. Hoffman, Acting Attorney General
Richard F. Engel, Esq., Deputy Attorney General
Allan Kanner, Esq. and Elizabeth B. Petersen, Esq., Special Counsel to the Attorney General
(Kanner & Whiteley, L.L.C.)

For the Defendant:

Marc A. Rollo, Esq., Attorney for Defendant (Archer & Greiner P.C.)
Theodore V. Wells, Jr., Esq., Attorney for Defendant (Paul, Weiss, Rifkind, Wharton & Garrison LLP)
Alice A. Brown, Esq., Attorney for Defendant

For the Intervenors:

Susan J. Kraham & Selena Kyle, Attorneys for New York/New Jersey Baykeeper, New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, Environmental New Jersey, Natural Resources Defense Council, and New Jersey Audubon

Senator Raymond J. Lesniak, 20th Legislative District (Union)
Richard L. Rudin, Attorney for Senator Lesniak

HOGAN, M. J., P.J. Chancery. Retired T/A on Recall

I. STATEMENT OF FACTS

This decision concerns eight environmental interest groups' and a New Jersey State Senator's attempted intervention to oppose the settlement of a complex, eleven-year-old natural resources damages ("NRD") case. On August 19, 2004, the New Jersey Department of Environmental Protection ("DEP," "State," or "Department"), as the public's statutorily entrusted trustee of natural resources, filed two complaints against ExxonMobil Corporation ("Exxon").¹ The complaints alleged injuries to the soils, sediments, groundwater, and surface water² at Exxon sites known as the Bayway refinery in Linden, New Jersey ("Bayway") and the Bayonne former refinery in Bayonne, New Jersey ("Bayonne"). The DEP alleged that these injuries began when Standard Oil Company, Exxon's predecessor in interest, commenced industrial operations in 1877 at Bayonne and 1909 at Bayway. The DEP sought \$8.9 billion in damages for these injuries pursuant to N.J.S.A. 58:10-23.11 to -23.24, the Spill Compensation and Control Act ("Spill Act"), and common law theories of public nuisance, trespass, and strict liability. The State also sought to recover its natural resource damage assessment costs and counsel fees. The site remediation cleanup of Bayway and Bayonne was not a part of the State's claims because two 1991 Administrative Consent Orders ("ACOs") govern that issue.³ The underlying litigation experienced numerous pre-trial motions and two interlocutory appeals before it was assigned to the present judge for trial, which began January 2014 and concluded September 2014. A brief recap of these events is helpful to understanding the current motions.

¹ The complaints have since been amended and consolidated under the current docket number: UNN-L-3026-04 (consolidated with UNN-L-1650-05).

² Pursuant to a January 11, 2006 case management order, the case was bifurcated between the soil and sediment claims and the groundwater and surface water claims.

³ Exxon and the State voluntarily entered into these ACOs, and their provisions are not at issue in both the underlying litigation and these intervention motions.

On October 7, 2004, Exxon attempted to remove the case to the United States District Court for the District of New Jersey. This attempt was unsuccessful, and the matter was remanded back to the Superior Court by order dated March 24, 2005. On January 11, 2006, the DEP moved for partial summary judgment, seeking a determination that Exxon was strictly liable as a matter of law for all cleanup and removal costs under the Spill Act. N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 397 (App. Div. 2007). Exxon cross-moved for summary judgment on the ground that the Spill Act does not provide liability for loss of use of natural resources. Ibid. Judge Ross Anzaldi, sitting as motion judge, granted both motions in part, holding that Exxon was strictly liable and dismissing the DEP's claims for loss of use damages. Id. at 397-98. On appeal, Exxon did not contest Judge Anzaldi's strict liability ruling. Id. at 398. The Appellate Division, however, reversed Judge Anzaldi's loss of use ruling and held that loss of use damages "are a component of costs of mitigating damage to public natural resources." Id. at 402.

After the first interlocutory appeal, the DEP amended its complaint to include strict liability counts. N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp., 420 N.J. Super. 395, 398 (App. Div. 2011). Exxon moved for partial summary judgment on the strict liability count, claiming that it was barred by the statute of limitations. Ibid. The trial court agreed with Exxon and granted their motion for summary judgment. On appeal, the Appellate Division reversed and held that the statute of limitations did not bar the common law strict liability count because the common law could be considered part of the State's environmental laws, which have been legislatively granted an extension on their statute of limitations. Id. at 411.

After sixty-six days of a complex, contested bench trial, this court began work on its decision.⁴ In February 2015, before it rendered a decision, the parties informed the court that they had reached a proposed settlement. Under the terms of the settlement, Exxon agrees to pay the State \$225 million.⁵ In return, the State (1) releases with prejudice and covenants not to sue Exxon for all claims based on the discharge of contaminants onto the soil and sediments of Bayway and Bayonne; (2) dismisses the surface water claims without prejudice and agrees that the water claims can only be brought in the future in a multi-defendant action if a formal natural resource damage assessment is completed by the applicable trustee through a procedure that allows for Exxon's participation; (3) releases with prejudice and covenants not to sue Exxon for all NRD relating to Exxon Retail Stations located within the state (this excludes any claims involving any Exxon Retail Station where methyl tertiary butyl ether ("MTBE") has been discharged); (4) releases and covenants not to sue Exxon for all NRD relating to sixteen statewide facilities, including the Former Paulsboro Terminal #3045 that has been the subject of litigation in Gloucester County since 2007 ("Gloucester litigation") (Docket No. L-1063-07 consolidated with L-0563-03); and (5) agrees to defer the final remedy determination and remediation of Morses Creek until the cessation of refining operations.⁶

Further, the parties agreed that each party shall bear its own costs and expenses and that the agreement, with the exception of the remediation of Morses Creek, will not alter Exxon's obligations under the ACOs.⁷ Finally, the settlement states that "[n]othing contained in this

⁴ Both parties filed six pre-trial Rule 104 Motions to bar the testimony of the other sides' expert witnesses. Because this was a bench trial, the parties agreed to allow the experts to testify at trial. After trial, the court was to decide these 104 motions and include them in its opinion. In the interests of judicial economy, the parties agreed to this format because this was a bench trial, and thus, there was less chance of prejudice if the judge heard testimony he ultimately decided not to admit.

⁵ Proposed Settlement, Pg. 13.

⁶ *Id.* at 14-20.

⁷ *Id.* at 20-21.

Consent Judgment shall be considered an admission by [Exxon],”⁸ and it grants Exxon contribution protection “to the fullest extent possible pursuant to Section 113(f)(2) of [the Comprehensive Environmental Response, Compensation, and Liability Act] CERCLA, 42 U.S.C.A. §§ 9613(f)(2), the Spill Act, N.J.S.A. 58:10-23.11f.a.(2)(b) and any other statute, regulation, or common law principle that provides contribution rights against ExxonMobil”⁹

In accordance with N.J.S.A. 58:10-23.11e2, the State published a copy of the proposed settlement on the DEP’s website, published notice of the settlement in the New Jersey Registrar, and arranged for notice in twelve newspapers.¹⁰ Details of the settlement were made public April 6, 2015. The settlement immediately received extensive public backlash and has since been the topic of a number of media sources.¹¹ Although the DEP usually gives the public thirty days to comment on any proposed settlement, due to the heightened public interest, it extended the time period prescribed in N.J.S.A. 58:10-23.11e2 to sixty days. This “Public Comment Period” ended June 5, 2015, by which time the DEP had received around 16,000 public comments, the vast majority of which were opposed to the settlement. The purpose of these comments is twofold. First, in any settlement under the Spill Act, the DEP reviews them before it decides to make a formal application for approval of a settlement. Second, the court ultimately charged with approving a settlement can review them for assistance in determining if the settlement is fair, reasonable, and in the public interest.

On June 9, 2015, the New York/New Jersey Baykeeper, New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, Environment New Jersey, Natural Resources Defense Council, and New Jersey Audubon collectively filed a motion to

⁸ Id. at 23.

⁹ Id. at 25.

¹⁰ Id. at 25-26.

¹¹ Both local newspapers and national outlets such as the Philadelphia Inquirer, the New York Times, and Comedy Central’s “The Daily Show” have run stories on the proposed settlement.

intervene as of right under N.J. Ct. R. 4:33-1 or, alternatively, for permissive intervention under N.J. Ct. R. 4:33-2. On June 19, 2015, New Jersey State Senator Raymond Lesniak, individually and as a member of the New Jersey State Senate for the 20th Legislative District (Union), filed a motion seeking intervention under the same court rules. The environmental groups allege that “the Department inexplicably abandoned its duty as trustee of the State’s natural and financial resources” by settling with Exxon for “less than three cents on the dollar,” an amount they consider “suspiciously low.”¹² By doing so, they believe “the Department has failed to protect the public.”¹³ Further, they claim “the Department abruptly changed course” and that the “Settlement amount is woefully short of what the Department is legally entitled to receive and obligated to recover.”¹⁴

For these reasons, they “wish to be heard in opposition, to urge the Court to reject the sweetheart deal the Department and Exxon are poised to receive.”¹⁵ Their desired intervention would be limited to “seek[ing] to intervene to participate as plaintiffs in any proceedings relating to the Court’s consideration of the Settlement. In addition, should the Court enter a judgment approving the Settlement, Environmental Intervenors seek the right to appeal as a party.”¹⁶ They “seek only to challenge the legality and sufficiency of the Settlement, not to reopen trial proceedings or otherwise relitigate the case”¹⁷ and, if permitted to intervene, “will address solely the salient question the Court must decide: Should the Settlement be approved or disapproved.”¹⁸ If they are permitted to “simply brief and argue orally that, under prevailing law, the Court

¹² Brief Supporting Environmental Groups’ Motion to Intervene [hereinafter “Environmental Groups’ Brief”], Pg. 1.

¹³ Ibid.

¹⁴ Id. at 7.

¹⁵ Id. at 9.

¹⁶ Ibid.

¹⁷ Id. at 11.

¹⁸ Id. at 14.

should refuse to approve the Settlement,” they believe “they will present a legally driven perspective that neither primary party will offer.”¹⁹

Senator Lesniak alleges “the NJDEP is eviscerating the intent and purpose of the [Spill Act].”²⁰ He believes the DEP is not adequately representing New Jersey citizens and faults the DEP for “not publicly disclos[ing] any site-specific assessments as to the environmental damages caused by Exxon Mobil’s operations at” the non-Bayway/Bayonne facilities.²¹ He is also opposed to the settlement because he claims it allows Exxon “to deduct 35% and 9% from its federal and state corporate business taxes” and because it does not specify how the DEP will spend the money on remediation and restoration projects.²²

On July 9, 2015, the State formally moved for approval of the proposed settlement. The State and Exxon oppose the environmental groups’ and Senator Lesniak’s (collectively “Intervenors”) motions. The court held oral argument on the motions July 10, 2015.

II. INTERVENTION AS OF RIGHT

New Jersey Court Rule 4:33-1 states:

Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

Our courts have interpreted this rule as a four prong test:

The applicant must (1) claim “an interest relating to the property or transaction which is the subject of the action,” (2) show he is “so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that

¹⁹ Id. at 14-15. Although this was their original stated intent, the environmental groups appear to have changed and expanded the reasons they seek to intervene. See infra Section III (discussing expansion of purpose in their reply brief and at oral argument).

²⁰ Brief Supporting Senator Lesniak’s Motion to Intervene [hereinafter “Senator Lesniak’s Brief”], Pg. 2.

²¹ Id. at 3.

²² Id. at 4.

interest,” (3) demonstrate that the “applicant’s interest” is not “adequately represented by existing parties,” and (4) make a “timely” application to intervene.

Chesterbrooke Ltd. P’ship v. Planning Bd. of Twp. of Chester, 237 N.J. Super. 118, 124 (App. Div. 1989). “The substance of the rule permitting intervention as of right is also ordinarily construed quite liberally.” ACLU of N.J., Inc. v. Cnty. of Hudson, 352 N.J. Super. 44, 67 (App. Div. 2002) (citing Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998)). “As the rule is not discretionary, a court must approve an application for intervention as of right if the four criteria are satisfied.” Meehan, 317 N.J. Super. at 568 (citing Chesterbrooke, 237 N.J. Super. at 124).

The court has reviewed not only the binding New Jersey caselaw but also the persuasive authorities from the federal circuit courts of appeals. Because Rule 4:33-1 “is taken substantially from Fed. R. Civ. P. 24,” Twp. of Hanover v. Town of Morristown, 118 N.J. Super. 136, 140 (Ch. Div. 1972),²³ New Jersey courts “may look to the federal decisions for guidance in construing the rule.” Testut v. Testut, 32 N.J. Super. 95, 99 (App. Div. 1954) (citing Lang v. Morgan’s Home Equip. Corp., 6 N.J. 333, 338 (1951)); see also Chesterbrooke, 237 N.J. Super. at 125 (citing cases from the Court of Appeals for the District of Columbia Circuit and United States Supreme Court to aid in its interpretation of N.J. Ct. R. 4:33-1). Based on this review, the court finds that the environmental groups satisfy the “interest” and “impair or impede his ability to protect that interest” prongs. Because the environmental groups do not meet the “adequate representation” and “timeliness” prongs, however, the court denies their motion for intervention as of right. The court finds that Senator Lesniak fails all four Rule 4:33-1 prongs.

²³ Federal Rule of Civil Procedure 24(a)(2) states, “On timely motion, the court must permit anyone to intervene who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”

II.A. The Intervenor's Interest Relating to the Property That is the Subject of This Action

The environmental groups have an “interest relating to the property or transaction which is the subject of the action.” N.J. Ct. R. 4:33-1 (emphasis added). Our courts do not require potential intervenors to have an interest “in” a plaintiff’s or defendant’s property.²⁴ Rather, it is sufficient that intervenors own property adjacent to the property at issue. Chesterbrooke, 237 N.J. Super. at 124 (finding that such an interest “relates to” the property which is the subject of the action). Furthermore, the Appellate Division has found that “nonprofit corporations having the declared purpose of protecting open spaces and the environment . . . and the preservation of wildlife” meet the interest prong, especially when many members of the intervening groups reside in the township and live adjacent to the site. Warner Co. v. Sutton, 270 N.J. Super. 658, 660 (App. Div. 1994) (finding that intervenors had an interest because, “Many members of the movant groups reside in Maurice River Township. Some live adjacent to the Warner site.”) The environmental groups meet these requirements.

“New York/New Jersey Baykeeper is a nonprofit, membership-based environmental organization that advocates for the preservation, protection, and restoration and the Hudson-Raritan Estuary.”²⁵ “Baykeeper members and supporters, including more than 2,400 members in Northern New Jersey, use New Jersey waters, meadows, and wetlands for swimming, wading, fishing, birding, boating, kayaking, and a variety of other recreational, professional, and aesthetic purposes.”²⁶ The New Jersey Sierra Club “is a nonprofit organization dedicated to protecting and

²⁴ Exxon argues that the Intervenor cannot have an “interest” in this litigation because they lack standing to have brought the suit in the first place. This argument, however, ignores that fact that the Environmental Rights Act gives “access to the courts by *all* persons interested in abating or preventing environmental damage.” Twp. of Howell v. Waste Disposal, Inc., 207 N.J. Super. 80, 93 (App. Div. 1986). Private persons may also bring common law claims, such as the common law trespass and strict liability claims in this case.

²⁵ Environmental Groups’ Brief at 2.

²⁶ Ibid.

restoring the environment.”²⁷ “At the Bayway site, the Club has been involved in worker safety, toxic chemical cleanup, and reporting of air and water pollution violations for over twenty-five years.”²⁸ Clean Water Action “is a 1.2 million-member organization that works to protect the environment, health, economic well-being, and community quality of life.”²⁹ “The Delaware Riverkeeper is a full-time, privately funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed.”³⁰ “The Delaware Riverkeeper Network is a nonprofit environmental organization that champions the rights of communities to a Delaware River and tributary streams that are clean and healthy.”³¹ The organization “has members who live and recreate in areas directly influenced by Exxon sites included in the Settlement.”³²

“Environment New Jersey is one of the state’s largest citizen-based advocacy organizations, and is committed to protecting New Jersey’s environment for future generations by protecting the state’s land, air, and water, and by promoting a clean energy future.”³³ “The organization has over 20,000 dues-paying citizen members, including more than 1,700 members in Union County, 300 members in Hudson County, and 300 members in Gloucester County.”³⁴ Natural Resources Defense Council “is a public interest environmental advocacy organization with approximately 300,000 members in the United States, including more than 8,000 in New Jersey.”³⁵ “Over the last decade, NRDC has litigated cases to prevent air pollution and soil contamination in Bayonne, New Jersey, and Staten Island, New York; remediate dioxin contamination of Newark Bay, New Jersey; and remediate chromium contamination of soil in

²⁷ Ibid.

²⁸ Id. at 2-3.

²⁹ Id. at 3.

³⁰ Ibid.

³¹ Id. at 4.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Id. at 5.

Jersey City, New Jersey.”³⁶ New Jersey Audubon “is a privately supported, not-for-profit, statewide membership organization incorporated in New Jersey.”³⁷ “NJ Audubon fosters environmental awareness and conservation ethic; protects New Jersey’s birds, mammals, other animals, and plants, especially endangered and threatened species; and promotes preservation of New Jersey’s valuable natural habitats.”³⁸

The Bayway/Bayonne litigation, Gloucester litigation, and claims at Exxon Retail Stations all involve the State’s attempts to recover money for alleged damages to its natural resources. The eight environmental interest groups are interested in the protection, restoration, and recreational use of the State’s natural resources. Moreover, many of their members live at or near the sites in question. This is sufficient to satisfy the “interest” prong.

Senator Lesniak alleges that he has “been at the forefront on sponsoring environmental laws in New Jersey since [he has] been in the Legislature” and “was also a proponent of the Spill Act amendments in the early 1990s”³⁹ His “Senate District includes the Bayway neighborhoods of the Cities of Linden and Elizabeth”⁴⁰ According to his brief and certification, the local public officials of these cities and numerous residents have been nearly uniform in expressing their opposition to the proposed settlement.⁴¹ Indeed, 22,000 New Jersey residents have signed his online petition urging rejection of the settlement.⁴²

Despite these facts and allegations, for two reasons, the court finds that Senator Lesniak does not have an interest relating to the property or transaction which is the subject of this action. First, although Senator Lesniak’s district includes the Exxon sites and surrounding areas, this

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Senator Lesniak’s Brief at 2.

⁴⁰ Ibid.

⁴¹ Id. at 3.

⁴² Ibid.

cannot serve as an “interest” under Rule 4:33-1. There is no limiting principle to his assertion that he has an interest in this litigation because his district is affected. To allow a state legislator to intervene in a matter because it impacts his/her district would set a precedent by which any legislator could claim an interest any time litigation concerns property or transactions that affect his district.

Second, the court can find no case holding that a legislator has an interest due to the fact that an action impacts his district. The court does not doubt that he cares about natural resources and wants to see them restored. His political and public policy concerns, however, are distinguishable from the environmental groups’ concerns because Warner specifically stated that “nonprofit corporations having the declared purpose of protecting open spaces and the environment . . . and the preservation of wildlife” can have an interest in an action. Ibid. There is no binding New Jersey caselaw that holds state legislators who want to preserve open spaces and wildlife have a Rule 4:33-1 interest.

**II.B. The Disposition of This Action May Impair or Impede
the Environmental Groups’ Ability to Protect Their Interest**

The environmental groups meet the second Rule 4:33-1 prong because they are “so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect” their interest in the protection and restoration of natural resources located in New Jersey. N.J. Ct. R. 4:33-1 (emphasis added). The second prong does not present a high hurdle for potential intervenors because of its use of the word “may.” An intervenor does not have to show that the disposition of a case “will” impair or impeded his ability to protect his interest. In both the Bayway/Bayonne and Gloucester litigation, the DEP, as the public’s trustee of natural resources, seeks money from Exxon that it intends to use to restore injured natural resources. The disposition of these cases “may” impair or impede the environmental groups’

interest in these resources because should this court dismiss the State's claims for lack of sufficient evidence, the State will not recover any amount of money for the restoration of natural resources. If this occurs, the environmental groups and their members will not be able to use the resources for aesthetic or recreational purposes. See Meehan, 317 N.J. Super. at 571 (finding that concerns of diminished "quality and enjoyment of light, air, and quiet" relate to the subject property). The environmental groups, therefore, meet the second prong.

II.C. The DEP Adequately Represents the Intervenor's Interests⁴³

A potential intervenor's motion must fail if at least one of the existing parties adequately represents the intervenor's interests. The third Rule 4:33-1 prong is a separate inquiry from the interest prong, and "courts must be careful not to blur the interest and representation factors together." Kleissler v. U.S. Forest Serv., 157 F.3d 964, 972 (3d Cir. 1998) (citing Solid Waste Agency v. U.S. Army Corps of Eng'rs, 101 F.3d 503, 508 (7th Cir. 1996)). For ten years, the Intervenor considered the DEP to adequately represent their interests. The Intervenor, however, believe that the DEP's settlement for "pennies on the dollar" constitutes an abdication of their fiduciary duty. Due to the difference in opinion on the proper NRD recovery amount, the Intervenor believe the DEP no longer adequately represents their interests and seek to intervene to brief and orally argue against the proposed settlement.

For the reasons elaborated on in the rest of Section II.C, the court finds that the DEP still adequately represents the Intervenor's interest in the protection and restoration of natural resources located in New Jersey. The DEP and Intervenor share the same ultimate goal, and

⁴³ Although the court finds that Senator Lesniak does not have a Rule 4:33-1 interest, see supra Part II.A., this Section was written with his intervention as of right motion in mind. The legal principles stated in this Section apply to both his and the environmental groups' motions. Even if Senator Lesniak had "an interest relating to the property or transaction which is the subject of the action and [was] so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest," N.J. Ct. R. 4:33-1, his intervention as of right motion would still fail because the DEP adequately represents his interests.

their quarrel is only over the means employed to achieve that goal. Further, the public comment period provided an adequate forum for the Intervenors to provide the court with arguments against the settlement. Because the environmental groups' intervention as of right motion hinges on the "adequate representation" prong, the court will devote a substantial portion of Section II to this issue.

This Section proceeds by first exploring the cases Intervenors cited in their briefs and explaining why these cases are distinguishable from the current matter.⁴⁴ The court will then discuss the federal courts of appeals' "ultimate goal" test and how this test works against the Intervenors. Finally, the court will discuss New Jersey courts' preference for finding adequate representation when statutes entrust agencies with certain duties and the deference given to these executive agencies. This deference closely mirrors the federal presumption of adequate representation that arises when parties share the same ultimate goal.

II.C.1. New Jersey Caselaw and the Intervenors' Authorities

The Intervenors rely on a number of cases that granted post-judgment applications for intervention for the sole purpose of appealing the judgment. The Appellate Division has consistently held that "[i]ntervention after final judgment is allowed, if necessary, to preserve some right which cannot otherwise be protected." Chesterbrooke, 237 N.J. Super. at 123 (citing Hanover, 118 N.J. Super. at 142). In Chesterbrooke, the plaintiff filed a subdivision approval for certain variances with the defendant planning board. Id. at 120. The board initially denied the application and the plaintiff filed suit. Id. at 121-22. After the matter was argued, the judge granted automatic approval of the subdivision application, a decision that the planning board decided not to appeal. Id. at 122. The day after the board announced its decision not to appeal,

⁴⁴ These cases were all cited by the environmental groups. The section of Senator Lesniak's brief on intervention as of right only cited two cases for general Rule 4:33-1 propositions.

two landowners filed an intervention motion for the sole purpose of appealing the trial court's ruling. Ibid. The trial court denied the motion, but the Appellate Division reversed, finding that once the board decided not to appeal, it no longer adequately represented the objectors' interest because "there was no one available to protect their interest through an appeal." Id. at 124-25.

Likewise, in Warner Co. v. Sutton, the Appellate Division allowed post-judgment intervention because it was necessary to preserve some right which otherwise could not have been protected. Warner, 270 N.J. Super. at 667. There, a plaintiff mining company's land was rezoned a "conservation zone," in which mining was prohibited. Id. at 660. The company filed an action against the planning board, alleging an unconstitutional taking. Ibid. The company and board reached a settlement, under which the company would receive a perpetual nonconforming-use status. Id. at 661. Citing environmental concerns, a number of nonprofit corporations filed a post-judgment intervention motion to appeal the settlement. Id. at 662. The Appellate Division reversed the trial court and allowed intervention, finding that after the consent order was entered, the board did not represent the intervenors' environmental interests. Id. at 665.

Finally, in Meehan v. K.D. Partners, L.P., the Appellate Division also allowed post-judgment intervention because it was necessary to preserve some right which otherwise could not have been protected. Meehan, 317 N.J. Super. at 571. There, a developer sought use of a variance from a planning board "to allow the conversion of an existing hotel to an eight-unit hotel with kitchen facilities." Id. at 564. "The application was successful, but a neighboring property owner, plaintiff James P. Meehan, filed an action in lieu of prerogative writs in the Law Division challenging the settlement." Id. at 565. The Law Division voided the approval, but while the appeal was pending, Meehan and the developer entered a settlement that would allow the variance to go through. Ibid. Thirty days after the consent order was signed, Thaddeus

Barkowski, another adjacent property owner, filed a motion to intervene, claiming that the variance would diminish his property value and lessen the quality of enjoyment of light, air, and quiet. *Id.* at 565, 571. The Appellate Division found that although Meehan adequately represented Barkowski’s environmental and property value concerns prior to the settlement, once Meehan agreed to allow the variance to proceed, their “interests were no longer parallel.” *Id.* at 571.

The Intervenors believe these three cases aid their cause because they all granted intervention motions concerning environmental matters. A closer inspection of these cases’ reasoning and fact patterns compels this court to reach a different result. In three respects, these cases are distinguishable from the present matter. First, these three cases all dealt with intervention motions filed post-judgment for the purpose of appealing a judgment that neither original party wanted to appeal. “There is a significant difference between intervening at an appellate level to advance arguments on behalf of uniquely interested parties . . . and intervening at the trial level as an interested party.” *City of Asbury Park v. Asbury Park Towers*, 388 *N.J. Super.* 1, 12 (App. Div. 2006) (citations omitted). These cases, therefore, are not directly on point because this court has neither approved nor rejected the settlement.

Second, these three cases found lack of adequate representation because intervention was necessary to preserve some right which could not otherwise be protected. Here, the environmental groups seek to intervene to “simply brief and argue orally that, under prevailing law, the Court should refuse to approve the Settlement,” and they believe “they will present a legally driven perspective that neither primary party will offer.”⁴⁵ Likewise, Senator Lesniak seeks to intervene “for the purpose of arguing that the proposed Consent Judgment . . . should be

⁴⁵ Environmental Groups’ Brief at 14-15.

disapproved by the court.”⁴⁶ They are correct that at the Settlement Hearing to occur July 21, 2015, neither original party is likely to offer arguments against the settlement. However, the Intervenor, along with thousands of other individuals, have already voiced their objections to the settlement through the statutorily mandated public comment process.⁴⁷ On June 12, 2015, the DEP provided the court with these comments, and the court has been extensively reviewing the comments for arguments both for and against the settlement. This case, therefore, is unlike Chesterbrooke where the intervenors had no avenue to voice their objections. See Chesterbrooke, 237 N.J. Super. at 124-25.

In essence, the Intervenor has already done that which they seek to do through intervention: argue to the court against the settlement. Cf. United States v. Metro. Dist. Comm’n, 865 F.2d 2, 5 (1st Cir. 1989) (finding adequate representation where potential intervenors “had other avenues for influencing the decisions”). Furthermore, at all times since the DEP filed its complaint, the DEP has, on behalf of the public, been the entity that has prosecuted this case, conducted a natural resource damage assessment, retained outside counsel, and hired numerous expert witnesses to further its cause. This is not a case where Intervenor possess “intimate knowledge as to what is going on.” ACLU, 352 N.J. Super. at 65 (agreeing with the trial court that because “the real party in interest here is the United States of America and presumably it has intimate knowledge as to what is going on with regard to the continuing investigation” the County of Hudson did not adequately represent its interests (internal quotation marks omitted)).

The court does not find the Intervenor’s contention that neither original party is likely to make arguments against the settlement at the July 21, 2015 hearing to be a reason warranting intervention. Any time the DEP brings a NRD case against an individual defendant and the case

⁴⁶ Senator Lesniak’s Brief at 1.

⁴⁷ Environmental Groups’ Brief at 2-3, 5, 8-9, 11.

settles, it is unlikely either the DEP or the defendant will argue against the settlement if a hearing occurs. Therefore, there is no limiting principle to the Intervenor's contention. If they were allowed to intervene here because neither the DEP nor Exxon will argue against the settlement, then it would set a precedent that allows movants to intervene in any NRD case. The court sees the Legislature's adoption of the public comment period as evidence that they did not intend for this result to occur. Rule 4:33-1 is to be construed liberally, not limitlessly.

Third, Chesterbrooke, Warner, and Meehan are distinguishable from this case because in those cases, the original party and the potential intervenor started out with the same ultimate goal, but their goals later diverged. In those cases, original parties adequately represented the potential intervenors' aesthetic, environmental, and property value goals, but ceased to further those goals when they settled. The DEP has settled this case, but it still shares the same ultimate goal with the Intervenor: the protection and restoration of natural resources located in New Jersey. As the following Section explains, when parties still share the same ultimate goal and only disagree on the means or strategy employed to achieve that goal, the federal courts have found adequate representation.

II.C.2. The Intervenor and DEP Share the Same Ultimate Goal

In 1977, the year the Spill Act came into effect, the Legislature found and declared "that the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction" N.J.S.A. 58:10-23.11a. With the passage of the Spill Act, the Legislature intended "to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances" Ibid. Specifically, the Legislature charged the DEP with the duty of

“facilitat[ing] and coordinat[ing] activities and functions designed to clean up contaminated sites in this State.” Ibid.

In 1991, the DEP began to perform its fiduciary duty with regard to the Bayway and Bayonne sites when it convinced Exxon to enter into two ACOs for the remediation of the sites. With the filing of the 2004 complaints, the DEP began its attempt to recover damages from Exxon for Bayway and Bayonne that it intends to use to restore and replace damaged natural resources in New Jersey. Likewise, the DEP began a similar pursuit in 2007 by bringing a NRD claim against Exxon for contamination at its former Paulsboro site. The Intervenors do not want anything that the DEP does not want. Both parties seek the remediation of contaminated sites and the restoration/replacement of injured natural resources. Because these ultimate goals are the same, the court believes a presumption of adequate representation should arise, a presumption the Intervenors have done nothing to rebut.

The First, Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits, along with the United States District Courts for the District of Utah, Eastern District of Missouri, and Southern District of Ohio have all held that where the party seeking to intervene has the same ultimate goal as a party already in the suit, a presumption of adequate representation arises. Prete v. Bradbury, 438 F.3d 949, 956 (9th Cir. 2006); Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 215 (11th Cir. 1993); Wade v. Goldschmidt, 673 F.2d 182, 186 n.7 (7th Cir. 1982); Moosehead Sanitary Dist. v. S. G. Phillips Corp., 610 F.2d 49, 54 (1st Cir. 1979); U.S. Postal Serv. v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978); Virginia v. Westinghouse Electric Corp., 542 F.2d 214, 216 (4th Cir. 1976); Ordinance Container Corp. v. Sperry Rand Corp., 478 F.2d 844, 845 (5th Cir. 1973); Phila. Electric Co. v. Westinghouse Electric Corp., 308 F.3d 856, 859-60 (3d Cir. 1962); SEC v. Am. Pension Servs., No. 2:14-cv-

00309-RJS-DBP, 2015 U.S. Dist. LEXIS 6782, at *14 (D. Utah Jan. 20, 2015); United States v. Bliss, 132 F.R.D. 58, 61 (E.D. Mo. 1990); Piedmont Paper Prods., Inc. v. Am. Fin. Corp., 89 F.R.D. 41, 44 (S.D. Ohio 1980). To overcome this presumption, intervenors “must produce something more than speculation as to the purported inadequacy,” and “ordinarily must demonstrate adversity of interest, collusion, or nonfeasance.” Moosehead, 610 F.2d at 54. The inadequacy of representation element “is not met when the applicants present only a difference in strategy.” SEC v. TLC Invs. & Trade Co., 147 F. Supp. 2d 1031, 1042 (C.D. Cal. 2001) (citing Nw. Forest Res. Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996)). Furthermore, a potential intervenor’s concern that the plaintiff recover the full amount to which they are entitled is not a sufficient reason to find inadequacy of representation. See Moosehead, 610 F.2d at 54 (finding adequate representation even when potential intervenor “Maine wants [plaintiff] Moosehead to collect as much as possible”); Phila. Electric Co., 308 F.2d at 859 (“To the extent that the concern of the Commission is that the plaintiff recover the full amount to which it is entitled, the Commission’s interest and that of the plaintiff are identical. . . . We conclude, therefore, that any interest the Commission may have in the adequacy of the plaintiff’s prospective recovery cannot be a basis for intervention as of right.”).

Here, Intervenors have the same ultimate goal as the DEP: the recovery of money from Exxon to use to replace and restore natural resources in New Jersey. The Intervenors seek to intervene because they take issue with the amount the DEP would receive under the proposed settlement. This case has been ongoing for eleven years, and Exxon has fiercely contested the DEP’s claims. All parties have always known that it could conclude in one of three ways: (1) this court could dismiss the DEP’s claims and the DEP could recover \$0; (2) the DEP could recover the full amount of \$8.9 billion; or (3) the amount the DEP recovers, either through litigation or

settlement, could be somewhere in between. After last year's lengthy trial, for any number of reasons the DEP could have realized their hand was not as strong as they originally believed. As the public's trustee, they could have believed that the best strategy was to settle the case and take a certain amount of money over the prospect of no money.

At this stage, the court does not pass judgment on the fairness and reasonableness of the proposed settlement. This will be done after the July 21, 2015 hearing. All the court is saying is that the Intervenor's preference for a different strategy, SEC, 147 F. Supp. 2d at 1042, and concern over the amount recovered, Phila. Electric Co., 308 F.2d at 859, is not enough to meet the adequate representation prong. The Intervenor has not demonstrated adversity of interest, collusion, or nonfeasance. Moosehead, 610 F.2d at 54. They have not even alleged misfeasance, let alone nonfeasance. Cf. Prete, 438 F.3d at 957 & n.9 (noting that courts find adequate representation when the original party "vigorously defends" that action); Asbury Park, 388 N.J. Super. at 8-9 (finding that the city "more than adequately represented" the potential intervenors when it "zealously and successfully opposed" a condemnation proceeding). Nor have the Intervenor claimed they did not receive notice of the public comment period so as to allow them to submit feedback on the settlement.

In an attempt to overcome the "ultimate goal" test, the Intervenor relies on In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019 (D. Mass 1989). At first blush, this case appears to support the Intervenor's position. There, the United States District Court for the District of Massachusetts granted environmental interest groups' petition for intervention who were challenging the adequacy of a \$2 million settlement recovery. Acushnet River, 712 F. Supp. 2d at 1022.⁴⁸ A closer review of the case, however, reveals that it is easily distinguishable from

⁴⁸ Although it was a permissive intervention motion, the court still discussed the adequate representation prong. Acushnet River, 712 F. Supp. at 1022-23, 1024.

the present matter. Under CERCLA, the trustees argued that “the proper measure of natural resource damages is the *lesser* of the costs of restoring or replacing the injured resources and the resources’ lost use value.” Id. at 1024 (internal quotation marks omitted). The Acushnet River intervenors believed the measure of damages should be “the cost of restoration or replacement of the natural resources, or failing that, of the acquisition of equivalent resources, *plus* the lost use value.” Ibid. Thus, the court found that the ultimate goal divergence did not concern the recovery amount, but rather “the proper measure of damages.” Ibid. (emphasis added).

In the present case, because the dispute is only over the recovery amount and not the proper measure of damages, the Intervenor do not satisfy the adequate representation prong. At all relevant times, the DEP has sought to have Exxon pay for the sites’ remediation through the ACOs and attempted to recover lost use damages to use to restore and replace injured natural resources. Exxon, 393 N.J. Super. at 401-02. This is exactly what the Intervenor want, and this court will not allow intervention when the Intervenor seek no relief other than that which the DEP seeks. Virginia, 542 F.2d at 216 (“Nonetheless, we find that Virginia has not met its burden. Virginia seeks no relief other than that which VEPCO seeks for itself.”).

The environmental groups also do not meet the adequate representation prong because they are public interest groups whose concerns closely parallel those of a public agency. The Third Circuit has held that a “government entity charged by law with representing a national policy is presumed adequate for the task, particularly when the concerns of the proposed intervenor, *e.g.*, a ‘public interest’ group, closely parallel those of the public agency.” Kleissler, 157 F.3d at 972 (citations omitted). To overcome this presumption, intervenors must make a “strong showing of inadequate representation.” Ibid. (citing Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996)); see also Prete, 438 F.3d at 957 (requiring a “very compelling showing to

the contrary”). “[I]ntervenors should have an interest that is specific to them.” Kleissler, 157 F.3d at 972. Intervenors have not overcome this presumption of adequate representation because their interests are general, rather than specific, and they have not pled any facts to show why the DEP cannot adequately represent them.

Moreover, during oral argument, the Intervenors admitted that because they are only challenging the settlement, if the underlying litigation had been allowed to proceed to its natural end, they would not have filed these motions before the court rendered a decision.⁴⁹ This concession at oral argument that they are “primarily concerned with the outcome of the settlement negotiations, and that [their] interests at trial would be adequately represented by [the DEP], is significant. [This court fails] to see how a party which admittedly is adequately represented at trial by parties to the action, is somehow entitled *as of right* to participate in settlement proceedings.” Virginia, 542 F.2d at 216.

The “ultimate goal” test’s reasoning is equally applicable to Rule 4:33-1. In New Jersey, when parties share the same ultimate goal, one “who is interested in pending litigation should not be permitted to stand on the sidelines, watch the proceedings and express his disagreement only when the results of the battle are in and he is dissatisfied.” Hanover, 118 N.J. Super. at 143. The Intervenors’ quarrel is with the means and strategy employed by the DEP against Exxon. The Intervenors have done nothing to overcome the presumption of adequate representation. Although this presumption comes from federal law, New Jersey courts apply a similar presumption when the case involves an administrative agency that has been statutorily entrusted with certain duties.

⁴⁹ Oral Argument Transcript, Lesniak, Pg. 7, Ln. 2-8; Oral Argument Transcript, Kyle, Pg. 44, Ln. 2-5; Oral Argument Transcript, Kyle, Pg. 47, Ln. 23 – Pg. 48, Ln. 15.

II.C.3. New Jersey Presumption Favoring Statutorily Entrusted Agencies

“There is a *prima facie* presumption that the power and discretion of governmental action has been properly exercised.” Miller v. Passaic Valley Water Comm’n, 259 N.J. Super. 1, 14 (App. Div. 1992) (citing Grundlehner v. Dangler, 51 N.J. Super. 53, 61 (App. Div. 1958)). “The good faith of public officials is to be presumed, their determinations are not to be approached with a general feeling of suspicion.” Ibid. (citing Ward v. Scott, 16 N.J. 16, 23 (1954); N.J. Highway Auth. v. Curry, 35 N.J. Super. 525, 532 (App. Div. 1955)). To overcome this presumption, challengers must “establish[] clearly that the [government’s] action was unreasonable.” Grundlehner, 51 N.J. Super. at 61. For example, in the field of taxation, it is presumed that the “government will act scrupulously, correctly, efficiently, and honestly.” F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 427 (1985). Applying these principles, the Appellate Division has consistently found adequate representation when the Legislature has entrusted municipalities and agencies with certain duties.

For instance, the Appellate Division has found that a municipality adequately represents a private developer in condemnation proceedings when that private entity is contractually obligated to pay a condemnation amount and seeks to intervene to challenge the valuation. Asbury Park, 388 N.J. Super. at 3, 8. The Appellate Division, referencing Miller, Grundlehner, and F.M.C. Stores, placed great weight on the fact that the Legislature made the municipality “the sole entity entrusted with the authority to acquire land by condemnation to carry out a redevelopment plan,” id. at 11-13, and noted that the potential intervenor had not made “a clear showing, by specifically articulated facts, of conduct by the public entity that palpably evinces a derogation of its fiduciary responsibilities.” Id. at 12.

Similarly, in New Jersey Division of Youth & Family Services v. D.P., 422 N.J. Super. 583 (App. Div. 2011), the Appellate Division denied resource parents' motion to intervene in a child's best interest hearing because the "process, as designed by the Legislature . . . precludes their participation as a party in the litigation." D.P., 422 N.J. Super. at 586. Because the resource parents had an opportunity to "impart information to the Family Part," just as Intervenors have the same opportunity by way of their public comments, the court found adequate representation. Ibid. The Legislature has made the DEP the public's trustee for natural resources, N.J.S.A. 58:10-23.11a, just as it has entrusted law guardians with the "object of ensuring [foster children's] well-being." D.P., 422 N.J. Super. at 593. Although it is admirable that Intervenors seek to replace and restore the state's natural resources, absent specifically articulated facts as to why the DEP cannot achieve its ultimate goal, the court sees no reason to allow them to intervene as of right.

The resource parents' ability to impart information to the Family Part was key to the court's D.P. determination. Likewise, the Appellate Division has also placed importance on the use of "fairness hearings" to approve settlements and has found adequate representation when this occurs. In Builders League of South Jersey, Inc. v. Gloucester County Utilities Authority, 386 N.J. Super. 462 (App. Div. 2006), when a developer objected "with the amount of the proposed settlement," the court found adequate representation because the trial judge employed a fairness hearing. Builders League, 386 N.J. Super. at 467-68. At the fairness hearing, which was used to determine if the settlement was reasonable, the developer was allowed to file written comments and objections. Id. at 468. Finding adequate representation, the court noted that the "hearing protected the public's interest while balancing the rights and concerns of the parties." Id. at 472.

Here, the court affords the DEP's decision to settle the case the same presumption that the municipality and administrative agency were afforded in the above mentioned cases. The Intervenors have done nothing to rebut this presumption. At best, they have stated that the settlement amount is "suspiciously low,"⁵⁰ and chided the DEP for not explaining why the settlement is fair, reasonable, and in the public interest and how they are to spend the settlement funds.⁵¹ The DEP's decision, however, is "not to be approached with a general feeling of suspicion." Miller, 559 N.J. Super. at 14. Further, fairness, reasonableness, and public interest are not factors at this stage. The court is currently considering the wealth of public comments, especially Intervenors', and is holding a hearing in less than two weeks to make that determination. Although the court finds that the DEP adequately represents the Intervenors' interests, neither Exxon, the State, nor Intervenors should read this decision as to impact the determination the court will make in the coming weeks.

In conclusion, even under a liberal reading of Rule 4:33-1, Intervenors fail the third prong because the DEP adequately represents their interests in the protection and restoration of New Jersey's natural resources. Through their public comments, the Intervenors have a mechanism to protect their interest. They share the same ultimate goal with the DEP and have not rebutted the presumption of adequacy that therefore arises. As the public's statutorily entrusted trustee for public resources, it is the DEP that has been charged with prosecuting the underlying action, and Intervenors have made no showing as to why the DEP cannot properly perform this function.

II.D. The Intervenors' Motions are Not Timely

Intervenors' motions for intervention as of right would fail under Rule 4:33-1 even if they were timely because the DEP adequately represents their interest. For this reason, the court need

⁵⁰ Environmental Groups' Brief at 1.

⁵¹ Id. at 7-8; Senator Lesniak's Brief at 3.

not discuss at length timeliness under Rule 4:33-1. Timeliness is a permissive intervention factor under Rule 4:33-2, and the court will elaborate on it in that section. The court notes, however, that when discussing intervention as of right, the Appellate Division has stated that “the controlling date” for a timeliness inquiry is when the interests of the original party and intervenor diverge. See Meehan, 317 N.J. Super. at 570. As discussed above in Section II.C., the DEP and Intervenors’ interests have never diverged. For this reason, “the controlling date” for the timeliness inquiry should be 2004, the date the DEP filed the complaints. As such, the court cannot consider the Intervenors’ motions to be timely under Rule 4:33-1.

III. PERMISSIVE INTERVENTION

“Where intervention of right is not allowed, one may obtain permissive intervention under R. 4:33-2.” Atl. Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Ctr., 239 N.J. Super. 276, 280 (App. Div. 1990). New Jersey Court Rule 4:33-2 states:

Upon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state or federal governmental agency or officer, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the agency or officer upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 4:33-2 (emphasis added). Like Rule 4:33-1, it is to be liberally construed, but unlike Rule 4:33-1, it permits intervention at the trial court’s discretion. ACLU, 352 N.J. Super. at 70.⁵² Trial courts are to consider four factors when determining whether to grant permissive intervention: (1) the promptness of the application; (2) whether the granting thereof will result in further undue delay; (3) whether the granting thereof will eliminate the probability of subsequent

⁵² The federal counterpart to Rule 4:33-2 states, “On timely motion, the court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1).

litigation; and (4) the extent to which the grant thereof may further complicate litigation which is already complex. Ibid. (quoting Pressler, Current N.J. Court Rules, comment on R. 4:33-2 (2002)). Based on these factors, the binding New Jersey caselaw, and the relevant persuasive federal authorities, the court denies the Intervenor's motions for permissive intervention.

The Intervenor's argue that the motions for permissive intervention are prompt, or timely, because they were filed less than two months after the DEP publically released the details of the proposed settlement. As discussed in the intervention as of right timeliness section, however, the court views the timeliness of their motion in relation to when the DEP filed the suit in 2004. This case is very much like Sutter v. Horizon Blue Cross Blue Shield of New Jersey, in which the Appellate Division denied a permissive intervention motion as untimely. 406 N.J. Super. 86, 107-08 (App. Div. 2009). There, the intervenors filed a motion to intervene only months after the proposed settlement of a class action lawsuit was announced. Id. at 95-96. The trial court denied the motion and the Appellate Division affirmed, noting that "the [intervenors] have moved at a very late date," and that "litigation began over four years ago and has received much attention." Id. at 107. Based on this analysis, the Intervenor's motions are even less timely than that in Sutter because this litigation began eleven years ago and has likewise received much attention.

As to the second factor, the court finds that granting the Intervenor's motions will result in further undue delay. It is true that the granting of any permissive intervention motion will necessarily delay proceedings somewhat. This second factor, however, works against the Intervenor's because the delay they will cause is undue. Both the environmental groups and Senator Lesniak initially stated in their briefs that they only seek to intervene to argue against the proposed settlement. Even if this is all the Intervenor's seek to do, the delay would be undue because both parties, as well as the public, have submitted numerous public comments opposing

the settlement. The delay caused by their intervention, therefore, would be undue because it would give these parties two bites at the apple: they would be able to argue against the proposed settlement in the public comment forum and again at the settlement hearing. See id. at 107 (denying permissive intervention motion because, inter alia, the potential intervenors were allowed to voice their concerns at the statutorily mandated “fairness hearing”). To give these groups time to write briefs and prepare oral arguments for the hearing, proceedings would unnecessarily have to be further delayed.

The court highlights the Intervenor’s original statement of intent because, after reading the environmental groups’ reply brief and conducting oral argument, it seems they have changed their intent. In their reply brief, the environmental groups stated, “Once Applicants receive and review [the State’s substantive explanation and argument on the terms of the settlement], they will be able to present a more fully formulated position on the role they wish to play in the settlement-review proceedings.⁵³ This position was reiterated at oral argument.⁵⁴ This inconsistency and expansion of intent not only weakens their argument as to the undue delay factor, but also as to the third and fourth factors.

The third factor also works against the Intervenor because their intervention would not eliminate the probability of subsequent litigation, it would increase that probability. Finally, the granting of their motions would add to the complexity of an already complicated case that has seen both original parties spend millions of dollars in assessment costs and attorneys fees. “The courts have recognized that once parties have invested time and effort in settling the case, it would be prejudicial to allow intervention.” Ibid. (quoting trial court). To do so “would render worthless all of the parties’ painstaking negotiations.” Ibid. (quoting trial court).

⁵³ Environmental Groups’ Reply Brief at 9-10.

⁵⁴ Oral Argument Transcript, Kyle, Pg. 47, Ln. 17-19; Id. at Pg. 55, Ln. 10-11; Id. at Pg. 82, Ln. 1-12.

The factors employed by the Court of Appeals for the First Circuit also work against the Intervenor. That court looks to (1) the length of time the applicants knew, or reasonably should have known, of their interest before they petitioned to intervene; (2) the prejudice to the existing parties due to the applicants' failure to petition for intervention promptly; (3) the prejudice that applicants would suffer if they were not allowed to intervene; and (4) unusual circumstances militating for or against intervention. Garrity v. Gallen, 697 F.2d 452, 455 (1st Cir. 1983). Here, the Intervenor was aware of the lawsuit's inception in 2004 and has known of its interests in its outcome for eleven years. As Sutter instructs, intervention after a settlement has been reached prejudices the original parties because it would render worthless their "painstaking negotiations." Sutter, 406 N.J. Super. at 107. Furthermore, allowing intervention would prejudice the State because it would be forced to spend scarce public resources opposing the Intervenor. See Garrity, 697 F.2d at 457 (finding prejudice to the state when allowing intervention would compel them to expend additional public resources). The Intervenor, its members, and the general public have already submitted thousands of comments in opposition to the settlement. The DEP has spent considerable time and money reviewing these comments and still decided to go through with the settlement. To add to that time and money would be unduly prejudicial.

Third, the Intervenor will not suffer any prejudice if it is not allowed to intervene. As repeatedly stated in this opinion, the Intervenor has already extensively argued against the settlement through its public comments. The court has reviewed, and is still reviewing, its comments and nothing will be gained by permitting the Intervenor to submit additional briefs and make additional oral arguments on the subject. Finally, to the extent there are unusual circumstances, the length of this case works against the Intervenor.

To support their motion, Intervenors rely on the previously discussed In re Acushnet River & New Bedford Harbor. In that case, applying the Garrity factors, the court found that allowing intervention would not cause undue prejudice or delay. Acushnet River, 712 F. Supp. at 1025. Acushnet River, however, is easily distinguishable from the present case. There, the court specifically highlighted the fact that “this one settlement constitutes a relatively small part of this entire litigation,” and that viewing “the matter in the context of this entire massive litigation, the possible undue prejudice that may result to the existing parties discounted by the probability that such prejudice will ever occur is insufficient” to defeat the motion. Id. at 1025. Far from being “a relatively small part of this entire litigation,” the proposed settlement seeks to dispose of all aspects of the State’s soil and sediment claims. The State and Exxon have fought over these claims for eleven years, and intervention at this stage, unlike that in Acushnet River, would be highly prejudicial.

Finally, Senator Lesniak raises one argument that is distinct from the environmental groups’ arguments. Citing Evesham Township Zoning Board of Adjustment v. Evesham Township Council, 86 N.J. 295 (1981), he argues “the courts have generally been solicitous of applications by public officials and agencies who represent a constituency with an interest in the matter.”⁵⁵ Far from announcing such a general principle, however, the New Jersey Supreme Court in Evesham specifically pointed out that the vice-chairman of the zoning board’s intervention motion was filed “to intervene individually as a party plaintiff asserting his status as a taxpayer and resident of the municipality.” Evesham, 86 N.J. at 298 (emphasis added). Because, contrary to Senator Lesniak’s assertion, there is no general principle concerning officials and agencies who represent constituencies, the court gives no weight to his assertion. Because Lesniak is a Senator of the same Legislature that has delegated to the DEP the

⁵⁵ Senator Lesniak’s Brief at 8.

responsibility of pursuing NRD claims, N.J.S.A. 58:10-23.11a, the court is less inclined to allow him to intervene in this matter. Such an intervention would implicate separation of powers issues. Furthermore, as a legislator, he not only has the ability to use his position as a State Senator to urge his colleagues to prospectively change any flaws he currently finds in the NRD settlement process, but to also air concerns about the settlement in the many recognized public forums as part of the political process.

In conclusion, the court denies the Intervenor's motions for permissive intervention. Even under a liberal reading of Rule 4:33-2, the motions were not prompt and would unduly prejudice the original parties. To allow intervention at this stage would work against the very purpose of the rule's timeliness requirement, which is "to prevent last minute disruption of painstaking work by the parties and the court." Metro. Dist., 865 F.2d at 6.

SUMMARY

The court denies both the environmental groups' and Senator Lesniak's motions for intervention as of right and permissive intervention. The court denies the Rule 4:33-1 motion as to the environmental groups because the DEP adequately represents their interests. The court denies the Rule 4:33-1 motion as to Senator Lesniak because he lacks an interest or, alternatively, assuming he has an interest, because the DEP adequately represents that interest. The court denies the Rule 4:33-2 motions because they are not timely and granting them would unduly delay proceedings and prejudice the original parties.

The court is not saying that potential intervenors can never intervene to oppose a Spill Act settlement. However, the Intervenor here have done nothing to overcome the presumption of adequate representation that arises when they share the same ultimate goal with an original party. They have not demonstrated collusion, nonfeasance, or lack of notice of the opportunity

for public comments. Everything they seek to do through their intervention motion has already been accomplished through their public comments. Furthermore, neither Exxon nor the State are opposed to allowing the Intervenors to serve as amici curiae. Intervenors can apply to brief and orally argue as amici so that they can address their concerns without unduly disrupting proceedings. To allow intervention, however, would unduly delay proceedings and prejudice the State and Exxon. For these reasons, the motions are DENIED WITHOUT PREJUDICE.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff,

vs.

EXXON MOBIL CORPORATION,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
UNION COUNTY

DOCKET NO.: UNN-L-3026-04
(consolidated with UNN-L-1650-05)

Civil Action

FILED WITH THE COURT

JUL 13 2015

Michael J. Hogan, J.S.C., ret. Recall

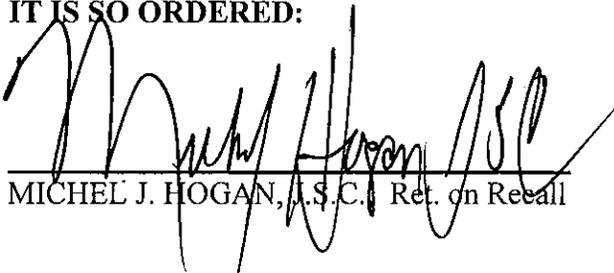
ORDER

THIS MATTER having come before the Court on the Motion to Intervene filed by New York/New Jersey Baykeeper, the New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, Environment New Jersey, Natural Resources Defense Council, and New Jersey Audubon (collectively, the "Putative Interveners"), the Court having considered the papers presented and having heard the oral arguments of counsel, and good cause having been shown;

It is on this 13th day of July, 2015 ORDERED that the Putative Interveners' motion to intervene is hereby DENIED. *for the reason set forth in the attached and filed written decision*

Counsel for Plaintiff shall serve a copy of this Order upon all counsel within five (5) days of receipt of this Order.

IT IS SO ORDERED:


MICHEL J. HOGAN, J.S.C., Ret. on Recall

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff,

vs.

EXXON MOBIL CORPORATION,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
UNION COUNTY

DOCKET NO.: UNN-L-3026-04
(consolidated with UNN-L-1650-05)

Civil Action

FILED WITH THE COURT

JUL 13 2015

Michael J. Hogan, J.S.C., ret. Recall

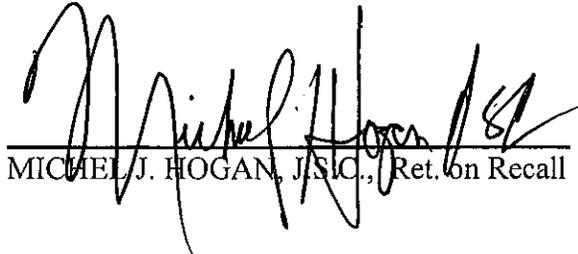
ORDER

THIS MATTER having come before the Court on the Motion for Leave to Intervene filed by Raymond J. Lesniak, individually and as a New Jersey State Senator, 20th Legislative District (Union), the Court having considered the papers presented and having heard the oral arguments of counsel, and good cause having been shown;

It is on this 13th day of July, 2015 ORDERED that Raymond J. Lesniak's motion to intervene is hereby DENIED. *for the reasons set forth in the attached filed written decision*

Counsel for Plaintiff shall serve a copy of this Order upon all counsel within five (5) days of receipt of this Order.

IT IS SO ORDERED:


MICHAEL J. HOGAN, J.S.C., Ret. on Recall