IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY, Plaintiff vs. WALNUTDALE FAMILY FARMS, LLC, a Michigan Corporation and KEVIN LETTINGA, Defendants	Case No. 1:20-cv-00397

SIERRA CLUB'S MOTION TO INTERVENE

Sierra Club respectfully moves to intervene in the above-captioned proceeding pursuant to Section 505 of the Clean Water Act and Fed. R. Civ. P. 24(a). Section 505(b)(1)(B) provides that "any citizen may intervene as a matter of right" in a Clean Water Act enforcement suit brought by EPA or a state. 33 U.S.C. § 1365.

Pursuant to the Western District of Michigan Local Rule 7.1(d), counsel for the Sierra Club contacted counsel for Plaintiff U.S. EPA and Defendants, to request concurrence in the relief requested in this Motion. Plaintiff U.S. EPA concurred in the relief requested. However, Defendants' counsel did not respond, thus necessitating the filing of this Motion.

A memorandum setting forth Sierra Club's contentions of fact and law, argument, and authorities accompanies this motion. In accordance with Rule 24(c), Sierra Club's [Proposed] Complaint in Intervention is attached hereto as Exhibit A.

Respectfully Submitted,

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Dated: May11, 2020

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MEMORANDUM IN SUPPORT OF SIERRA CLUB'S MOTION TO INTERVENE

I. INTRODUCTION

Sierra Club and its Michigan Chapter ("Sierra Club") respectfully seeks to intervene in this matter to ensure that its interests are protected during the remedial and any subsequent stages of the litigation.[1] Pursuant to Section 505(b)(1)(B) of the Clean Water Act, 33 U.S.C. § 1365 (b)(1)(B), Sierra Club has an unconditional right of intervention. Moreover, Sierra Club meets all the requirements for intervention of right under Rule 24(a)(1) of the Federal Rules of Civil Procedure.

[1] The Sierra Club's Michigan Chapter was called "Mackinac Chapter" when the consent decree at issue in this case was filed.

Put simply, Sierra Club seeks intervention to ensure that appropriate remedies are pursued and implemented to address the Clean Water Act violations, including violations and to protect Sierra Club's interests during any appeals or settlement discussions. Sierra Club acted promptly to intervene as soon as it became apparent that its interests may no longer be protected by the United States. Because the remedies phase has not yet begun, intervention will not cause any delay or other prejudice to the existing parties.

II. BACKGROUND

A. Background on Sierra Club and its Members.

Sierra Club is an incorporated, not-for-profit environmental organization whose purpose includes reducing and eliminating pollution and protecting public health—including reducing pollution resulting from industrial animal agriculture, among the largest contributors to water pollution in the United States. Pollution from industrial animal agriculture negatively affects Sierra Club's members. Sierra Club has over 784,000 members nationwide, including over 22,000 members in Michigan. Many of these members live, work, and recreate in and around Allegan County, Michigan well as other areas near and downstream from Walnutdale Family Farms, LLC-owned industrial dairy facility ("Walnutdale").[2]

Established in 1967, the Michigan Chapter of the Sierra Club has been active in fighting pollution in Michigan for over 50 years. The Michigan Chapter of the Sierra Club is comprised of ten regional volunteer Groups and Conservation Committees plus a very active student coalition who work for healthier communities at the local level. The Michigan Chapter works with volunteer leaders, state agencies and the legislature for better environmental stewardship statewide. One of the Michigan Chapter's active priorities is its Healthy Food Project that works

[2] 219 members live in Allegan County, where the Walnutdale Facility is located.

to educate the public about the impact of the factory farms on our health, the environment, the local economy and animal welfare and to offer local, sustainable alternatives to the industrial food supply. The Michigan Chapter is also engaged in the LESS=MORE Coalition, which tracks Farm Bill subsidies in Michigan benefiting industrial agriculture operations that are big polluters and tracks Concentrated Animal Feeding Operations ("CAFOs") of the Western Lake Erie Basin and their impact on Lake Erie's algal crisis. The Michigan Chapter is also a leader of the Great Farms Great Lakes Coalition, which seeks to end the application of manure to frozen ground and protect people's right to safe drinking water. The Great Farms Great Lakes Coalition spent significant resources in 2018 and 2019 fighting for a stronger dairy CAFO permit in Michigan.

Sierra Club and its Michigan Chapter thus have a long history of working to protect and improve water quality in Michigan. It has a particularly strong interest in ensuring that Walnutdale operates in compliance with the Clean Water Act because the facility is one of the largest sources of pollution to the Red Run Drain, a tributary of the Little Rabbit River, which flows into the Rabbit River, which in turn flows into the Kalamazoo River, eventually emptying into Lake Michigan. Those interests are especially pertinent to Sierra Club because it originally took action that led to a Clean Water Act Consent Decree with Walnutdale signed by the United States Environmental Protection Agency ("EPA") and Sierra Club and entered by the Court in 2004 (W.D. Mich. Civ. No. 4:00-cv-193, Dkt. 66) ("the Consent Decree"). Sierra Club has a strong interest in ensuring that appropriate measures, including proper pollution controls, are pursued and implemented to remedy these violations and the additional violations of Walnutdale's National Pollutant Discharge Elimination System ("NPDES") permit and the Clean Water Act alleged in the EPA's Complaint (ECF No.1) ("the EPA Complaint").

B. Background on Sierra Club's interest in this proceeding.

Sierra Club filed a complaint on November 30, 2000 against Walnutdale Farms, Inc., Ralph Lettinga and Kevin Lettinga (collectively "Defendants") for violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq*. The EPA filed almost two years later, and the cases were consolidated and resolved by the Consent Decree at issue in this action. The Sierra Club is a party to the Consent Decree. The Consent Decree sets forth a number of remedial measures that the Defendants were required to implement to resolve the Clean Water Act violations and pollution in the Red Run Drain. The Consent Decree also provides for stipulated penalties for the violations of its terms.

In addition, the Consent Decree required that Walnutdale comply with NPDES General Permit No. MIG440000 for concentrated animal feeding operations and the Certificate of Coverage No. MIG440001, both issued by the Michigan Department of Environmental Quality. This was in part, a response to Sierra Club's allegations that Walnutdale failed to obtain a NPDES permit in violation of 40 C.F.R. 122.23. Finally, the Sierra Club Michigan Chapter continues to monitor Walnutdale's compliance with state and federal law. They have participated and intend to continue to participate in the public comment and public hearing forums of Clean Water Act permit proceedings governing the Walnutdale CAFO permits.

III. DISCUSSION

Federal Rule of Civil Procedure 24(a) provides that, upon a timely motion, the Court "must permit anyone to intervene who… is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1). Sierra Club meets the Rule 24(a)(1) criteria here because it has an unconditional right to intervene pursuant to Section 505(b)(1)(B) and it has acted in a timely manner in light of all the circumstances in the case. 33 U.S.C. § 1365. Sierra Club also meets

the "substantial interest" standing requirement for intervention in the Sixth Circuit. *Providence Baptist Church v. Hillandale Comm., Ltd*., 425 F.3d 309, 318 (6th Cir. 2005).

A. Sierra Club has an Unconditional Right to Intervene under the Clean Water Act.

Sierra Club has an unconditional right of intervention under the "citizen suit" provision of the Clean Water Act Section 505(b)(1)(B), which provides that "any citizen may intervene as a matter of right" in a Clean Water Act enforcement suit brought by EPA or a state. 33 U.S.C. § 1365. "Citizen" is defined by the Clean Water Act as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C.A. § 1365(g). The term "person" includes a corporation or association, 33 U.S. Code § 1362(5), and thus includes a non-profit public benefit corporation such as Sierra Club. As previously stated, Sierra Club has a substantial interest which "may be adversely affected" because of its members near and downstream of the facility as well as its ability to enforce the terms of the Consent Decree to which it is a party. *See Jansen v. City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) (sufficient legal interest in the subject matter of the litigation exists where the person is a party to a consent decree at issue in the action).

Thus, Sierra Club has an unconditional right to intervene pursuant to Section 505(b)(1)(B) of the Clean Water Act. This case is no different than *United States v. Board of County Commissioners of Hamilton County*, *Ohio*, which

> "granted Sierra Club's motion to intervene without restrictions or limitations on the scope of said intervention…the Court stated that the Clean Water Act…confers an unconditional right to intervene and that citizens have been given this right 'presumably to prosecute ... [their] interests when they feel that the government is doing less than an adequate job of protecting the interests of the intervenors themselves as well as the public-at-large.'"

No. 1:02 CV 00107, 2005 WL 2033708, at *1 (S.D. Ohio Aug. 23, 2005) (quoting court's order granting Sierra Club's motion to intervene).

B. Sierra Club has a Substantial Legal Interest that Cannot be Adequately Represented by an Existing Party.

Because the Clean Water Act grants an unconditional right to intervene, Rule 24(a)(1) applies. It is therefore unnecessary for Sierra Club to satisfy the demonstration required by intervention of right under Rule 24(a)(2). *United States v. Duke Energy Corp*., 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001). However, Sierra Club could make this showing as well.

The Sixth Circuit has identified four factors that must be satisfied before intervention as of right will be granted under Rule 24(a)(2). *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). These factors are: "(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *Id*. The Sixth Circuit "as opted for a rather expansive notion of the interest sufficient to invoke intervention of right" and has construed that interest "liberally." *Id*. quoting *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir.1987).

Sierra Club plainly meets the requirements of 24(a)(2). Movant's motion is timely as a matter of law. Sierra Club has a substantial legal interest in the case as it has been engaged in the ongoing settlement discussions and efforts to bring Walnutdale into compliance. *Id*. at 1246 (stating that being a "vital participant" and a "repeat player" in a political process made a party's legal interest sufficient for intervention on the outcome of that process). Sierra Club and its members who live, work, and recreate in the vicinity of Walnutdale have an interest in the facility's compliance with the Clean Water Act. Resolution of the underlying lawsuit may as a practical matter impair or impede Sierra Club's ability to protect that interest and its ongoing interest in enforcing its Consent Decree.

Moreover, Sierra Club has a unique interest in ensuring the more stringent requirements it advocated for in the original consent decree be similarly protected here. Sierra Club played a significant role advocating for more protective terms in the original consent decree, as evidenced by the differences in allegations between the plaintiffs that led to the original Consent Decree, and how the Consent Decree addressed both the United States as well as Sierra Club's allegations. Here too, Sierra Club has pushed for more stringent measures to ensure environmental compliance. *Linton v. Comm'r of Health & Envt*, 973 F.2d 1311, 1319 (6th Cir. 1992) (court allowed intervention where representation *may* be inadequate); *Michigan State AFL-CIO*, 103 F.3d at 1247 9 ("it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments").

C. This Court has Discretion to Permit Intervention to Expedite Resolution of All Claims.

Finally, Rule 24(b) allows the Court to exercise its discretion to permit intervention of anyone who, on timely motion, 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)(B). A court should "balance whatever delay may occur against advantages of the disposition of all the claims and defense in one action." *Bd. of Trustees of Cleveland Asbestos Workers Pension Fund v. Berry Pipe*, 2008 WL 4619748 (N.D. Ohio 2008) (citing 7C Federal Practice and Procedure at Section 1913). As explained above, this motion is timely, causing no delay whatsoever. Further, the Sierra Club's claim for relief shares the very same common questions of law and fact articulated in the Unites States' complaint. As a co-plaintiff in the Consent Decree matter, and the violations thereof before this Court, Sierra Club will be inextricably involved in this litigation. Any declaration or relief relating to the Consent Decree can be accomplished fully in a single proceeding if Sierra

Club is permitted to intervene. Sierra Club's intervention will prejudice no party as Sierra Club was party to the Consent Decree at issue in this case, but will expedite resolution of claims.

IV. CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests that its motion to intervene be granted.

Respectfully Submitted,

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Attorneys for Plaintiff Sierra Club

Dated: May11, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2020, I caused a copy of the foregoing Motion to Intervene to be filed and served upon all counsel of record via CM/ECF.

By: /s/ Regina Bell