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STATEMENT OF THE CASE

The State of New Jersey, Department of Environmental Protection (NJDEP) and Mark Mauriello, Acting Commissioner, Department of Environmental Protection (collectively "State of New Jersey"), by their attorney, Anne Milgram, Attorney General of the State of New Jersey hereby move to intervene as of right in this lawsuit pursuant to Fed. R. Civ. P. 24(a)(2), for the purpose of ensuring that the residents, lands, air, waters, wildlife, plant life, and natural resources of New Jersey are protected. Intervention is necessary here because the State of Delaware's obligations and authority do not include the protection of New Jersey's interests in this matter.

The State of Delaware Department of Natural Resources and Environmental Control (State of Delaware) filed a Complaint and a Motion for Preliminary Injunction on October 30, 2009 to prevent the United States Army Corp of Engineers (ACOE), the Honorable John McHugh, Secretary of the Army, the Honorable Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works, Lieutenant General Robert L. Van Antwerp, Jr., Commander, ACOE, and Lieutenant Colonel Thomas Tickner, Commander, ACOE, North Atlantic Division, Philadelphia District (collectively "defendants") from commencing construction of a 102-mile project to dredge and deepen the Delaware River from the Port of Philadelphia to the Delaware Bay, known as the Delaware River Main Stem and Channel Deepening Project ("the Project"), until defendants obtain Delaware subaqueous lands and wetlands permit; demonstrate conformity with Delaware's State Implementation Plan (SIP) as required by Section 176 of the Clean Air Act (CAA); and obtain Delaware's concurrence with a supplemental federal consistency determination as required by the federal Coastal Zone Management Act (CZMA).

The State of New Jersey filed its own Complaint in the District of New Jersey on November 2, 2009, seeking to preclude project commencement until the ACOE adequately

samples and analyzes the material to be dredged; conducts supplemental coordination with New Jersey under the CZMA; demonstrates conformity with New Jersey's SIP under the CAA; and obtains a water quality certification for New Jersey under the Clean Water Act (CWA).¹

The State of New Jersey has a significant interest in the outcome of this litigation because both the Project itself and the requests for relief made by the State of Delaware will directly impact New Jersey. In particular, the State of New Jersey will be greatly affected by the outcome of the State of Delaware's request for injunctive relief to require defendants to essentially perform adequate environmental analyses and planning to support obtaining the required Delaware permits, and to complete the required coordination under the CZMA and conformity determination under the CAA before starting the Project. If the Project proceeds, defendants will not only dredge submerged lands within Delaware, but also the submerged lands of New Jersey, and such dredging will disperse sediment with mostly unknown characteristics into both Delaware and New Jersey waters. If the Project proceeds, the dredged spoils will not only be deposited in Delaware, but also in New Jersey and will thus discharge to the surface and ground water in both Delaware and New Jersey. If the Project proceeds, the people, natural resources, including wildlife and plant life, and air of both Delaware and New Jersey will be affected and impacted. If, alternatively, the Project is delayed by Court order pending the completion of the required environmental analyses and planning by the ACOE, this, too, will directly impact New Jersey, insomuch as New Jersey also seeks the completion of environmental analyses and planning prior to project commencement. Since the State of New Jersey has a significant interest in the manner and timing of the Project and hence the outcome of this litigation, which will affect the manner and timing of the Project, and because the State of

¹ New Jersey respectfully submits that it would be appropriate to consolidate the New Jersey and Delaware cases in this District and intends to move for such consolidation pursuant to Fed. R. Civ. P. 42(a).

Delaware does not represent the State of New Jersey's interest, the State of New Jersey is entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2).

The Project is unprecedented within the region in size and scope. It will dredge millions of cubic yards of likely contaminated sediment and disperse this material into the Delaware River and into New Jersey and Delaware waters, where environmental quality has significantly improved in the past several decades. Nearly all dredging will occur in Delaware and New Jersey waters, after which the dredged sediment will be deposited at confined disposal facilities within Delaware and New Jersey, and discharge to surface and ground waters within Delaware and New Jersey. The Project also will increase air emissions in the area surrounding the Project, including Gloucester and Camden Counties, New Jersey, an area that does not meet National Ambient Air Quality Standards (NAAQS) for ozone. Moreover, the Project is located in an ozone non-attainment area that includes both New Jersey and Delaware. However, the ACOE has not completed required determinations that the Project's emissions will conform to the SIPs of either Delaware or New Jersey for attainment of NAAQS for this pollutant.

To avoid potentially significant regressions in water quality within the Delaware River, continued deterioration in air quality, likely harm to fragile environmental resources, marine, and terrestrial life, and risks to human health and safety, sediment dredging and disposal must comply with all environmental standards and include all necessary management measures. Nevertheless, defendants are poised to commence project construction without obtaining approvals from the State of Delaware, as required by the Clean Water Act (CWA) and Delaware law, or from the State of New Jersey pursuant to the CWA; without demonstrating that the Project will conform to Delaware's SIP to attain NAAQS, as required by the federal CAA and Delaware law, or from the State of New Jersey pursuant to CAA; and without obtaining

Delaware's concurrence that the Project will be consistent with Delaware's coastal zone management plan, as required by the CZMA, or from New Jersey pursuant to the CZMA. New Jersey's interest in protecting its natural resources, surface and ground waters, and air quality and the health of its residents will be directly affected by the disposition of Delaware's claims for relief. Delaware is not charged with protecting New Jersey's interests. Thus, New Jersey's motion to intervene should be granted.

STATEMENT OF FACTS

A. Background

The Project defendants propose to start without obtaining approvals required under Delaware and federal law will occur primarily within New Jersey and Delaware, will dredge 102 miles of the main navigation channel of the Delaware River from Philadelphia to the Delaware Bay, and will increase the depth of the main channel from 40 to 45 feet. The Project will generate an estimated 16.3 million cubic yards of dredged material that is likely contaminated, and increase dredging to maintain the channel by 20 percent to 4.3 million cubic yards of dredged material per year. Most of this material will be deposited in New Jersey. Declaration of Suzanne Dietrick (“Dietrick Declaration”), ¶¶1, 13. New Jersey shares a multi-state non-attainment area for NAAQS for ozone with Delaware, Pennsylvania, and Maryland called the Philadelphia-Wilmington-Atlantic City (PA-NJ-MD-DE) eight-hour ozone non-attainment area. Declaration of Chris N. Salmi (“Salmi Declaration”), ¶6. Since the project activities will take place in the Delaware River, which forms the border between New Jersey and Delaware, and on disposal facilities in New Jersey, the Project will increase air emissions in the surrounding area as a result of wind travel, including Gloucester and Camden Counties, New Jersey. Salmi Declaration, ¶14. Thus, the Project has the potential to cause air quality deterioration within New Jersey and to exacerbate New Jersey’s efforts to attain NAAQS for this pollutant. Salmi Declaration, ¶14. Significant new information exists regarding the project area, but defendants have not submitted updated applications to Delaware for subaqueous lands or wetlands permits, and they continue instead to rely on outdated information. Dietrick Declaration, ¶¶17-21, Declaration of Joel A. Pecchioli (“Pecchioli Declaration”), ¶¶7, 11e, 11f; Plaintiff’s Brief in Support of Motion for Preliminary Injunction (“Pb”), at 14-15.

Water quality within the Delaware River within New Jersey has improved over the past several decades, and the river is a designated essential fish habitat for many species, as well as threatened and endangered species. Dietrick Declaration, ¶9, Exhibits C, D. These improvements have largely occurred because discharges of contaminants that previously caused environmental harm, including PCBs (polychlorinated biphenyls) and pesticides such as DDT (dichlorodiphenylteochloroethane) and its metabolites, have been banned since the 1970s. The sediment to be dredged likely contains these contaminants, as well as PAHs (polyaromatic hydrocarbons) and metals such as mercury, lead, and cadmium, which can have toxic and bioaccumulative impacts. Pecchioli Declaration, ¶¶9, 10, 35.

Defendants are poised to commence project construction within Reach C, where the limited sediment sampling done to date shows that the dredged sediment will likely exceed New Jersey standards for contaminants of significant concern. This sediment will be dispersed within both Delaware and New Jersey waters that contain sensitive natural resources, including the endangered shortnose sturgeon and the atlantic sturgeon, and will then be deposited at the Kilcohook confined disposal facility located in both New Jersey and Delaware. Dietrick Declaration, ¶34, Pecchioli Declaration, ¶15. Sampling done for maintenance dredging within Reach C exceeds New Jersey's Residential and Non-residential Soil Remediation Standards for arsenic or benzo(a)pyrene (a polyaromatic hydrocarbon, PAH). PAHs are a group of toxic compounds generated by sources that include oil spills, industrial processes, and automobile emissions. Most of the samples from Reach C also potentially exceed New Jersey's Residential Soil Remediation Standards for PCBs (polychlorinated biphenyls), which can have toxic impacts and are specifically designated as toxic compounds in the Toxic Substances Control Act (TOSCA), 15 U.S.C. § 2601 *et seq.* Groundwater monitoring summary reports from 2002 to

2006 for the Kilcohook confined disposal facility, which the ACOE did not supply to New Jersey until July 2009, also show exceedances of New Jersey groundwater quality standards. Pecchioli Declaration, ¶¶15, 36, Exhibit H.

B. Previous Environmental Analyses and New Information

In 1992, defendant ACOE submitted an environmental impact statement (“EIS”) to Congress for the Project pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* The EIS stated that the Project would dredge 33 million cubic yards to deepen the main channel, and then require annual maintenance dredging of six million cubic yards. In 1996, the National Marine Fisheries Service (NMFS) designated the Delaware River and Bay within New Jersey and Delaware from New Castle, Delaware and Pennsville, New Jersey, as Essential Fish Habitat for over twenty species of fish pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* Dietrick Declaration, ¶¶5, 9. In 1997, the ACOE completed a supplemental environmental impact statement (“SEIS”), which explained that nearly all dredged material would be deposited at new and existing confined disposal facilities in New Jersey. Dietrick Declaration, ¶6.

Pursuant to the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 *et seq.*, Delaware issued a conditional coastal zone consistency determination for the Project in 1997, but advised the ACOE that Delaware subaqueous and wetlands permits were required. The ACOE applied for those permits and for a Delaware water quality certification in 2001, but the Project was suspended in 2002. Pb at 6-7; Dietrick Declaration, ¶10. In 2002, New Jersey’s Commissioner of Environmental Protection revoked New Jersey’s consistency determination of 1997 and advised the ACOE that supplemental coordination under the CZMA was required pursuant to 15 C.F.R. § 930.46. The ACOE agreed to conduct supplemental coordination but has

not done so. Dietrick Declaration, ¶¶8, 23, 35. In 2003, the Delaware hearing officer recommended denial of the applications for Delaware permits. Pb at 7.

In 2004, the M/T Athos I tanker struck a large, submerged anchor while preparing to dock at an oil refinery in Paulsboro, Gloucester County, New Jersey. The anchor punctured the vessel's bottom, resulting in the discharge of more than 263,000 gallons of crude oil into the Delaware River and its tributaries. Dietrick Declaration, ¶11. Following that spill, the National Oceanic Atmospheric Administration (NOAA) collected 42 surface subtidal and intertidal grab samples in December 2004 and January 2005 as part of a limited Injury Assessment that did not examine many of the areas most affected by the oil spill. Twenty-one of these samples exceed New Jersey residential and non-residential standards for benzo(a)pyrene, a polycyclic aromatic hydrocarbon (PAH), a group of toxic compounds generated by sources that include oil spills, industrial processes, and automobile emissions. The ACOE has never considered these sample results in any analysis of the Project or project impacts, even though the compounds can have toxic and bioaccumulative impacts. Pecchioli Declaration, ¶¶20, 22.

After the 1997 SEIS, the United States Environmental Protection Agency (USEPA) designated Camden and Gloucester Counties, New Jersey, as non-attainment areas for fine particulate matter and eight-hour ozone. Dietrick Declaration, ¶21. This triggered New Jersey's obligation under the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.*, to adopt a SIP describing how the State would attain NAAQS for those pollutants, and required the ACOE to explain in a conformity determination how the Project would conform to that SIP. Salmi Declaration, ¶¶7, 15. Ozone has many significant health effects, including premature death, breathing difficulties during exercise, lung inflammation, aggravation of asthma, increased risk of respiratory illness, and permanent lung damage. Salmi Declaration, ¶4.

The ACOE issued a Final Draft Statement of Conformity for the Project in June 2004 and concluded that project emissions would exceed emissions standards for various pollutants but would still conform with New Jersey's SIP if identified mitigation measures were undertaken. Salmi Declaration, ¶17. The Draft Statement was never finalized. In 2006, USEPA amended its General Conformity rules to include de minimis emissions for fine particulate and its precursors. Dietrick Declaration, ¶21.

On June 23, 2008, the ACOE signed a project agreement with the Philadelphia Regional Port Authority to dredge the main channel of the Delaware River to a depth of 45 feet. Dietrick Declaration, ¶16. However, the project area within New Jersey and Delaware has undergone a significant, positive environmental transformation since the 1997 SEIS, and many significant species, including some threatened and endangered species, have started to rebound. Further, since 1997, federal and state authorities have adopted new measures to protect natural resources within these New Jersey and Delaware waters and have obtained new information on federally-listed threatened and endangered species, and a new species, the atlantic sturgeon, has been listed as endangered by the States of Delaware and Pennsylvania and is under consideration for listing by New Jersey and the federal authorities. Dietrick Declaration, ¶¶17, 18.

The ACOE conducted some sediment sampling within the project area in the early 1990s but has never comprehensively sampled the millions of cubic yards of sediment it now proposes to dredge and then dispose of in New Jersey and Delaware. The ACOE also has not analyzed the impacts on surface water quality and groundwater quality within New Jersey or Delaware of dredging and disposing millions of cubic yards of sediment. These failures conflict with the ACOE's own manuals for dredging and upland dredged material disposal, which preclude reliance on samples that are more than three years old, as well as with standards within NJDEP's

dredging manual. The limited sampling that has occurred since the early 1990s, including sediment within the part of the Delaware River where project construction will start in October 2009 (Reach C), includes sediments that exceed New Jersey standards for compounds such as arsenic or benzo(a)pyrene (a polycyclic aromatic hydrocarbon (PAH) and PCBs (polychlorinated biphenyls). Pecchioli Declaration, ¶¶9-11, 15, 35.

After defendants executed the project agreement in June 2008, New Jersey urged the ACOE to conduct supplemental coordination under the CZMA, obtain required approvals under the CWA, and update its environmental analyses. Dietrick Declaration, ¶22. However, the ACOE instead published a public notice on December 17, 2008 requesting comment on the Project and identification of new information since finalization of the 1997 SEIS. The ACOE's public notice provided only a two-week public comment period, from December 17 to December 31, 2008, which was then extended by two weeks in response to objections, including objections from New Jersey, USEPA, and the NMFS. In objecting to the public notice, the USEPA identified the Athos I oil spill as a significant change in the Delaware River requiring consideration as part of the public process required by NEPA. Dietrick Declaration, ¶¶23-25.

NJDEP timely commented on the public notice on January 14, 2009, calling to the ACOE's attention many additional studies and significant new information postdating the 1997 SEIS. Dietrick Declaration, ¶26. On April 6, 2009, however, the ACOE published an Environmental Analysis (EA) of the Project that did not analyze much of the extensive new information and data, and concluded that the Project impacts remain as analyzed in the 1997 SEIS and that the Project could proceed without additional analyses or public comment. Dietrick Declaration, ¶¶27-29.

On June 23, 2009, NJDEP sent the ACOE detailed comments on the EA, highlighting numerous deficiencies. On July 1, 2009, the USEPA Air Protection Division sent a letter to ACOE stating that a new conformity determination for the Project is required and that “the dredging operation timeframes stated in the EA for [the Project] do not provide sufficient time for your office to comply with the Clean Air Act conformity requirements.” Dietrick Declaration, ¶¶32, 33. The ACOE solicited bids on June 30, 2009 for commencement of project construction without responding to these communications. Dietrick Declaration, ¶34, Salmi Declaration, ¶18.

On July 23, 2009, Delaware denied the ACOE’s applications for Delaware subaqueous lands and wetlands permits, based in large part on significant new information related to the Project and the ACOE’s failure to address it in an updated application or a supplemental consistency determination under the CZMA. Pb at 14 – 15.

Thereafter, on August 7 and 14, 2009, the ACOE issued a General Conformity and Mitigation Report for the Project, and a Draft Conditional Statement of Conformity, purporting to comply with Clean Air Act requirements. In the Draft Statement, the ACOE concluded that the Project will produce annual emissions of nitrogen oxide (NOx), an ozone precursor, in excess of the threshold levels set by 40 C.F.R. § 93.153(b). Salmi Declaration, ¶18.

On September 15, 2009, the USEPA advised the ACOE by letter that these documents did not satisfy CAA requirements because, among other things, the Draft Conditional Statement of Conformity did not include the specific mitigation measures and offsets that the ACOE would use to make the Project’s indirect and direct annual nitrogen oxide (NOx) emissions for each project year conform to New Jersey’s SIP. In addition and in conflict with CAA requirements, the Statement provided for use of NOx or ozone emissions credits from a different non-

attainment area than the Project's non-attainment area. On September 14, 2009, New Jersey similarly advised ACOE by letter that the documents did not satisfy CAA requirements, because they did not include all project emissions; proposed to use emissions credits from another non-attainment area to offset emissions in the Project's non-attainment area; did not include a specific mitigation plan required to ensure all project emissions would conform to New Jersey's SIP; and did not demonstrate compliance with CAA public notice requirements. Dietrick Declaration, ¶¶43-44.

On October 6, 2009, USEPA and the ACOE met without representatives of either New Jersey or Delaware to discuss deficiencies in the ACOE's draft CAA conformity statements and methods to correct them. USEPA's summary of the meeting, dated November 5, 2009, states that specific mitigation measures to offset project emissions must be in place before the project emissions start, along with a binding, enforceable agreement identifying the offsets. The USEPA summary also indicates that USEPA advised the ACOE to reissue a draft conformity determination for public comment, pursuant to 40 C.F.R. § 93.160(e), and cautions the ACOE not to start the Project until it conforms to the SIP. The letter concludes that the ACOE should not "rush forward prior to meeting the federal requirements for a conformity determination and analysis," and that such an action would subject the ACOE to a citizen's suit or a state enforcement action. Dietrick Declaration, ¶45, Exhibit I.

Notwithstanding the Delaware denials and its ongoing failure to demonstrate that the Project will meet CAA requirements and conform to the SIPs of Delaware and New Jersey, the ACOE now intends to award a contract for the first phase of the Project (Reach C) and to start project construction. Dietrick Declaration, ¶46.

The Project will affect coastal uses and resources substantially differently than as described in the 1997 SEIS but has not been determined to be consistent with Delaware's coastal zone management program as required by the CZMA. The ACOE also has not obtained required Delaware permits or water quality certifications from Delaware and New Jersey for the Project as mandated by the CWA, even though the Project will dredge millions of cubic yards of likely contaminated sediment and result in dispersal of that sediment in the Delaware River, disposal of the sediment in confined disposal facilities in Delaware and New Jersey, and discharge of effluent from those facilities to the Delaware River and in leachate to groundwater. Further, despite project changes and significant new information regarding the Project's potential environmental impacts, the ACOE has concluded that the Project can proceed without any updated applications to Delaware. The ACOE also has not completed an updated conformity determination under the CAA for the Project as required by USEPA on July 1, 2009, September 15, 2009, and November 5, 2009, even though the project area does not meet the NAAQS for fine particulate or ozone, a pollutant associated with significant adverse health effects. This failure will undermine New Jersey's efforts to comply with NAAQS, exacerbate the risk to New Jersey residents and visitors posed by unhealthy air quality, and expose New Jersey to legal sanctions. Salmi Declaration, ¶¶8, 10.

The State of New Jersey has experienced similar problems as Delaware and will be directly impacted by the disposition of Delaware's claims. Specifically, the ACOE has failed to conduct supplemental coordination in New Jersey as required by the CZMA; has failed to obtain a water quality certificate for New Jersey as required by the CWA; has failed to complete a determination that project emissions will conform to New Jersey's SIP to attain NAAQS as required by the CAA; and plans to start the Project without conducting environmental analyses

that reflect existing conditions in the project area, including the characteristics of the sediment to be dredged, which New Jersey believes violates NEPA. Accordingly, the State of New Jersey seeks to intervene because the relief that Delaware seeks will directly impact New Jersey's interest in protecting its natural resources, its surface and ground waters, its air quality, and the health of its citizens.

On October 30, 2009, the State of Delaware filed this lawsuit. On November 2, 2009, the State of New Jersey filed a Complaint for Injunctive and Declaratory Relief in United States District Court for the District of New Jersey regarding the Project against the ACOE, Lieutenant Colonel Thomas Tickner, District Commander of the ACOE Philadelphia District, and Jo-Ellen Darcy, Assistant Secretary for Civil Works, ACOE alleging violations of the Administrative Procedure Act (APA), CWA for failure to obtain an updated water quality certification and non-compliance with the existing water quality certification for maintenance dredging, CAA for failure to demonstrate conformity with New Jersey's SIP, CZMA for failure to conduct supplemental coordination, and NEPA for failure to update its environmental analyses and planning to take into account significant changes in the environment.

The State of Delaware consents to the State of New Jersey's intervention in this matter. The ACOE does not oppose the State of New Jersey's intervention in this matter.

ARGUMENT

I. THE STATE OF NEW JERSEY IS ENTITLED TO INTERVENE AS OF RIGHT IN THIS MATTER BECAUSE ITS INTERESTS WILL BE AFFECTED BY THE DISPOSITION OF THIS LITIGATION AND ARE NOT ADEQUATELY PROTECTED BY ANY OTHER PARTY

The Third Circuit has said intervention as of right under Fed. R. Civ. P. 24(a)(2) requires:

(1) a timely application for leave to intervene; (2) a sufficient interest in the underlying litigation; (3) a threat that the interest will be impaired or affected by the disposition of the underlying action; and (4) that the existing parties to the action do not adequately represent the prospective intervenor's interest. *Liberty Mut. Ins. Co. v. Treesdale*, 419 F.3d 216, 220 (3d Cir. 2005). The State of New Jersey meets this standard and therefore must be permitted to intervene in this matter.²

The first requirement to intervene as of right is the filing of a timely motion to do so. Determining whether a motion to intervene is timely is determined from the totality of the circumstances and is within the sound discretion of the trial judge. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994). "Among the circumstances generally considered are: (1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *Pitney Bowes*, 25 F.3d at 70. Here, the State of Delaware filed its papers just over a week ago and thus this motion to intervene is timely. There should be no prejudice to the parties due to delay based on this timing. Moreover, as explained further below, there will be substantial

² The State of New Jersey also qualifies for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention is permitted in one instance where there is "a claim or defense that share with the main action a common question of law or fact." Here, the State of New Jersey's claims share both common questions of law and fact with Delaware's claims. Both states seek the same relief – delay of the Project until state and federal requirements are met – and relate to the same Project.

prejudice to the State of New Jersey if such motion is denied. Thus, the first prong for intervention as of right is satisfied.

As to the second and third requirements for intervention as of right, the State of Delaware's complaint and motion for preliminary injunction directly impact New Jersey's environment, including its air, lands, and waters, as well as New Jersey's people and natural resources, including wildlife and plant life. The Project involves the dredging of submerged lands in both Delaware and New Jersey and will disperse sediment which is likely to contain toxins into the waters of both Delaware and New Jersey. The dredging itself will affect both wildlife and its habitat, as well as plant life, in both Delaware and New Jersey waters and lands. The dredge spoils will be deposited in both Delaware and New Jersey and thus will discharge to the surface and ground waters of both Delaware and New Jersey. The barges, trucks, and other devices employed to dredge the material and transport the dredge spoils will affect the air quality in both Delaware and New Jersey.

More specifically, the State of New Jersey has interest in the outcome of the litigation initiated by Delaware because the disposition of this matter will directly affect New Jersey's natural resources and New Jersey's ability to protect those resources and the health of New Jersey residents. Delaware and New Jersey implement separate state regulatory programs which implement common federal programs pursuant to CWA, CAA, and CZMA to protect shared, common, or related resources. Indeed, the ecosystem of the project area does not know State boundaries.

Moreover, the State of New Jersey has had similar problems and issues with ACOE as to those claims raised by the State of Delaware. As such, New Jersey filed its own complaint in New Jersey District Court seeking its own injunctive and declaratory relief. If this Court makes

determinations regarding the relief requested by Delaware herein without intervention by New Jersey such determinations will impact New Jersey's interests without any consideration of New Jersey's position.

The State of Delaware claims that defendants have failed to comply with the CWA, which requires them, under Delaware State law, to obtain two state permits: a subaqueous lands permit and a wetlands permit. Similarly, defendants have failed to obtain a state water quality certification pursuant to the CWA from the State of New Jersey. Moreover, defendants have failed to comply with the conditions of their existing water quality certification from New Jersey maintenance of the Delaware River and Bay navigational channel at its current depth of 40 feet. The CWA recognizes that the prevention, reduction, and elimination of water pollution is the primary responsibility of the states, 33 U.S.C. § 1251, and states are encouraged to cooperate with each other in the prevention, reduction, and elimination of water pollution. 33 U.S.C. § 1253. The State of New Jersey and the State of Delaware share the ecosystem of the Delaware River and Delaware Bay, such that determinations made under the CWA in one state will impact the other.

Further, the State of Delaware claims that defendants have failed to demonstrate conformity with Delaware's SIP under the Clean Air Act. Similarly, defendants have failed to finalize a conformity determination with New Jersey's SIP under the CAA prior to proceeding with the Project. Salmi Declaration, ¶¶19, 20. The Project is located in the Philadelphia-Wilmington-Atlantic City non-attainment area for the 0.08 ppm eight-hour ozone NAAQS, which includes portions of New Jersey, Delaware, Maryland, and Pennsylvania. Notably, in multi-state non-attainment areas, the CAA requires that the states "take all reasonable steps to coordinate, substantively and procedurally," in the revisions of the SIPs for the area. 40 U.S.C. §

7511(j)(1); Salmi Declaration, ¶9. New Jersey has an interest in ensuring that the Project conforms with both Delaware's and New Jersey's SIPs. Specifically, New Jersey's ability to meet the commitments in its SIP and attain the NAAQS will be directly and adversely affected if the Project produces unmitigated or unoffset emissions in excess of those accounted for by the Delaware SIP. Salmi Declaration, ¶ 21. Violation of the NAAQS in any site in the multi-state non-attainment areas would cause the entire multi-state non-attainment area to fail to attain the NAAQS, which would result in a reclassification of the area from a moderate non-attainment area to a serious non-attainment area, and would further require all the states in the non-attainment area to revise their SIPs. Salmi Declaration, ¶¶8, 22. More importantly, the critical consequence is that the people in the non-attainment area could continue to be exposed to unhealthy air quality levels for a longer period of time. Salmi Declaration, ¶9. Ozone has many adverse health effects, including premature death, airway irritation, coughing, painful breathing, and breathing difficulties. Salmi Declaration, ¶4. Thus, New Jersey has an interest in ensuring that the ACOE's actions conform with Delaware's SIP, as well as its own.

Moreover, the State of Delaware claims that the defendants have failed to prepare and issue a modified consistency determination pursuant to the CZMA. Similarly, defendants' Project is in conflict with New Jersey's coastal zone management program, and defendants have refused to conduct supplemental coordination with the State of New Jersey under the CZMA. The CZMA requires coordination and consistency among federal and state coastal management plans and consideration of the views of each state with coastal zone affected by a federal action. 16 U.S.C. § 1452; 16 U.S.C. § 1456(c)(1). The coastal zones of Delaware of New Jersey along the Delaware River and Bay are ecologically linked, making it impossible for a coastal zone consistency determination for one state not to affect the other state.

Finally, Delaware has noted the need for updated environmental analyses and planning to support various permits and determinations required in order for the ACOE to legally proceed with the Project. Similarly, New Jersey has urged the ACOE repeatedly to conduct additional environmental analyses to account for significant changes in the environment and contends that failure to do so violates NEPA.

Thus, the State of New Jersey has satisfied the second and third prongs for intervention as of right under Fed. R. Civ. P. 24(a)(2) because it has a direct interest in the underlying litigation that will be impaired or affected by this litigation. In addition, New Jersey cannot be excluded from this controversy without impairing its ability to protect that interest. *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 130 (D.C. Cir. 1972); *Nuesse v. Camp*, 385 F.2d 694, 699, 703 (D.C. Cir. 1967). When a state is a party to a suit involving a matter of sovereign interest, it is presumed to represent the interests of its citizens. *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir.1979); *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976). New Jersey's interests differ from those of the State of Delaware, since each state is charged with protecting its own residents and natural resources. Accordingly, while Delaware shares with New Jersey an interest in ensuring that the ACOE meets pertinent environmental standards, Delaware cannot be expected to protect New Jersey's interests. In light of those circumstances, the State of New Jersey has satisfied the final prong of Rule 24(a)(2) - that no existing party adequately represents movant's interests. *See Georgia v. United States Army Corps of Engineers*, 302 F.2d 1242, 1255-56 (11th Cir. 2002); *Lawrence v. Elsea*, 478 F. Supp. 480, 482 (W.D. Wis. 1979).

Motions for intervention are liberally construed. *Nuesse, supra*, 385 F.2d at 702. New Jersey's right to intervene in this matter is beyond dispute. The State of New Jersey has an

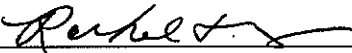
obvious, distinct interest in protecting New Jersey's environment, residents, and natural resources. Precluding the State of New Jersey from this lawsuit will impair its ability to protect these critical interests. In light of the State of New Jersey's indisputable, strong, and distinct interest in this matter, the motion of the State of New Jersey to intervene in this matter must be granted.

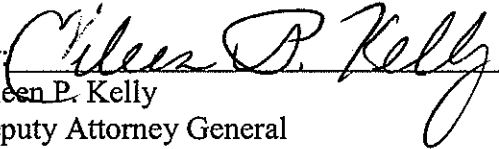
CONCLUSION

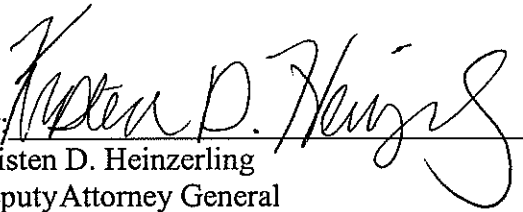
The motion of the State of New Jersey to intervene should be granted, and the State of New Jersey should be joined in this lawsuit.

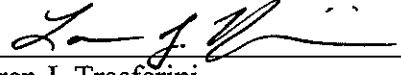
Respectfully submitted,

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