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PREPARED BY THE COURT

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	SUPERIOR COURT OF NEW JERSEY
	:	UNION COUNTY
	:	LAW DIVISION
Plaintiff,	:	
	:	DOCKET NO.: UNN-L-3026-04,
v.	:	consolidated with Docket No. 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 Putative Intervenors:
Susan J. Kraham and Edward Lloyd, Attorneys for New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, and Environment New Jersey

Sentor 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

INTRODUCTION

This opinion addresses the New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, and Environment New Jersey's (the "Environmental Groups") and New Jersey State Senator Raymond Lesniak's (collectively "Movants") renewed attempts to intervene as plaintiffs in New Jersey Department of Environmental Protection v. Exxon Mobil Corp., Docket No. UNN-L-3026-04, consolidated with Docket No. UNN-L-1650-05. This opinion contains an abbreviated procedural history. For a complete statement of facts and procedural history, see the court's July 13, 2015 opinion denying Movants' initial motions to intervene, N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., No. UNN-L-3026-04, slip op. (N.J. Super. Ct. Law Div. July 13, 2015) (hereinafter "Exxon III"), and August 25, 2015 opinion approving the Proposed Consent Judgment between the New Jersey Department of Environmental Protection ("DEP" or "State") and ExxonMobil Corporation ("Exxon"). N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., No. UNN-L-3026-04, slip op. (N.J. Super. Ct. Law Div. Aug. 25, 2015) (hereinafter "Exxon IV").

I. Procedural History

On July 13, 2015, the court denied without prejudice Movants' initial intervention as of right and permissive intervention motions. Exxon III, slip op. at 32.[1] Although Senator Lesniak did not elect to file an interlocutory appeal, on July 27, 2015, the Environmental Groups filed a motion for leave to appeal and requested that this court stay proceedings. On July 30, 2015, after hearing oral argument on the stay request, the court denied the request. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., No. UNN-L-3026-04, letter op. at 12 (N.J. Super. Ct. Law Div. July 30,

[1] The New York/New Jersey Baykeeper, Natural Resources Defense Council, and New Jersey Audubon were also putative intervenors in the Environmental Groups' first intervention attempt. They have since elected not to further participate in these proceedings.

2015). That same day, the court granted Movants' requests to become amici curiae and held oral argument on the DEP's Motion to Approve the Proposed Consent Judgment. On August 25, 2015, the court approved the Proposed Consent Judgment. Exxon IV, slip op. at 81.[2] On August 31, 2015, the Appellate Division dismissed without prejudice the Environmental Groups' motion for leave to appeal and directed that the Environmental Groups could file a new motion of appeal if they suffered an adverse judgment after renewing their intervention motions with this court.[3]

On September 1, 2015, Senator Lesniak filed his "Motion for Reconsideration of Order Denying Intervention." During the June/July intervention proceedings, Senator Lesniak sought to intervene to (1) brief and argue orally against the Proposed Consent Judgment; and (2) obtain a right of appeal if the court approved the Proposed Consent Judgment. Because the court has already approved the Proposed Consent Judgment, his first intervention purpose is now moot, and he only seeks to intervene "for the limited purpose of filing an appeal from the Court's Decision and Order entered on August 25, 2015, after the Decision and Order becomes final."[4] In support of his Reconsideration Motion, he relies upon his June 19, 2015 letter brief, a new letter brief, and a reply letter brief.

On September 10, 2015, the Environmental Groups filed their "Motion to Intervene for the Purpose of Appealing the Final Order." During the June/July intervention proceedings, the Environmental Groups sought to intervene to (1) brief and argue orally against the Proposed Consent Judgment; (2) conduct additional discovery to counter the parties' submissions in support of the Proposed Consent Judgment; and (3) obtain a right of appeal if the court approved the Proposed Consent Judgment. Because the court has already approved the Proposed Consent

[2] Although the court, through Exxon IV, approved the Proposed Consent Judgment on August 25, 2015, the Consent Judgment did not become final until the court signed it on August 31, 2015.
[3] Order on Motion, Appellate Division, Aug. 31, 2015 ("The notice of appeal is dismissed without prejudice to the filing of a new notice of appeal from the final judgment.").
[4] Senator Lesniak's Brief in Support of Motion for Reconsideration, 1 ("Senator Lesniak's Brief").

Judgment, these first two intervention purposes are now moot. For this reason, the Environmental Groups now "renew their motion to intervene for the limited purpose of appealing the final decision of the trial court to the Appellate Division."[5] In support of their renewed motion, they rely on their June 10, 2015 brief, a newly filed brief, and a reply brief.

II. Senator Lesniak's Motion for Reconsideration

Before analyzing the merits of Movants' intervention as of right and permissive intervention motions, the court must first address the procedural flaw in Senator Lesniak's Motion for Reconsideration. Such motions are governed by New Jersey Court Rule 4:49-2, which states that "a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it." R. 4:49-2 (emphasis added). There is no dispute that Senator Lesniak has filed a motion for reconsideration,[6] and there is no dispute that he is asking the court to reconsider its July 13 opinion denying his intervention as of right and permissive intervention motions.[7] Because more than twenty days passed between July 13, 2015 and September 1, 2015, his present motion is therefore not timely and should be procedurally dismissed by the court. See R. 4:49-2. In the interests of justice and judicial economy, however, the court will treat his present motion as if it were a new intervention motion.

Senator Lesniak briefed and argued his positions in June/July and has readopted those same positions in his present motion.[8] Therefore, the State and Exxon are well aware of his positions and will suffer no prejudice if the court treats his present motion as a new motion for intervention. In fact, their briefs opposing his motion treat it as if it were a new intervention

[5] Environmental Groups' Brief in Support of Motion to Intervene, 1 ("Environmental Groups' Brief").
[6] See Senator Lesniak's Brief, 7.
[7] See id. at 1.
[8] Ibid.

motion.[9] Further, at oral argument, Senator Lesniak agreed to have his motion be treated as a new intervention motion, and neither Exxon nor the State objected. This action serves judicial economy because dismissing Senator Lesniak's motion on procedural grounds and having him refile would needlessly prolong what is now over eleven years of litigation, especially when the court has before it the Environmental Groups' procedurally proper intervention motion.

This opinion proceeds by first discussing standing and its interrelation with Rules 4:33-1 and 4:33-2. It then explains that Movants could not have brought this natural resource damages ("NRD") action against Exxon under the Spill Compensation and Control Act (the "Spill Act"), N.J.S.A. 58:10-23.11 to -23.24, the Environmental Rights Act (the "ERA"), N.J.S.A. 2A:35A-1 to -14, or the common law. Because of this lack of standing, the court is compelled to deny the intervention motions. This opinion will then explain why, even if Movants' had standing, their intervention as of right motions should be denied because the DEP adequately represents their interests despite the fact that the court has now approved the Proposed Consent Judgment. This opinion will then discuss why, if they possessed standing, the court would have granted the Environmental Groups' permissive intervention motion. The opinion will conclude by explaining that Senator Lesniak, independent of his intervention rule shortcomings, cannot intervene due to the New Jersey Constitution's separation of powers provision.

III. Standing

Although Exxon raised the standing issue during Movants' first attempts to intervene, the court assumed Movants had standing without deciding the issue. See N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., No. UNN-L-3026-04, letter op. at 8 (N.J. Super. Ct. Law Div. July 30, 2015) (clarifying that in footnote 24 of Exxon III, the court "was assuming standing without

[9] See generally DEP's Brief Opposing Environmental Groups' and Senator Lesniak's Motions to Intervene; Exxon's Brief in Opposition to Putative Intervenors' Renewed Motions to Intervene.

deciding so"); Exxon III, slip op. at 8 n.24 (addressing Exxon's standing argument). Both Rule 4:33-1 and 4:33-2 contain multiple prongs, and because Movants' motions failed numerous prongs for both rules, the court was in a position to dispose of the motions without deciding whether Movants had standing.

Standing is a "threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 85 (App. Div. 2004) (emphasis added) (citing In re Adoption of Baby T., 160 N.J. 332, 340 (1999)). The essential purpose of the doctrine in New Jersey is "to assure that the invocation and exercise of judicial power in a given case are appropriate." N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 69 (1980). "[E]ach party bringing an action must be beneficially entrusted or rightfully or substantially interested in the outcome of the litigation . . . ." N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 413 (App. Div. 1997) (discussing "real party in interest" and how "New Jersey law does not recognize any distinction between the concepts of standing and real party in interest").

New Jersey courts "have historically taken a much more liberal approach on the issue than have the federal cases." Crescent Park Tenants Ass'n v. Reality Equities Corp., 58 N.J. 98, 101 (1971) (citing Al Walker, Inc. v. Borough of Stanhope, 23 N.J. 657 (1957); Jaffe, Judicial Control of Administrative Action 535-36 (1965)). This is because "[u]nlike the Federal Constitution, there is no express language in New Jersey's Constitution which confines the exercise of our judicial power to actual cases and controversies." Id. at 107 (citing U.S. Const. art. III, § 2; N.J. Const. art. VI, § 1). If standing is "at least debatable," courts will allow the action to proceed. Booth v. Twp. of Winslow, 193 N.J. Super. 637, 640 (App. Div. 1984).

Further, "in cases of great public interest, any 'slight additional private interest' will be sufficient to afford standing." Salorio v. Glaser, 82 N.J. 482, 491 (1980) (citations omitted).

Although the New Jersey Constitution does not explicitly limit the types of disputes that courts may entertain, the judiciary has "long recognized that 'our authority is confined to deciding questions presented in an adversary context in a form capable of resolution through the judicial process.'" Indep. Energy Prods. of N.J. v. N.J. Dep't of Envtl. Prot. & Energy, 275 N.J. Super. 46, 55 (App. Div. 1994) (emphasis added) (quoting In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180, 185 (App. Div. 1988)). Thus, our courts require that a "litigant's concern with the subject matter [be] evidenced [by] a sufficient stake and real adverseness," for courts will "not render advisory opinions or function in the abstract, nor will we entertain proceedings by plaintiffs who are 'mere intermeddlers,' or are merely interlopers or strangers to the dispute." Crescent Park, 58 N.J. at 437-38 (citations omitted). Judicial review is available to not only parties, but also "any one who is affected or aggrieved in fact by that decision." In re Camden Cnty., 170 N.J. Super. 439, 446 (2002) (citations omitted). To determine whether one is "affected or aggrieved," our courts apply a "common sense" test, id. at 449 (quoting New Jersey Practice, Administrative Law and Practice § 7.4 at 360 (Steven L. Lefelt, et. al., 2d ed. 2000)), which looks to see if third parties have "some real and direct interest" in the action. Id. at 447. If the interest is fanciful, philosophical, overly generalized, id. at 451, or "too ethereal to justify judicial recognition and acknowledgement," Indep. Energy, 275 N.J. Super. at 56, then it is not sufficient to confer standing.

III.A. Standing Is Required for All Types of Intervention Motions

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.

R. 4:33-2 (emphasis added). The Pressler comment on Rule 4:33-2 makes clear that whether one has a "claim or defense" is a question of whether one has standing to have brought the action in the first place. See Sylvia B. Pressler & Peter G. Verniero, Rules Governing the Courts of the State of New Jersey, R. 4:33-2 cmt. 1 (2015 ed.) ("Cleary those without standing in the first instance are also without sufficient interest to warrant intervention."). Movants contend that courts need only perform a standing analysis for Rule 4:33-2, not Rule 4:33-1, because this quote only appears in the Rule 4:33-2 comments. This contention, however, ignores the fact that New Jersey Courts routinely perform a standing analysis for both intervention as of right and permissive intervention motions. See, e.g., VW Credit, Inc. v. Coast Auto. Grp., Inc., 346 N.J. Super. 326, 334 (App. Div. 2002) (finding that the putative intervenor had standing before finding that the putative intervenor was allowed to intervene as of right); Warner Co. v. Sutton, 270 N.J. Super. 658, 664 n.1 (App. Div. 1994) ("Had they filed a direct action challenging the amended consent order, movants would no doubt have had standing."); Mobil Admin. Servs. Co. v. Mansfield Twp., 15 N.J. Tax. 583, 587-90 (Tax 1996) (denying the putative intervenor's intervention as of right motion because it lacked standing and "cannot create such standing by its motion to intervene").

Movants further argue that because permissive intervention requires a "claim or defense," R. 4:33-2, and intervention as of right only requires an "interest relating to the property or transaction," R. 4:33-1, these different requirements show that standing is not required for

intervention as of right. This contention, however, ignores the interplay of Rule 4:33-3 with Rules 4:33-1 and 4:33-2. That rule, which outlines the procedural requirements for intervention, states:

> A person desiring to intervene shall file and serve on all parties a motion to intervene stating the grounds therefor and accompanied by a pleading setting forth the claim or defense for which intervention is sought along with a Case Information Statement pursuant to R. 4:5-1(b)(1). The appropriate filing fee for the proposed pleading shall be paid at the time of filing the motion to intervene but shall be returned if that motion is denied.

R. 4:33-3 (emphasis added). Because this rule applies to both permissive and intervention as of right motions, a "claim or defense" is thus required for either motion. If movants do not have a "claim or defense," they cannot intervene under the plain language of Rule 4:33-2. Likewise, if they do not have a "claim or defense," they cannot intervene under Rule 4:33-1 through Rule 4:33-3. These three rules, taken together, show that standing is required for both permissive and intervention as of right motions.[10]

Moreover, applying its own independent reasoning, the court finds that requiring standing for intervention makes sense. Any time a plaintiff brings a lawsuit, they must have standing to do so. When a movant has a claim with a question of law or fact in common with the main action and succeeds in intervening, they become a party plaintiff to an action. If standing were not required to intervene, the bar to becoming an intervening plaintiff would, therefore, be lower than the bar to becoming an original plaintiff. Such a result would be illogical.

The court is bound by VW Credit and Warner, which are Appellate Division opinions, and is persuaded by Mobil Administrative Services from the Tax Court. Furthermore, the

[10] The Environmental Groups' also contend that standing is not required to intervene because both the U.S. Supreme Court and U.S. Court of Appeals for the Third Circuit have declined to definitively rule on this issue. Environmental Groups' Brief, 6 n.3. New Jersey courts may certainly look to federal decisions for guidance when construing Rules 4:33-1 and 4:33-2. Exxon III, slip op. at 7 (citations omitted). Federal decisions, however, are irrelevant in situations, such as the present, where New Jersey courts have definitely ruled on an issue and federal courts have declined to address that issue.

interplay of Rule 4:33-3 with Rules 4:33-1 and 4:33-2 shows that because a "claim or defense" is required for all intervention motions, standing is also a requirement. For this reason, the court finds that it must perform a standing analysis for both Rule 4:33-1 and 4:33-2 motions. Performing this analysis, even under New Jersey's liberal standing rules, the court finds that Movants lack standing under both the Spill Act and ERA.

III.B. Movants Lack Standing to Bring NRD Lawsuits

"'The Spill Act does not provide a private right of action for recovery of cleanup costs and other damages.'" Bowen Eng'g v. Estate of Reeve, 799 F. Supp. 467, 479 (D.N.J. 1992) (quoting Allied Corp. v. Frola, 701 F. Supp. 1084, 1091 (D.N.J. 1988)) (citing T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 703 (D.N.J. 1988); Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257, 1263 (D.N.J. 1987)). On the contrary, it explicitly provides that only the DEP can bring NRD suits. N.J.S.A. 58:10-23.11u(a)-(b). Furthermore, N.J.S.A. 58:10-23.11g(c) allows only the DEP "to recover its cleanup costs from responsible parties, and allows the New Jersey Spill Compensation Fund (created by the Spill Act) to recover such cleanup costs for which it has reimbursed the DEP." Frola, 701 F. Supp. at 1091 (citing Jersey City, 655 F. Supp. at 1263; N.J. Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 481-83 (1983)). In an attempt to overcome this hurdle, Movants argue that the ERA gives them standing and that they could have brought this NRD suit through the ERA.

Enacted December 9, 1974, the ERA "was passed primarily to insure 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) (citing N.J.S.A. 2A:35A-2).[11] Although the "ERA does not itself provide any substantive cause of action," Superior Air Prods.

[11] Although it became effective in 1974, three years before the Spill Act became effective, the ERA also applies to environmental statutes passed subsequent to its enactment. Howell, 207 N.J. Super. at 94.

v. NI Indus., 216 N.J. Super. 46, 58 (App. Div. 1987); see also Bowen, 799 F. Supp. at 479 ("While the ERA generally allows for citizen enforcement of state environmental laws, it does not create any independent substantive rights." (citing Frola, 701 F. Supp. at 1091; Superior Air, 216 N.J. Super. at 58)), it accomplishes its goal by conferring "standing upon private persons to enforce the Spill Act (and other New Jersey environmental statutes) 'as an alternative to inaction by the government which retains primary prosecutorial responsibility.'" Frola, 701 F. Supp. at 1091 (quoting Superior Air, 216 N.J. Super. at 58). There are, however, three limitations to the standing the ERA can grant.

First, any rights individuals have under the ERA are "derivative of their rights under the Spill Act . . . ." Bowen, 799 F. Supp. at 479 (citing Frola, 701 F. Supp. at 1091). For this reason, individuals' "substantive rights under the Spill Act through the ERA cannot exceed their substantive rights under the Spill Act directly." Frola, 701 F. Supp. at 1091. Second, the ERA's plain language limits the types of relief that individuals can seek to equitable relief, declaratory relief, and the assessment of civil penalties:

> **a.** Any person may commence a civil action . . . against any other person alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment. The action may be for injunctive or other equitable relief to compel compliance with a statute, regulation or ordinance, or to assess civil penalties for the violation as provided by law.
>
> **b.** Except in those instances where the conduct complained of constitutes a violation of a statute, regulation or ordinance which establishes a more specific standard for the control of pollution, impairment or destruction of the environment, any person may commence a civil action in any court of competent jurisdiction for declaratory and equitable relief against any other person for the protection of the environment, or the interest of the public therein, from pollution, impairment or destruction.

N.J.S.A. 2A:35A-4(a)-(b) (emphasis added). Third, "the right of a private actor to sue under the ERA is limited." Bowen, 799 F. Supp. at 479. Individuals may only bring actions "commenced

upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future." N.J.S.A. 2A:35A-4(a) (emphasis added). Applying these limitations, courts have consistently dismissed individual plaintiffs' actions that sought to recover damages and cleanup costs, the very types of actions the DEP initiated in this case.

For instance, in Allied Corp. v. Frola, James Frola and Albert Von Dohln sought to impose liability on a number of third-party defendants under the Spill Act. Frola, 701 F. Supp. at 1090. The U.S. District Court for the District of New Jersey dismissed their Spill Act claims because they sought "relief under the Spill Act that is unavailable to them under that Act." Id. at 1091. The court noted that because individuals "cannot recover damages under the Spill Act directly, neither can they recover damages under the Spill Act via the ERA." Ibid. Importantly, the court distinguished these claims from Frola and Von Dohln's other claims, which it did not dismiss because they sought equitable remedies. Ibid.

Likewise, in Bowen Engineering v. Estate of Reeve, the same court granted a defendant's summary judgment motion as to the plaintiffs' count seeking to recover past and future cleanup costs. Bowen, 799 F. Supp. at 478-79. Noting that the Spill Act does not provide for private recovery of cleanup costs and that plaintiffs' rights under the ERA are derivative of their rights under the Spill Act, the court ruled that the plaintiffs could not recover these costs. Id. at 479 ("[C]itizens may bring an action through the ERA for injunctive relief under the Spill Act." (emphasis added) (citing Frola, 701 F. Supp. at 1091; Port of Monmouth Dev. Corp. v. Middletown Twp., 229 N.J. Super. 445, 451 (App. Div. 1988))). The court also granted summary judgment as to the plaintiffs' count seeking a permanent injunction because injunctive relief is only available under the ERA when the defendant "'is in violation, either continuously or

intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future.'" Ibid. (quoting N.J.S.A. 2A:35A-4(a)). The court found that because "[a]ny violation of the Spill Act for which [the deceased defendant] was responsible occurred no later than May of 1974, when he sold his interest . . . . [he was] not in continuing violation of the spill *[sic]* Act, and there is no likelihood that decedent will be responsible for future violations." Ibid.

As these two cases are from the U.S. District Court for the District of New Jersey, they are, of course, not binding on this court. Neither is Panaccione v. Holowiak, an unpublished Appellate Division opinion that highlighted the ERA's limitation to injunctive relief, No. A-5461-06T3, 2008 N.J. Super. LEXIS 1809, at *10 (N.J. Super. Ct. App. Div. Nov. 12, 2008), and noted that "the ERA is only available to prevent future violations; it cannot be used to seek redress for past ones." Id. at *12 (emphasis added) (citing N.J.S.A. 2A:35A-4(a)).[12] These cases, however, are highly persuasive because they all based their reasoning on the ERA's plain statutory language.[13]

[12] The Environmental Groups contend that the ERA can be used to address past wrongs. Environmental Groups' Reply Brief, 5. For support, they argue that only section 4(a), not 4(b), of the ERA contains language limiting private actions to continuous and future violations. Ibid. This argument, however, misses the mark because only section 4(a) is relevant to the instant motions. That section addresses private claims that seek to enforce statutes, such as the Spill Act. N.J.S.A. 2A:35A-4(a). Section 4(b) addresses private claims that seek to enforce common law rights. Id. at 2A:35A-4(b); Howell, 207 N.J. Super. at 99. Movants are attempting to intervene to enforce the Spill Act through the ERA, not to enforce common law claims through the ERA.

[13] None of these three cases are recent decisions. The Legislature has known that courts have been holding that individuals cannot recover damages under the ERA since 1988, the year Frola was decided. When courts interpret a provision of a statute and the legislature either amends or reenacts the entire statute, without altering the specific judicially construed provision, this evinces legislative acquiescence to the interpretation. Harper v. N.J. Mfrs. Casualty Ins. Co., 1 N.J. 93, 99 (1948) ("Where a statute has received a contemporaneous and practical interpretation, added weight is given the practical interpretation if the statute as interpreted is re-enacted." (citing Sutherland, Statutory Construction, 3rd ed. p. 523, § 5109)); see also Tx. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 576 U.S. ___, 135 S. Ct. 2507, 2519-21, 192 L. Ed. 2d 514, 533-36 (2015) (holding that disparate impact suits are cognizable under the Fair Housing Act because, inter alia, Congress's inaction against the uniform backdrop of Circuit Court decisions allowing for disparate impact suits evinced Congress's agreement with these decisions). The Legislature amended section 4 of the ERA in 1990 and has more recently amended the Spill Act. None of these amendments changed the judicial interpretation that individuals cannot bring damages suits under the ERA or Spill Act. Applying this statutory interpretation principle, the court reads the Legislature's inaction as agreement with Frola, Bowen, and Panaccione.

Applying their reasoning, the court is compelled to deny Movants' Rule 4:33-1 and 4:33-2 motions because Movants' could not have initiated and maintained the present underlying lawsuit in the first place. See Six Month Extension, 372 N.J. Super. at 85 ("In general, standing is a threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal."). There is no dispute that the DEP brought a Spill Act NRD suit for $8.9 billion in damages and sought to recover their natural resource damage assessment costs. This damages and cost recovery suit did not involve injunctive relief. Moreover, the underlying suit was brought to hold Exxon responsible for chronic, long term injuries that were suffered in the past. Because Movants could not have brought this damages suit in their individual, interest group, or legislative capacity, any relief they would have sought through the ERA would not have been "in a form capable of resolution through the judicial process." Indep. Energy, 275 N.J. Super. at 55.

The fact that Movants lack a "claim" is further underscored by the deficiency of the complaints they filed pursuant to Rule 4:33-3. In the "Claim for Relief" section of their Proposed Complaint, the Environmental Groups merely reference the Spill Act[14] and Public Trust Doctrine.[15] Although they continually assert that they could have initiated the underlying action through the ERA, their Proposed Complaint makes no reference whatsoever to the ERA. Whether this is viewed as an oversight or tacit admission that they could not have brought this damages suit through the ERA, this omission shows that the Environmental Groups lack a claim with a question of law or fact in common with the main action. R. 4:33-2. Senator Lesniak's complaint is likewise deficient in the same manner. His complaint references the Spill Act and

[14] Environmental Groups' Proposed Complaint and Crossclaim in Intervention, ¶¶ 29-33.
[15] Id. at ¶¶ 34-36.

Public Trust Doctrine but does not mention the ERA.[16] Were their intervention motions not substantively deficient, such a flaw would be enough to procedurally dismiss their attempted intervention.

* * *

None of the cases on which the Environmental Groups rely help them overcome their fatal flaw, namely, the fact that they could never have initiated and maintained the underlying action in the first place. All are either distinguishable or actually work against their assertion that they have standing. In Crescent Park Tenants Association v. Realty Equities Corp., the Appellate Division reversed the trial court and ruled that a nonprofit organization could bring an action on behalf of its members. 58 N.J. at 99. Were this case decided today, it would not be a close question. When it was decided in 1971, the issue of associational standing was somewhat unsettled. Importantly, in Crescent Park, the Supreme Court noted that there would have been no attack of standing if the individual members had brought the complaint. Id. at 108. The court does not dispute that interest groups, such as the Environmental Groups, can have standing. In the present case, however, neither the Environmental Groups nor their individual members could have initiated and maintained the present underlying action.

New Jersey Citizen Action v. Riviera Motel Corp. actually works against the Environmental Groups. There, the plaintiff nonprofit corporation brought an Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101—12213, claim against a motel. Riviera Motel, 296 N.J. Super. at 408. The Appellate Division found that the plaintiff had standing because the ADA provides a private cause of action, and its legislative history clearly demonstrates that associations are "persons" empowered to bring actions. Id. at 413. This case, therefore, works against the Environmental Groups because it shows that courts are to look to the

[16] Senator Lesniak's Complaint and Crossclaim in Intervention, ¶¶ 31-34.

relevant statute to determine if potential plaintiffs have standing. Unlike the ADA, the Spill Act does not have a private cause of action, and the ERA expressly limits private standing to actions for equitable relief, declaratory relief, or the assessment of civil penalties. N.J.S.A. 2A:35A-4.

Jen Electric, Inc. v. County of Essex, in which the Supreme Court interpreted N.J.S.A. 40A:11-13, also works against the Environmental Groups. Under that statute, "[a]ny prospective bidder who wishes to challenge a bid specification shall file such challenges in writing with the contracting agent no less than three business days prior to the opening of the bids." N.J.S.A. 40A:11-13. Because the plaintiff was not a "prospective bidder" within the meaning of the statute, the Appellate Division found that the plaintiff lacked standing. Jen Electric, Inc. v. Cnty. of Essex, 197 N.J. 627, 630-31 (2009). The Supreme Court reversed and held that in enacting N.J.S.A. 40A:11-13, the Legislature did not intend to limit who could bring challenges. Rather, the Legislature intended the statute to serve as a statute of limitations. Id. at 643-44. In the present case, there is no dispute that the ERA was enacted as a standing granting statute, a statute that clearly places limits on the standing it confers. N.J.S.A. 2A:35A-4. Moreover, in Jen Electric, the Court made clear that its ruling had a "very limited nature," due to the unique nature of public contracting. Jen Electric, 197 N.J. at 646.

The Environmental Groups are correct that under Booth v. Township of Winslow, plaintiffs can proceed any time standing is "at least debatable." 193 N.J. Super. at 640. Standing in this case, however, is not debatable because there is no reading of either the Spill Act or ERA that would allow private individuals to pursue a NRD claim. Furthermore, they cite In re Six Month Extension of N.J.A.C. 5:91-1 et seq. for the proposition that "'in public interest and group litigation, especially, standing has been approached permissively.'"[17] A review of this case,

[17] Environmental Groups' Brief, 8 (quoting Six Month Extension, 372 N.J. Super. at 86).

however, reveals that the types of cases the Appellate Division was discussing included only land use and Mount Laurel cases. Six Month Extension, 372 N.J. Super. at 86.

The Environmental Groups rely on In re Camden County because there, Camden County was allowed to appeal a final administrative decision even though it was not a party to the action. 170 N.J. at 451. There, a former sheriff was awarded disability benefits by the Board of Trustees of the Public Employees Retirement System. Id. at 442. Although Camden County was not initially allowed to appeal this determination, the Supreme Court reversed and held that the County could appeal because it was the body that would have to pay the benefits. Id. at 450-51. Thus, the County had standing because it was directly financially affected by the disability award. Ibid. In the present case, the Environmental Groups suffer no direct harm from the entry of the Proposed Consent Judgment.

Al Walker, Inc. v. Borough of Stanhope does not aid their cause for the same reason that In re Camden County does not. There, a number of local ordinances either prohibited the parking of mobile homes or imposed regulations on their use. Al Walker, 23 N.J. at 658. The Supreme Court found that a retail seller of trailer homes had standing to challenge these ordinances because, like Camden County, they had a direct financial impact on his business. Id. at 666.

In People for Open Government v. Roberts, city residents spearheaded an approved voter referendum that curtailed the pay to play system. 397 N.J. Super. at 510-11. Because the city officials were not enforcing this provision, the residents brought an action to compel the officials to enforce it. Id. at 511. The Appellate Division found that the residents had standing, focusing on the fact that at oral argument, the city could not point to one official charged with the duty of enforcing the ordinance. Ibid. Here, there is no allegation that the DEP is not enforcing the Spill Act. Rather, the Environmental Groups merely disagree with a number of enforcement decisions

that the DEP, acting within its discretion, has made. Finally, nothing in In re Christie's Appointment of Perez as Public Member 7 of Rutgers University Board of Governors, 436 N.J. Super. 575 (App. Div. 2014), supports the Environmental Groups' claim to standing. This case is more applicable to Senator Lesniak's attempted intervention and will be discussed more fully below.

These cases all found standing under New Jersey's liberal standing rules. None of these cases, however, did what Movants urge this court to do: find a private cause of action when a statute expressly allows only a governmental agency to bring certain actions or allow private parties to pursue damages claims where a statute expressly limits private suits to equitable relief, declaratory relief, and the assessment of civil penalties. In fact, New Jersey courts have consistently found a lack of standing in situations where only the State and its agencies are allowed to bring certain suits. See Guarini v. New York, 215 N.J. Super. 426, 443 (Ch. Div. 1986) ("Individual citizens simply do not have standing to have determined by a court those matters reserved to sovereign governments."); Ott v. Town of West New York, 92 N.J. Super. 184, 196 (Law Div. 1966) (finding that individual plaintiffs lacked standing to argue that the federal Housing Act of 1949 was being violated because this was "of concern only to the Housing and Home Finance Administration"); see also Cnty. of Bergen v. Port of N.Y. Auth., 32 N.J. 303, 308 (1960) ("The county thus is not among those legislatively determined to be parties in interest.").

The Environmental Groups' reliance on Public Interest Research Group v. Star Enterprise is also misplaced. There, the U.S. District Court for the District of New Jersey found that an environmental interest group had standing to bring a Federal Water Pollution Control Act suit on behalf of its members. Pub. Interest Research Grp. v. Star Enter., 771 F. Supp. 655, 664 (D.N.J.

1991). That statute, unlike the Spill Act and ERA, provides that "'any citizen may commence a civil action,'" id. at 661 (emphasis added) (quoting U.S.C. § 1365(a)), and does not limit the types of suits to equitable relief, as does the ERA. In this case, the court is bound by the words of the Spill Act and ERA, not the distinguishable Federal Water Pollution Control Act.

In an attempt to overcome the standing hurdle, Senator Lesniak cites two Appellate Division opinions for the following proposition, "Even unaggrieved parties may be permitted to appeal where there are compelling public policy or public interest considerations at stake."[18] After reviewing these cases, the court finds that they are distinguishable from the present matter and that their standing rule does not apply.

In Tiger v. American Legion Post No. 43, an admitted "alcoholic who tended to black out when drinking" begin drinking at an American Legion hall. 125 N.J. Super. 361, 366 (App. Div. 1973). After blacking out, she left the bar on foot and was allegedly struck by a hit-and-run driver and suffered injuries. Id. at 366-67. Plaintiff brought suit and sought recovery from (1) the American Legion Post and its bartender, whom she claimed negligently served her alcoholic beverages; and (2) the Director of the Division of Motor Vehicles (the "Director") pursuant to N.J.S.A. 39:6-78, the Unsatisfied Claim and Judgment Fund Law, because of the alleged negligence of the unknown driver. Id. at 364-65. At the close of evidence, the American Legion and its bartender moved to dismiss the claims brought against them, and, although the Director opposed their motion, the trial court granted it. Id. at 365. After the jury returned a verdict in favor of the plaintiff, the trial court entered an order directing the Unsatisfied Claim and Judgment Fund to pay her $10,000. Ibid.

On appeal, the Director argued that the trial court erred in dismissing the claims brought against the co-defendants American Legion and its bartender. Ibid. Noting that his appeal

[18] Senator Lesniak's Brief, 4.

centered around "whether the Director has standing to challenge the dismissal of the complaint as to the co-defendants," id. at 366, the Appellate Division first explained that "[g]enerally, one defendant in a tort action may not assert as a ground of appeal error favorable to a co-defendant unless that error also prejudicially affected his own defense to plaintiff's action." Id. at 370 (citing Donofrio v. Farr Lincoln Mercury, Inc., 54 N.J. Super. 500, 504-05 (App. Div. 1969)). Creating an exception to this general rule, the Appellate Division held that based on public policy and justice considerations, the Director should be allowed to appeal a judgment favorable to a co-defendant. Id. at 371. The Appellate Division, however, made clear that it was creating this limited exception due only to the nuances of the Unsatisfied Claim and Judgment Fund Law.

That law's purpose "is to provide a measure of relief to persons who sustain losses or injury inflicted by financially irresponsible or unidentified operators of motor vehicles, where such persons would otherwise be remediless." Ibid. (citing Dixon v. Gassert, 26 N.J. 1, 5 (1958); Feliciano v. Oglesby, 102 N.J. Super. 378, 390-91 (Law Div. 1968)). Considering this purpose, the court reasoned that preventing the Director from challenging the dismissal of a complaint against potentially culpable co-defendants would defeat the objectives of the statute. Ibid. This is because the Fund would be required to pay the judgment and potentially culpable defendants would escape responsibility. Ibid. In this sense, Tiger is well within general New Jersey standing law because it found that the Director, who stood to suffer a direct financial harm in his official capacity, had standing. Camden Cnty., 170 N.J. at 450.

In Borough of Seaside Park v. Commissioner of New Jersey Department of Education, the Borough of Seaside Park and its board of education filed a complaint asserting constitutional claims in an attempt to dissolve a regional school district. 432 N.J. Super. 167, 190-91 (App.

Div. 2013). Seaside Heights Board of Education filed a third-party complaint also seeking dissolution. Id. at 191. The trial court dismissed these claims. Id. at 193, 198.

On appeal, defendant/cross-appellants Island Heights and its board of education argued that the trial court erred in dismissing the municipalities' and their boards of educations' constitutional claims. Id. at 199. The Commissioner argued that Island Heights lacked standing to challenge the dismissal of the claims because it did not assert any affirmative claims at the trial level. Ibid. Rejecting this argument and citing Tiger, the Appellate Division noted that it would be addressing Island Heights' arguments in the context of the plaintiffs' appeal. For this reason, it allowed the appeal to proceed, ibid., but ultimately affirmed the trial court in all respects. Id. at 223.

Taken together, these two cases stand for the proposition that standing rules may be somewhat relaxed when one party seeks to appeal a judgment affecting another party. This principle, however, is inapplicable to the present matter for two reasons. First, it only applies when a party seeks to appeal a judgment affecting another party. The Director and Island Heights both benefited from this rule because they were already party defendants to the lawsuits. Neither the Environmental Groups nor Senator Lesniak are parties to this matter. Rather, they are seeking to become parties. Second, this principle controls the interactions among parties at the appellate level. Movants may want to appeal this court's approval of the Proposed Consent Judgment, but this case is still at the trial level. For these reasons, and because Movants' "cannot create standing by [filing] motion[s] to intervene," their motions must be denied. Mobil Admin., 15 N.J. Tax at 588.

Finally, as a policy matter, Movants argue that they should be allowed to intervene in order to take an appeal because if they cannot intervene, then no one will ever be able to appeal a

NRD consent judgment between the DEP and a settling defendant. This argument is wrong for two reasons. First, as the court noted in Exxon IV, NRD suits between a trustee and a single defendant are the rare exception to the general rule. Exxon IV, slip op. at 45. NRD actions often involve numerous defendants, all of whom would have standing to appeal a consent judgment by virtue of their status as parties.

Second, in this very case, a review of the Public Comments shows that there were potential candidates for intervention and appeal who elected not to do so. During the Public Comment Period, a number of entities filed comments urging the court to reject the Proposed Consent Judgment because the contribution protection it would confer on Exxon would allow Exxon to bring actions against the entities. Although the court is aware of no Spill Act settlement that has been appealed due to contribution protection, numerous appellants have challenged Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), U.S.C. §§ 9601—9675, settlements on the basis of the contribution rights those settlements confer on settling defendants against non-settling defendants. See, e.g., Ariz. ex. rel. Woods v. Nucor Corp., 825 F. Supp. 1452, 1464-65 (D. Ariz. 1992); City of New York v. Exxon Corp., 697 F. Supp. 677, 694 (S.D.N.Y. 1988). These cases, of course, are not on point because they all involved appeals by parties, and the commenting entities are not parties to this lawsuit. Under New Jersey's liberal standing rules, however, as long as a third party suffers a direct financial harm from the resolution of a lawsuit, that third party has standing to appeal. Camden Cnty., 170 N.J. at 450.[19] Due to the contribution protection the Proposed Consent Judgment confers, the commenting entities could arguably suffer a direct financial harm and, therefore, might not have been "mere interlopers or strangers to the dispute," Indep. Energy, 275 N.J. Super. at 55

[19] These entities might have arguably had a "defense" with a question of law or fact in common with the main action. See R. 4:33-2. For this reason, there would have been no need to analyze whether the Spill Act or ERA provided them with a "claim" with a question of law or fact in common with the main action.

(citations omitted), but might have had the direct, concrete adversity that standing seeks to ensure. Ibid. (citations omitted).

III.C. Lack of Standing Under *Township of Howell v. Waste Disposal, Inc.*

The court denies Movants' intervention motions because, under general New Jersey standing law, they lack standing. As an alternative holding, assuming, arguendo, that Movants could have initiated and maintained a damages claim under the ERA, the court denies their motions because they lack standing under Township of Howell v. Waste Disposal, Inc. The Environmental Groups, both in their July motions and present motions, fiercely contend that they having standing under Howell's interpretation of the ERA. Their reliance is misplaced.

Howell arose due to Waste Disposal, Inc.'s ("WDI") operation of a landfill in Howell, New Jersey. Howell, 207 N.J. Super. at 83. Due to alleged violations, WDI, the DEP, and the Township of Howell (the "Township") entered into an administrative consent order pursuant to the Solid Waste Management Act ("SWMA") and Water Pollution Control Act ("WPCA"). Id. at 85. Subsequently, because a compliance review showed that WDI had been late in meeting compliance deadlines, the Township unilaterally filed a complaint based on rights accorded under the SWMA, WPCA, ERA, Spill Act, and common law negligence, public nuisance, and strict liability. Id. at 86.[20] Although the DEP initially sought leave to appear as amicus curiae, the trial court denied this application and ordered the DEP to become a party to the action. Id. at 87.

[20] Like the Township in Howell, the DEP, in this case, filed common law trespass, strict liability, and public nuisance claims against Exxon. Movants have wisely made no attempt to argue that they have standing to intervene under these theories, and their Rule 4:33-3 complaints do not bring these actions. Movants do not have standing to bring these common law claims because they lack an ownership interest in the Bayway and Bayonne sites, which are, and have always been, privately owned by Exxon and their successors. Howell, 207 N.J. Super. at 98-99 (finding that the Township lacked standing to bring common law claims because it did not have an ownership interest in the WDI site). Additionally, Movants lack standing to bring common law claims under the ERA because that statute only grants private parties standing for such claims where "no statute, regulation or ordinance establishes a specific standard for environmental controls." Id. at 99 (citing N.J.S.A. 2A:35A-4(b)). Because the Spill Act

As plaintiff, the DEP filed a complaint, in which it sought injunctive relief, statutory penalties, attorney's fees, and costs of suit under the SWMA and WPCA. Id. at 88. Thereafter, WDI and the DEP settled the DEP's claims, with the exception of the demand for payment of statutory penalties. Ibid. The Township did not participate in this settlement. Ibid. Following the partial settlement, the trial court dismissed the Township's suit, finding that it lacked standing to sue under the SWMA, WPCA, ERA, and Spill Act. Ibid. Importantly, as to the ERA, the trial court ruled that in suits where the DEP has already proceeded to take action, private parties are precluded from taking similar action. Id. at 89.

On appeal, the Appellate Division reversed and remanded the trial court's dismissal for lack of standing. Id. at 98. Providing guidance, it instructed the trial court to conduct findings on the adequacy of the DEP's actions. The Appellate Division stated that "should the trial court determine that DEP has adequately, fairly and fully enforced the statutory requirements against WDI . . . the court may determine to reenter its judgments of dismissal." Ibid. The Appellate Division declined to issue a per se rule on when private parties lack standing during joint enforcement actions with the DEP and instead opted to allow trial courts to make case-by-case determinations:

> We believe that the determination of whether DEP, in a given situation, has exercised properly its preemptive jurisdiction should be resolved by the court when it is asserted that, DEP has failed in its mission, neglected to take action essential to fulfill an obvious legislative purpose, or where it has not given adequate and fair consideration to local or individual interests. In other words where the state agency has failed or neglected to act in the best interest of the citizenry or has arbitrarily, capriciously or unreasonably acted, the a court should permit interested persons to continue with enforcement under the Environmental Rights Act.

Id. at 96.

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establishes a standard for environmental controls, Movants could not have brought common law claims through the ERA.

Howell, therefore, stands for the following proposition: When a trial court determines that the DEP has properly and adequately acted to enforce environmental statutes, private parties that want to bring concurrent actions through the ERA are ousted from standing. The Environmental Groups, in both opposing the Proposed Consent Judgment and attempting to intervene, have argued that the DEP has neglected its duties and acted arbitrarily by agreeing to the Consent Judgment. Therefore, under Howell, the court is obligated to make findings concerning the DEP's actions.

As the court previously determined in Exxon IV, the DEP, in agreeing to the Proposed Consent Judgment, has acted procedurally and substantively fair, reasonably, consistently with the Spill Act's goals, and in the public interest. See generally Exxon IV, slip op. at 17-81. There has been no bad faith, negligence, inaction, or an abdication of duties. Howell, 207 N.J. Super. at 96. Therefore, pursuant to the Appellate Division's Howell guidance, Movants would be ousted of any standing that the ERA conferred upon them.[21]

For these reasons, Movants cannot intervene in this case, and their motions must be denied. Alternatively, as discussed below, even if Movants had standing to bring a Spill Act NRD suit, the court would still have denied their intervention as of right motions because the DEP adequately represents their interests.

IV. 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.

[21] This discussion is, of course, theoretical. As the court found in Section III.B, Movants lack standing to bring damages suits under the ERA.

R. 4:33-1. 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 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).

In July, this court found that the Environmental groups (1) had an interest in the protection and restoration of natural resources located in New Jersey; and (2) that the disposition of this action may impair or impede their ability to protect that interest. The court denied their motions, however, because they failed prongs three and four. Exxon III, slip op. at 7. The court denied Senator Lesniak's motion because he failed all four prongs. Ibid. As to the present motions, the court finds that any interest Movants have is adequately represented by the DEP. For this reason, even if they had standing, the court would have denied their motions.

The court previously found that the DEP adequately represents Movants' interest in the protection and restoration of natural resources because (1) Movants and the DEP share the same ultimate goal, id. at 17-20; (2) Movants have done nothing to rebut the presumption of adequate representation that arises when parties share the same ultimate goal, id. at 20; (3) Movants disagreement with the DEP is only on the strategy and means employed to achieve that goal, id.

at 19-20; (4) a disagreement over the amount recovered is generally not enough to warrant intervention as of right, id. at 19-21; (5) the Environmental Groups are public interest groups whose concerns closely parallel those of a public agency, and their interests are general rather than specific to them, id. at 21-22; (6) Movants 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," id. at 22; (7) the three Appellate Division cases on which Movants rely are all distinguishable from the present matter, id. at 13-17; and (8) In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019 (D. Mass. 1989), on which the Environmental Groups rely is distinguishable. Id. at 20-21. The previous motions were denied without prejudice partly because something could have occurred from July to the present that would have altered this court's reasoning. Furthermore, at that time, the court had not yet determined whether it was going to approve the Proposed Consent Judgment. As nothing has changed to alter the court's reasoning in Movants' favor, the court now incorporates its previous reasoning into this decision. In fact, the court's finding that the Proposed Consent Judgment is fair, reasonable, in the public interest, and consistent with the Spill Act's goals has, if anything, bolstered its prior determination that the DEP adequately represents Movants' interest in the protection and restoration of natural resources.[22]

The court need not reiterate verbatim its reasons for finding adequate representation in this opinion. Rather, readers should read pages twelve to twenty-six of Exxon III in tandem with

[22] Because the DEP adequately represents any interest Movants' might have in the replacement and restoration of natural resources located in New Jersey, the court need not make dispositive findings on the first two Rule 4:33-1 prongs. It will, however, highlight two points. First, there is nothing inconsistent with finding that a putative intervenor lacks standing and also finding that the same intervenor has a Rule 4:33-1 interest. See Mobil Admin., 15 N.J. Tax at 588-89, 594 (finding that a putative intervenor had an "interest" but denying the intervention motion because it lacked standing). Second, although the court found that the Environmental Groups met prong two in Exxon III, approval of the Proposed Consent Judgment may have altered the court's analysis because there is no longer any worry that the court will "dismiss the State's claim for lack of sufficient evidence . . . ." Exxon III, slip op. at 11-12.

this decision. Where appropriate, the court will reference Exxon III and provide supplemental discussion on the areas that require it.

* * *

When a putative intervenor has the same ultimate goal as a party already in the lawsuit, a presumption of adequate representation arises. Id. at 18-19 (citing cases from eight U.S. Courts of Appeals and three U.S. District Courts). 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 Sanitary Dist. v. S. G. Phillips Corp., 610 F.2d 49, 54 (1st Cir. 1979). 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. v. Westinghouse Electric Corp., 308 F.2d 856, 859 (3d Cir. 1962) ("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.").

Applying these principles, the court previously found that Movants "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. Exxon III, slip op. at 19. For Bayway, Bayonne, and Paulsboro,

the DEP initiated NRD suits in an attempt to recover a sum of money. The DEP, exercising their expertise as the State's designated natural resource trustee, believes that the best way to achieve this goal is to lock in a guaranteed sum of money through settlement, rather than leave things to the uncertainties of trial. Just because Movants, who have been strangers to these lawsuits for years, disagree with the decision to settle, this does not mean that the DEP no longer adequately represents their interest. See City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 10 (App. Div. 2006) ("As often occurs in condemnation actions, there undoubtedly will be negotiations between the parties, and there may be compromise or settlement at some point in the litigation. That does not mean in doing so the City is not adequately representing Asbury Partners' interest.").

Movants contend that they have rebutted the presumption of adequate representation because the court's approval of the Proposed Consent Judgment demonstrates adversity of interest. This is not the case, however, because the DEP's preference for settlement and Movants' preference for litigation is merely a disagreement in strategy. Such disagreements do not warrant intervention as of right. TLC Invs. & Trade, 147 F. Supp. 2d at 1042 (citing Glickman, 82 F.3d at 838). In their present motions, Movants make no new arguments on this point. Instead, they continue to assert that the DEP is entitled to $8.9 billion, the amount which the DEP's experts calculated damages at Bayway and Bayonne. As the court noted in Exxon IV, this assertion ignores two key facts. First, just because a plaintiff obtains an expert damages report does not automatically entitle them to that amount of money. Plaintiffs must prove damages at trial. Exxon IV, slip op. at 48-50, 56. Second, testimony on this expert report was only conditionally admitted into evidence. Had this court ultimately found the testimony

unreliable when it ruled on Exxon's Rule 104 Motion, the State would not have been able to prove damages. Id. at 60.

Movants are correct that their objections to the Proposed Consent Judgment go further than just a disagreement over the amount recovered for Bayway, Bayonne, and Paulsboro. However, the DEP still adequately represents their concerns on the inclusion of the Attachment C Facilities and Retail Gas Stations because Movants and the DEP share the same ultimate goal with respect to these sites. They both seek the recovery of money from Exxon to use to replace and restore natural resources in New Jersey. The DEP, applying its years of litigation expertise, believes that litigating these thousands of sites would end up costing the State more money than it would recover by taking Exxon to trial over each site. It therefore believes pre-suit settlement is the best, and only, strategy to achieve this goal. Id. at 42-44. Movants, on the other hand, want to conduct costly natural resource damage assessments for these sites and then potentially bring lawsuits to recover alleged damages. Again, such a disagreement in strategy and the amount recovered is not enough to warrant intervention as of right.

The same logic applies to Movants' and the DEP's disagreement over the deferral of Morses Creek remediation. As the court found in Exxon IV, this deferral is a reasonable compromise with potential long term benefits and is in the public interest. Exxon IV, slip op. at 74-78. Both the DEP and Movants want to remediate the creek. The DEP, recognizing logistical impossibilities that arise due to the fact that Phillips 66 currently owns and operates the refinery, believes this goal is best achieved by deferring remediation. Movants, however, ignore these logistical problems and insist remediation should occur immediately. The Legislature has statutorily entrusted the DEP with the sole power to make these determinations, N.J.S.A. 58:10-23.11a, and they surely did not intend for third parties to be able to intervene when they merely

disagree about the means the DEP employs to achieve its goals. See Asbury Park, 388 N.J. Super. at 13 ("This was surely not the intention of the Legislature when it provided that a municipality or redevelopment entity, not a redeveloper, was the sole entity entrusted with the authority to acquire land by condemnation to carry out a redevelopment plan." (citing N.J.S.A. 40A:12A-8c)).

In July, the Environmental Groups relied on only one case in an attempt to overcome the "ultimate goal" test. For the reasons the court previously set forth, In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019 (D. Mass 1989), is still distinguishable from the present case. Exxon III, slip op. at 20-21. That case was brought in the early years of CERCLA, when there was a dispute over "the proper measure of damages" under CERCLA. Acushnet River, 712 F. Supp. at 1024. Because the proper measure of damages under CERCLA is now a settled question, see Ohio v. U.S. Dep't of the Interior, 880 F.2d 432, 459 (D.C. Cir. 1989) (invalidating the U.S. Department of the Interior's "lesser of" rule, the same rule against which the Acushnet River intervenors argued), the Acushnet River intervenors' motion would likely be decided differently if it were filed today.

In their present motion, the Environmental Groups attempt to draw a parallel to Acushnet River by listing four legal issues in their brief.[23] They do not, however, explain how their views on these issues differ from that of the DEP. That is because, unlike the federal trustee and intervenors in Acushnet River, the DEP and Environmental Groups share the same views on all four of these issues. The DEP maintained its views at trial and in its post-trial brief and has not

[23] These issues are "whether the Spill Act (1) empowers the Department to recover costs to restore and replace all natural resources damaged and destroyed at Bayway and Bayonne, including resources on privately held uplands; whether the Spill Act (2) requires the Department to link damages to specific Exxon discharges; whether the Spill Act (3) requires the Department to quantify the adverse change from pre-discharge conditions at the sites; and whether the Spill Act (4) requires the Department to value individual services provided by resources Exxon damaged and destroyed at the sites." Environmental Groups' Brief, 13.

since withdrawn its positions. The DEP, acting as the sole entity legislatively authorized to settle NRD suits, simply disagrees with the Environmental Groups on the weight accorded to these issues as litigation risks.

Movants also contend that this court erred in applying the federal "ultimate goal" test because no New Jersey court has ever adopted this test for the adequate representation prong. This argument, however, ignores that fact that 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),[24] 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 R. 4:33-1). Moreover, this court did not blindly accept this federal test. Rather, it synthesized it with New Jersey caselaw, which applies "a similar presumption when the case involves an administrative agency that has been statutorily entrusted with certain duties." Exxon III, slip op. at 22; see also id. at 23-25 (discussing this New Jersey caselaw).

Furthermore, the three main New Jersey intervention cases on which Movants rely are all still distinguishable from the present matter:

> 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

[24] 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."

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, 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.

Exxon III, slip op. at 13-15. As this review shows, these three cases all involved land use and zoning issues. In all three cases, the original plaintiffs and intervenors initially shared the same ultimate open space and aesthetics goals, but these goals later diverged when the original plaintiffs agreed to variances and settlements that would allow construction to occur. Therefore, the plaintiffs no longer adequately represented the intervenors' open space and aesthetics concerns.

Here, although there has been a settlement, the Proposed Consent Judgment still furthers the same goal that the initial lawsuit filed in August 2004 sought: the recovery of money from Exxon for natural resource damages. The Consent Judgment furthers environmental protection, unlike the development variances in Chesterbrooke, Warner, and Meehan. This is, thus, not a case where intervention is necessary to preserve some interest that cannot otherwise be protected. Chesterbrooke, 237 N.J. Super. at 123 (citing Hanover, 118 N.J. Super. at 142). Intervention as of right "is not triggered merely because [Movants and the DEP] do not see eye-to-eye on every aspect of the litigation." Asbury Park, 388 N.J. Super. at 10.

These cases are also distinguishable because they concerned the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 to -163. That statute, unlike the Spill Act or ERA, specifically defines which "interested parties" can bring lawsuits under the MLUL. N.J.S.A. 40:55D-4 (defining "interested party" as any person whose right to use, acquire, or enjoy property is or may be affected, denied, violated, or infringed by any action taken or failure to act under P.L.1975, c.291). The fact that Movants may meet the MLUL's definition of "interested party" because they may live in the Bayway/Bayonne area is irrelevant to whether they have standing and a Rule 4:33-1 interest in this case. They clearly do not meet the Spill Act's and ERA's requirements as to who can bring NRD suits.

Movants' final contention is that the DEP does not adequately represent their interests because, due to the interaction of the Proposed Consent Judgment with P.L.2015, c.63, the entire $225 million, minus attorney's fees, will not go towards natural resource restoration. This argument must fail for two reasons. First, as the court explained in Exxon IV, Movants may be incorrect that the entire settlement amount is not going to go towards natural resource restoration. Exxon IV, slip op. at 63-67 (discussing two plausible ways to reconcile the Proposed Consent Judgment with P.L.2015, c.63). Second, as the court also explained in Exxon IV, the Legislature has expressly contemplated the approval of NRD settlements where only the first $50 million recovered will go towards natural resource restoration. Id. at 65. Therefore, assuming only $50 million will go towards this purpose, Movants redress is with the Legislature. The Environmental Groups can lobby the Legislature, or Senator Lesniak can urge his colleagues to pass a new bill. They cannot, however, intervene in this lawsuit because they disagree with a legislative determination.

For these reasons, even if Movants had standing, the court would have denied their intervention as of right motions. The DEP, both in July and now, adequately represents Movants' interest in the protection and restoration of natural resources. Movants and the DEP share the same ultimate goal, and Movants have done nothing to rebut the presumption of adequate representation that arises under both federal and New Jersey law. Moreover, the court's finding that the Proposed Consent Judgment is fair, reasonable, in the public interest, and consistent with the Spill Act's goals bolsters, not undercuts, this finding.

V. Permissive Intervention

Because Movants lack standing, their Rule 4:33-2 motions must fail. However, the court will conclude this opinion by setting forth its permissive intervention analysis, which provides

that but for the lack of standing and deficiency of their Rule 4:33-3 complaint, the court would have granted the Environmental Groups' Rule 4:33-2 motion if they had standing. Because Senator Lesniak is attempting to intervene in a legislative capacity, however, his motions must fail, as such intervention would violate New Jersey separation of powers principles.

* * *

As mentioned above, 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.

R. 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 of N.J., Inc. v. Cnty. of Hudson, 352 N.J. Super. 44, 70 (App. Div. 2002). 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 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)).

Although in July the court found that these four factors all weighed in favor of denying the Environmental Groups' permissive intervention motion, Exxon III, slip op. at 27-31, "[t]here is a significant difference between intervening at an appellate level . . . and intervening at the trial level as an interested party." Asbury Park, 388 N.J. Super. at 12. The Appellate Division has

made clear that intervention for the sole purpose of appeal is timely "when made within the applicable time for filing an appeal." Warner, 270 N.J. Super. at 668 (citing United Airlines v. McDonald, 432 U.S. 385, 395 (1977)). Because the Environmental Groups' motion was filed eleven days after the court signed the Proposed Consent Judgment, their motion is well within the forty-five day appeal window and is therefore timely under Rule 4:33-2.

Furthermore, the Appellate Division has made clear that because "[d]elay is inherent in any successful post-judgment application for intervention solely for the purposes of appealing the judgment. . . . [i]t cannot alone form the prejudice necessary to defeat the application." Chesterbrooke, 237 N.J. Super. at 125-26. The court has signed the Proposed Consent Judgment, and there is nothing left to accomplish at the trial level. There is, therefore, no delay other than the inherent delay of an appeal that the Environmental Groups' motion would cause. The third and fourth factors, whether intervention will increase the probability of subsequent litigation and complicate litigation, weigh in favor of denying intervention. Because Rule 4:33-2 is to be liberally construed, however, the court would have granted intervention with two factors favoring intervention and two weighing against it.

With that said, the court would like to reiterate that it is compelled to deny their motion because the Environmental Groups lack standing to have brought this or any NRD suit. They have no statutory authority to have brought a Spill Act NRD suit in the first place, thus, they do not have a "claim" that has a question of law or fact in common with the main action. R. 4:33-2. As the instant case demonstrates, it makes logical sense that standing is required for successful intervention because if it were not, or if standing were interpreted as broadly as Movants insist, then Rule 4:33-2 would be completely meaningless in situations where individuals attempt to intervene for the sole purpose of appeal.

When interpreting statutes, "it is not proper statutory construction to reach a result that would render a provision completely meaningless." N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 409-10 (App. Div. 2007) (citing Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969)). This maxim applies with equal force to court rules, such as Rule 4:33-2. Because any intervention motion for the purpose of appealing made within the applicable time for filing an appeal is considered timely, and the inherent delay of an appeal cannot be considered the undue prejudice sufficient to defeat a motion, then Rule 4:33-2 would be completely meaningless if standing were not required. That is because such an interpretation would mean any individual lacking a claim or defense could intervene in any case for nearly any reason to prevent the conclusion of litigation. This cannot be what the Supreme Court intended when it adopted the rule.

If the court accepted Movants' argument, especially in a case in which they have exhibited little or no interest for eleven years, then individuals and interest groups would have unchecked and unwarranted ability to intervene for the purpose of taking an appeal. Movants lack standing because the Legislature has made a conscious decision to limit who can bring a Spill Act NRD suit. Certainly, it is not within the court's authority, through statutory interpretation, to fashion the ability Movants seek in order to effectuate fictional standing.

In concluding this section, the court would have allowed the Environmental Groups to permissively intervene for the limited purpose of taking an appeal if they had the required standing. As they do not possess this requirement, the court is compelled to deny their motion.

VI. Separation of Powers and Senator Lesniak's Intervention Motions

Independent of the intervention rules, Senator Lesniak cannot intervene permissively or as of right in this matter due to the New Jersey Constitution's limitation on legislative power. As

the court noted in Exxon III, to allow Senator Lesniak to intervene in this matter would implicate significant separation of powers concerns. Exxon III, slip op. at 10-11, 30-31.[25] This is because the New Jersey Legislature has entrusted the Executive, through the DEP, with the responsibility of pursuing NRD claims. N.J.S.A. 58:10-23.11u(a)-(b). The Legislature has done so because the DEP has extensive expertise in the environmental realm. By entrusting the DEP with fiduciary responsibilities, the Legislature has signaled its intent that the Executive, through the DEP, be the arm of government to independently and efficiently carry out these environmental responsibilities. To allow a sitting legislator to intervene to appeal a state agency consent judgment would open a political Pandora's Box whereby any legislator could intervene any time he or she disagrees with the executive branch's discretionary determination to settle a lawsuit.

In New Jersey, separation of powers is not a mere abstract principle inferred from our Constitution and history. Rather, it is explicitly provided for in our State Constitution, "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." N.J. Const. art. III, ¶ 1 (emphasis added). This principle has two purposes. First, it is meant "to safeguard the 'essential integrity' of each branch of government." Gilbert v. Gladden, 87 N.J. 275, 281 (1981) (footnote omitted) (quoting Massett Building Co. v. Bennett, 4 N.J. 53, 57 (1950)). The drafters of our State Constitution intended each branch to fully exercise its own powers without aggrogating the powers of another branch or transgressing upon powers rightfully belonging to a cognate branch. Knight v. Margate, 86 N.J. 374, 388 (1981).

[25] In Exxon III, the court briefly mentioned the separation of powers issues concerning Senator Lesniak's intervention attempt. Because he has now renewed his motion, the court is compelled to more fully address these concerns.

Second, by fragmenting power, this principle seeks to preserve our citizens' liberty by preventing "the concentration of governmental power [which] increases the potential for oppression . . . ." Gen. Assembly of N.J. v. Byrne, 90 N.J. 376, 381 (1982). Enshrined in our State Constitution in 1947, this principle, and its desire to protect liberty, traces its roots to colonial days and the impetus of the American Revolution. After experiencing the arbitrary exercise of power during colonial rule, the "Framers therefore sought to prevent tyranny by constructing a government that could limit its own aggrandizement of authority." Ibid. Although it was the tyrannical yoke of an all-powerful king from which our Founding Fathers sought to free themselves, they created a "government of separated and balanced powers primarily because they feared 'that in a representative democracy the Legislature would be capable of using its plenary lawmaking power to swallow up the other departments of the Government.'" Id. at 383 (emphasis added) (quoting Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n, 673 F.2d 425, 464 (D.C. Cir. 1982)).

This was the chief fear because "[n]o concentration of power offers greater potential for abuse than the ability to both make and enforce the law." Id. at 383. When these abilities are united, there is a threat to public liberty because there is no check on an official's capacity to tyrannically enact and execute laws. Ibid. ("'In all tyrannical governments, the supreme magistracy, or the right both of making and enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.'" (quoting 1 W. Blackstone, Commentaries 146-47 (T. Cooley ed. 1899))). To prevent this calamity, the New Jersey Supreme Court has stated that preserving a less autocratic government "requires the courts to enforce the Constitution's restraints on two distinct forms of legislative power." Byrne, 90 N.J. at 383. The first check on legislative

aggrandizement that courts must preserve is "the constitution's constraints on the Legislature's power to make the laws. Ibid. "Second, the courts must prevent legislative incursions into the Executive's power to enforce the laws." Ibid. It is the second of these concerns with which the remainder of this opinion concerns itself.

Providing guidance, the Supreme Court has stated that "we cannot decide what constitutes excessive legislative power merely by intoning the abstract principles of separation of powers," rather we must look to the attempted action of the Legislature or legislator and "determine its practical effects upon law making and law enforcement." Id. at 385 (emphasis added). Turning to Senator Lesniak's attempted intervention, the court cannot allow him to intervene in this matter because his intervention and appeal of the Proposed Consent Judgment would have the practical effect of controlling a statutorily entrusted agency function. Such intervention would "gravely impair the functions of agencies charged with enforcing statutes" and would "frustrate[] the Executive's constitutional mandate to faithfully execute the law." Ibid.

Our Constitution states, "The Governor shall take care that the laws be faithfully executed. To this end he shall have power, by appropriate action or proceeding in the courts brought in the name of the State, to enforce compliance with any constitutional or legislative mandate . . . ." N.J. Const. art. V, § 1, ¶ 12. The Court has made clear that administrative agencies, such as the DEP, "are the arms of the executive branch of government through which it executes the laws passed by the Legislature." Byrne, 90 N.J. at 386. We therefore have two provisions, one constitutional, N.J. Const. art. V, § 1, ¶ 12, the other statutory, N.J.S.A. 58:10-23.11u(a)-(b), that provide for only the Executive to bring and prosecute lawsuits to enforce compliance with legislative mandates. As Senator Lesniak is a legislator, he has the power, within the constraints of Article IV of our Constitution, to propose and urge his colleagues to

pass bills for the Governor's signature. He does not, however, have the power to enforce laws through legal proceedings. His intervention to appeal a Superior Court judgment would, therefore, excessively interfere with the Executive's powers "by impeding the Executive in its constitutional mandate to faithfully execute the law." Byrne, 90 N.J. at 378.

The DEP has decided that, in this particular case, enforcement of the Spill Act is best served through settlement rather than the uncertainties of continued litigation and prolonged appeals. It has made this decision pursuant to its statutory duty to bring and pursue NRD suits to recover for damages caused by the discharge of hazardous substances. N.J.S.A. 58:10-23.11u(a)-(b). To allow Senator Lesniak, or any legislator, to intervene to oppose the Proposed Consent Judgment would set a precedent whereby individual legislators could intervene to oppose any agency settlement, thereby potentially nullifying virtually every litigation decision that the executive branch makes. See Byrne, 90 N.J. at 386 ("The legislative veto undermines performance of [executive agencies' duty to implement statutes] by allowing the Legislature to nullify virtually every existing and future scheme of regulation or any portion of it."). Such intervention would deter executive agencies in the performance of their constitutional duty to enforce existing laws because officials may retreat from the execution of their responsibilities when faced with the potential paralysis from repeated legislative interference. See id. at 387 ("Faced with potential paralysis from repeated uses of the veto that disrupt coherent regulatory schemes, officials may retreat from the execution of their responsibilities."). Although separation of powers is meant to create friction between the branches, it is not meant to create such unworkable inefficiencies that would impair the essential integrity of each branch of government. See Gilbert, 87 N.J. at 281 ("Its purpose is to safeguard the 'essential integrity' of each branch of government.'" (quoting Massett, 4 N.J. at 57)).

Furthermore, the court cannot allow Senator Lesniak to intervene because such intervention would infringe on the liberty that the separation of powers seeks to guarantee for all parties; liberty which this court must safeguard, lest the fears of our Founding Fathers come to fruition. See id. at 391-92 ("'The internal effects of a mutable policy are . . . calamitous. It poisons the blessing of liberty itself. . . . Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?'" (quoting The Federalist No. 62 at 406 (R. Luce ed. 1976) (Hamilton or Madison))). In February of this year, Exxon and the State agreed to settle this lawsuit. When Exxon agreed to settle, it knew full well that the Proposed Consent Judgment was subject to this court's approval.[26] Exxon, however, could not have expected an uncoordinated tag team from the executive and legislative branches.

Any defendant that settles a suit with an executive agency does so in order to get finality and end litigation. Settling defendants know that any parties with standing are entitled to appeal, but they do not expect appeals from legislators who are strangers to the lawsuit. In a free society, individuals and corporations must be able to make choices today without guessing if those choices will still have effect come tomorrow. See Byrne, 90 N.J. at 391 ("By restraining the Legislature's ability to make, amend and revoke the law, the Presentment Clause adds stability and certainty that are essential in any law-abiding society."). In addition to frustrating the dual purposes of separation of powers, Senator Lesniak's intervention would also frustrate one of the principle goals of the Spill Act.

By providing contribution protection to settling defendants through the Spill Act, the Legislature has evinced a goal of encouraging settlement. See N.J.S.A. 58:10-23.11f. If individual legislators were allowed to intervene to oppose DEP settlements under the Spill Act, one of two things will happen, either of which would frustrate this settlement goal. First, fewer

[26] Proposed Consent Judgment, ¶ 29.

defendants may settle, reasoning that there is no point to settling if any one of the 120 legislators in this state can later intervene and appeal the settlement in the hopes of having it thrown out. Second, defendants would ask the DEP for a discount on their settlement amount, knowing that future legal expenditures are to occur fighting intervention and defending on appeal. Either result would frustrate the Spill Act's settlement goal and further drain scare public resources.

In situations when the Legislature creates an executive administrative agency, such as the DEP, and then explicitly designates that agency as the sole authority to bring and prosecute NRD suits, N.J.S.A. 58:10-23.11u(a)-(b), individual legislators should not be able to interfere with those suits through intervention when they merely disagree with the agency's ultimate decision to settle a lawsuit. That is because the coequal legislative and executive branches of the New Jersey Government have resources available to protect and assert their interests, resources not available to private litigants outside the judicial forum. See Goldwater v. Carter, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment) ("Here by contrast, we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum."). Some legislators, such as Senator Lesniak, no doubt disagree with the DEP's decision to settle this case. Others likely concur in the DEP's decision. The New Jersey Courts were designed for adversary proceedings between proper parties: plaintiffs versus defendants in civil matters and the State versus defendants in criminal matters. The courts were not designed to be a second forum for debate over policy issues. Those issues are debated and decided in the State House, the place to which Senator Lesniak should turn if he disagrees with an executive branch determination. To allow otherwise could usher in an "Age of Intervention" in which

individual legislators, seeking the political favor of their constituents, rush to intervene on either side of any number of issues that appear before the courts.

Intervention by an individual legislator would represent an unconstitutional aggrandizement of legislative power because Senator Lesniak would be exercising the powers properly belonging to the Executive in violation of our Constitution. See N.J. Const. art. III, ¶ 1 ("No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."). It would also create numerous uncertainties and inefficiencies, thereby frustrating one of the central purposes of the Spill Act. If Senator Lesniak disagrees with the DEP's litigation decisions, he can correct any perceived deficiencies by introducing a new bill or amendment to an existing law, having the General Assembly and Senate adopt the new provision, and having the Governor sign it into law. See N.J. Const. art. V, § 1, ¶ 14 ("Every bill which shall have passed both houses shall be presented to the Governor. If he approves he shall sign it . . . ."). For these reasons, and because he lacks standing and is adequately represented by the DEP, his motions must fail.

* * *

The court does not dispute that, in certain circumstances, the Senate, General Assembly, and individual members of either house can serve as parties to a lawsuit.[27] The cases in which this has occurred, however, are all easily distinguishable from Senator Lesniak's attempted intervention. None of those cases involved a lawsuit by a legislator who merely disagreed over the policy choices that an executive agency had made.

[27] The court also does not dispute that individual legislators may appear as amici curiae, which this court allowed Senator Lesniak to do in this case.

In re Christie's Appointment of Perez as Public Member 7 of Rutgers University Board of Governors, 436 N.J. Super. 575 (App. Div. 2014), involved a lawsuit brought by Senator Stephen Sweeney in his capacity as Senate President. There, Senator Sweeney challenged Governor Christie's direct appointment of Martin Perez as a public member of the Rutgers University Board of Governors. Perez, 436 N.J. Super. at 579. Sweeney argued that under The New Jersey Medical and Health Sciences Education Restructuring Act, N.J.S.A. 18A:64M-1 to -43, the Governor was required to seek the advice and consent of the Senate for this appointment. Id. at 583. Senator Sweeney, therefore, was a proper plaintiff because he sought to protect the statutory prerogative of the Senate to confirm nominees to the Board, not challenge a policy determination made by the Governor.[28]

Whereas Perez involved a dispute over proper statutory interpretation, other cases have involved disputes between the Legislature and Executive over constitutional interpretation. See Karcher v. Kean, 97 N.J. 483, 487 (1984) (President of Senate and Speaker of General Assembly contending that the Governor had exceeded his authority under the Constitution's line-item veto clause, thereby impairing the Legislature's authority to appropriate funds); Gilbert, 87 N.J. at 278-79 (suit brought by, inter alia, two members of the Senate and two members of the General Assembly against the Secretary and President of the Senate and Clerk and Speaker of the General Assembly challenging the constitutionality of gubernatorial courtesy, also known as the pocket veto); Byrne, 90 N.J. at 378 (General Assembly seeking declaratory judgment that the

[28] The court gives no weight to Senator Lesniak's argument that he is entitled to intervene because the Proposed Consent Judgment supposedly violates the Spill Act. Specifically, he argues that because it defers the remediation of Morses Creek, it violates the Spill Act's requirement that the environment be swiftly remediated. As the court found in Exxon IV, slip op. at 74-78, the DEP is delaying Morses Creek remediation because it is virtually impossible to remediate the Creek while the refinery is in operation. The DEP is not violating the law because Senator Lesniak disagrees how to go about effectuating one of the broad, general goals of the Act. Unlike individual legislators, the DEP has extensive environmental experience, which is one of the reasons why the Legislature vested NRD and remediation responsibilities with the agency in the first place. Like the Environmental Groups, Senator Lesniak merely disagrees with the DEP on the means employed to effectuate environmental cleanup. See supra 27-30. This case, therefore, is not Perez, which involved a legal, not policy dispute.

Legislative Oversight Act, N.J.S.A. 52:14B-4.1 to -4.9, was constitutional). Likewise, Application of Forsythe, 91 N.J. 141, 143 (1982), is distinguishable because that case involved a constitutional challenge brought by sitting members of the House of Representatives challenging the procedures used to enact redistricting legislation. Finally, Abbott v. Burke, 164 N.J. 84, 86 (2000), does not aid Senator Lesniak because that case involved intervention by the Speaker of the General Assembly to seek clarification from the Supreme Court on one of the Court's previous rulings. As this review shows, all previous cases have involved suits brought by legislators to protect the constitutional prerogatives of the respective houses of government. None of these cases involved lawsuits or intervention over a disagreement in policy or disagreement over settlement terms.

The two additional cases Senator Lesniak has cited in his reply brief do not come close to supporting the proposition for which they were cited, which is that "intervention by public officials has been liberally permitted especially when it is to advocate a matter of significant public interest."[29] In Home Builders League of South Jersey v. Township of Berlin, the Supreme Court found that the Public Advocate had standing and affirmed the trial court's decision to allow him to intervene. 81 N.J. 127, 133 (1979). The Public Advocate had standing because his actions were, at the time, governed by the Department of the Public Advocate Act of 1974. Ibid. (citing N.J.S.A. 52:27E-30 to -31). Through that Act, the Legislature specifically authorized the Public Advocate to intervene in administrative proceedings and institute litigation on behalf of the public interest. N.J.S.A. 52:27E-42.[30] There is, of course, no such statute authorizing sitting legislators to intervene in or bring litigation.

[29] Senator Lesniak's Reply Brief, 11.

[30] The fact that the Supreme Court performed a standing analysis for the Public Advocate and other intervening parties in Home Builders further underscores the fact that standing is required to intervene. The court, however, did not include this case in Section III.A of this opinion because neither the Supreme Court nor Law Division in that

The second case that Senator Lesniak cites for his broad intervention principle did not even involve intervention. Rather, in Borough of Morris Plains v. Dep't of the Public Advocate, the Public Advocate instituted a lawsuit, he did not intervene in a lawsuit. 169 N.J. Super. 403, 406 (App. Div. 1979). It bears noting that these two cases are actually the second and third cases that Senator Lesniak has erroneously cited for the proposition that courts favor intervention by public officials. In Exxon III, this court explained why Evesham Township Zoning Board of Adjustment v. Evesham Township Council, 86 N.J. 295 (1981), does not support this proposition. Exxon III, slip op. at 30 (explaining that intervention in Evesham was brought individually as a taxpayer and resident, not in an official capacity).

Senator Lesniak also argues that even if he cannot intervene in his official capacity, the court should, if he has standing, grant his motion because it was brought "individually and as a New Jersey Senator for the 20th Legislative District (Union)."[31] When a legislator seeks to intervene in both this official and individual capacity, however, there is no practical way to separate the two roles in a quest for intervention. This is especially true after considering the totality of Senator Lesniak's intervention submissions. His disagreement is with a coordinate branch of government's discretionary decision, and he cannot remedy the separation of powers issues with artful legal maneuvering. To do so would elevate form over substance.[32]

SUMMARY

The court denies both the Environmental Groups' and Senator Lesniak's intervention motions because they lack standing to have brought the underlying lawsuit in the first place.

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case identified if the intervention was as of right or permissive. See generally Home Builders, 81 N.J. 127; Home Builders League of S. Jersey v. Twp. of Berlin, 157 N.J. Super. 586 (Law Div. 1978).

[31] Senator Lesniak's Brief, 1.

[32] Despite not being allowed to intervene, Senator Lesniak's participation has still been substantial. He has filed comments during the public comment period and participated as an amicus curiae during the Proposed Consent Judgment review process, all of which has been helpful to the court.

Only the DEP is authorized to bring NRD suits under the Spill Act, and the ERA does not allow private parties to bring damages claims. Alternatively, the court denies the motions because Movants lack standing under Township of Howell v. Waste Disposal, Inc. Furthermore, the motions are denied because they are procedurally deficient under Rule 4:33-3. The proposed complaints filed under this rule make no reference to the ERA, thus showing Movants have not alleged a claim with a question of law or fact in common with the main action.

Assuming Movants had standing and their proposed complaints satisfied Rule 4:33-3, the court still would have denied their intervention as of right motions. The DEP adequately represents any interest Movants have in the protection and restoration of natural resources located in New Jersey.

Finally, had the Environmental Groups possessed standing and had their Rule 4:33-3 complaint not been procedurally deficient, the court would have granted their permissive intervention motion. In addition to Senator Lesniak's intervention rules shortcomings, his permissive and intervention as of right motions must fail because his intervention would violate the New Jersey Constitution's separation of powers provision. For these reasons, the motions are DENIED WITH PREJUDICE.

PREPARED BY THE COURT

NEW JERSEY DEPARTMENT OF ENVIROMENTAL PROTECTION,	: SUPERIOR COURT OF NEW JERSEY : UNION COUNTY : LAW DIVISION
Plaintiff,	: DOCKET NO. UNN-L-3026-04, : consolidated with UNN-L-1650-05
vs.	: Civil Action
EXXON MOBIL CORPORATION,	
Defendant.	

FILED WITH THE COURT

OCT 09 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 New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, and Environment New Jersey (collectively "Environmental Groups"), the Court having considered the papers presented and having heard the oral arguments of counsel, and for the reasons set forth in an attached written opinion;

It is on this 9th **day of** October, **2015 ORDERED,** that Environmental Groups' motion to intervene, is hereby DENIED WITH PREJUDICE.

Counsel for Plaintiff shall serve a copy of this Order upon all counsel within seven (7) days of receipt of this Order.

IT IS SO ORDERED:

Michael J. Hogan

MICHAEL J. HOGAN, P.J. Ch., Retired T/A Recall

PREPARED BY THE COURT

NEW JERSEY DEPARTMENT OF ENVIROMENTAL PROTECTION,	: SUPERIOR COURT OF NEW JERSEY : UNION COUNTY : LAW DIVISION
Plaintiff,	: DOCKET NO.: UNN-L-3026-04, : consolidated with UNN-L-1650-05
vs.	: Civil Action
EXXON MOBIL CORPORATION,	
Defendant.	

FILED WITH THE COURT

OCT 09 2015

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

ORDER

THIS MATTER having come before the Court on the Motion for Reconsideration of the Order Denying Motion for Leave to Intervene filed by Raymond J. Lesniak, individually and as a New Jersey Senator for the 20th Legislative District (Union), the Court having considered the papers presented and having heard the oral arguments of counsel, and for the reasons set forth in an attached written opinion;

It is on this 9th **day of** October **, 2015 ORDERED,** that the Raymond J. Lesniak's Motion for Reconsideration, which was considered as a motion for leave to intervene, is hereby DENIED WITH PREJUDICE.

Counsel for Plaintiff shall serve a copy of this Order upon all counsel within seven (7) days of receipt of this Order.

IT IS SO ORDERED:

MICHAEL J. HOGAN, P.J. Ch., Retired T/A Recall