

Complaint”).

2. Surfrider must be permitted to intervene here because it has an unconditional statutory right to intervene and has demonstrated a significant interest in addressing the violations alleged in the Government Complaint.

3. First and foremost, Section 505(b)(1)(B) of the CWA, 33 U.S.C. § 1365(b)(1)(B), provides an unconditional right to intervene to interested and affected parties like Surfrider.

4. Second, Surfrider has a specific and demonstrated interest in assuring that U. S. Steel’s CWA violations at the heart of this litigation are fully remedied, prevented from recurrence, and sufficiently penalized. Surfrider has members who recreate in and near the Burns Waterway immediately adjacent to the Midwest Facility. Surfrider was the first entity to take legal action against U. S. Steel in relation to the illegal hexavalent chromium spill of April 2017 when Surfrider served a Notice of Intent to Sue (“Notice of Intent”) on U. S. Steel on November 14, 2017, *see* Ex. A, and then filed its own complaint in this Court on January 17, 2018 (the “Surfrider Complaint”), *see* Ex. B, Comp., *The Surfrider Foundation v. United States Steel Corporation*, No. 18-cv-00020 (N.D. Ind.)—both long before the United States or the State of Indiana took legal action with regard to the ongoing violations at the Midwest Facility. Indeed, the CWA violations alleged in the Government Complaint overlap with facts and allegations in Surfrider’s own complaint. *Compare* Ex. B (Surfrider Complaint), ¶¶ 97, 100–103, 105–11, 121, *with* Dkt. 1, Government Complaint, ¶¶ 82–83, 96–99, app. A tbls. A & B. In addition to its interest in protecting the waters harmed by U. S. Steel’s CWA violations at issue in this case, Surfrider has a particular interest in this litigation because resolution of the claims raised in the Government Complaint, through a Consent Decree or otherwise, may have some effect on Surfrider’s independent litigation against U. S. Steel.

5. After several conversations on the subject of intervention with counsel for the United States, on September 12, 2018, the undersigned counsel contacted in writing counsel for the United States and U. S. Steel to request their consent to Surfrider's Motion to Intervene. Counsel for the United States, speaking on behalf of the State of Indiana as well, indicated that Plaintiffs were unable to provide a position. Counsel for U. S. Steel indicated that U. S. Steel takes no position on this motion.

6. In accordance with Rule 24(c), Proposed-Intervenors' [Proposed] Complaint-in-Intervention is attached as Exhibit C. Surfrider's [Proposed] Complaint-in-Intervention, unlike Surfrider's Complaint in its independent litigation, states precisely the same CWA violations as set forth in the Government Complaint.

I. FACTUAL BACKGROUND

7. Surfrider has a longstanding interest in the quality and safety of the water and beaches in Northwest Indiana. Portage Lakefront, one of the most popular beaches on Lake Michigan where Surfrider's members surf, is directly adjacent to U. S. Steel's Midwest Facility in Portage, Indiana. Surfrider has been an active advocate for clean water and healthy beaches in the Great Lakes region since 2006 and previously filed public comments related to pollution from U. S. Steel's Gary Works Facility in Gary, Indiana. Specifically, Surfrider's Chicago Chapter, formed in 2006, has conducted a campaign to protect water quality in the Southend (the southern tip of Lake Michigan in Northwest Indiana) since 2016.

8. Surfrider has an interest in this litigation because Surfrider's members use and enjoy Lake Michigan and its shoreline in the immediate vicinity of the Midwest Facility; U. S. Steel's violations of the Clean Water Act diminish and discourage that use and enjoyment. Surfrider member Amanda Bye had routinely surfed the Southend. Affidavit of Amanda Bye, Ex. D, ¶¶ 4-

5 (“Bye Aff.”).¹ She once surfed at Portage Lakefront, where the water smelled to her “like sewage or oil and had a darkish-brownish dirt color.” *Id.* ¶ 10. Concerned by this smell and color, Bye no longer surfs at Portage or the whole Southend, and now travels hours away to either Sheboygan, WI or St. Joseph, MI to surf. *Id.* ¶¶ 10, 15. Bye would surf at Portage Lakefront “frequently” if it were less polluted, because “[i]t is the best place to surf on Lake Michigan when the winds are up.” *Id.* ¶ 11. The Portage Lakefront is particularly important to surfers of the Southend because of the amenities it offers, including outdoor showers for washing after surfing, public access, and long hours. *See, e.g.,* Affidavit of Steve Haluska, Ex. E, ¶ 9–10.

9. Because of the carcinogenic nature of hexavalent chromium discharged by U. S. Steel, members are concerned about their long-term personal health—and the health of their children in the case of pregnant and nursing surfers. Surfrider member Courtney Shimenetto surfed at Portage in 2011, but after witnessing dirty brown water, and observing her husband come home smelling like chemicals, she no longer surfs at the Portage Lakefront. Affidavit of Courtney Shimenetto, Ex. F, ¶ 5. When pregnant with her daughter, Shimenetto avoided Portage and the Southend altogether “because of all the chemicals in the water there.” *Id.* ¶ 7. Like Bye, Shimenetto feels that the waves at the Portage Lakefront and the Southend are the best on Lake Michigan, and she would return to surfing there if “improvements were made to the water quality.” *Id.* ¶ 11. These concerns, including concerns related specifically to U. S. Steel’s violations discussed further herein, have directly led Surfrider’s members to use the waters and beach adjacent to the Midwest Facility less frequently. Moreover, members have experienced skin irritation and urinary tract infections (UTIs) after surfing at the Portage Lakefront. Among those who have experienced UTIs is Surfrider member Peter Matushek, who developed two

¹ Note that the attached affidavits were originally prepared for use in Surfrider’s independent action, Case No. 18-cv-00020, and are captioned accordingly.

infections he believes are the result of surfing in polluted water. Affidavit of Peter Matushek, Ex. G, ¶ 14 (“Matushek Aff.”). Matushek became ill “right after surfing at Portage Lakefront,” and was hospitalized for a week, where his doctors told him it was very unusual for a man to contract a urinary tract infection. *Id.*

10. Surfrider members have a deep interest in the protection of Lake Michigan and the environment near the Midwest Facility. Peter Matushek describes the scenery at the Portage Lakefront as “beautiful, with open water that stretches straight into the sky.” Matushek Aff., Ex. G, ¶ 12. Similarly, Amanda Bye describes walking at Indiana Dunes National Lakeshore and Indiana Dunes State Park as a “quiet reprieve,” giving her a “feeling of calmness when [she’s] out there.” Affidavit of Amanda Bye, Ex. D, ¶ 9. Bye thinks the “balance between the natural beauty of the area and the steel mills in the background make the area unique.” *Id.*; *see also* Affidavit of Paul D’Amato, Ex. H, ¶ 11. In addition, Bye thinks that since Chicago-area residents rely on Lake Michigan for their drinking water, “if we pollute the lake, we are polluting ourselves.” Bye Aff., Ex. D, ¶ 8.

11. Finally, the sense of community among Southend surfers is very strong, forged from often being the lone people on the lake in the middle of winter and their appreciation of the dichotomy between the natural beauty of the area and the economic activity at the hulking industrial facilities along the shore. *See* Haluska Aff., Ex. E, ¶ 7; Matushek Aff., Ex. G, ¶¶ 5, 9–10. However, due to pollution, including pollution discharged from U. S. Steel’s Midwest Facility in violation of its permit, the number of surfers in the Southend, and at the Portage Lakefront in particular, has declined, leading to a sense of loss of community. *See* Bye Aff., Ex. D, ¶ 16; Haluska Aff., Ex. E, ¶ 18; D’Amato Aff., Ex. H, ¶ 13.

12. Surfrider members have long had concerns about the safety of surfing at the Portage

Lakefront due to its proximity to the Midwest Facility. In April 2017, these fears came to life when U. S. Steel discharged at least 340 pounds of total chromium into Burns Waterway, including approximately 300 pounds of extremely carcinogenic hexavalent chromium, approximately 500 yards from where that drainage ditch flows into Lake Michigan. Dkt. 1, Compl. ¶¶ 58, 64. This spill led to serious concerns about health and safety, the closure of the Indiana American Water public drinking water intake, and the closure of four public beaches, including the Portage Lakefront beach and the Indiana Dunes National Lakeshore. *Id.* ¶ 65. After the April 2017 spill, Surfrider began a focused investigation of U. S. Steel with respect to its CWA compliance, combing through thousands of pages of publicly-obtainable documents to understand the scope of the company's environmental violations.

13. The April 2017 spill was just one of scores of permit violations at the Midwest Facility, including previous violations of permit conditions related to chromium limits, other pollutants, and facility maintenance, as detailed in Surfrider's Notice of Intent. *See* Notice of Intent, Ex. A, at 6–11.

14. In October 2017, the Midwest Facility again violated its chromium discharge limits. From publicly available reports, it appears that the discharge was the result of poor maintenance and operation at the facility and was only discovered when a contractor noticed discoloration of the plant's wastewater. *See* Indiana Department of Environmental Management, Inspection Summary/Noncompliance Letter (Dec. 11, 2017), Ex. I at 1 (reporting on inspection conducted on November 16 and 17).

15. U. S. Steel requested confidentiality for its report to the Indiana Department of Environmental Management ("IDEM") about the October 2017 violation. *See* Letter from Joseph E. Hanning, U. S. Steel, to David Greinke, IDEM (Oct. 31, 2017), Ex. J at 2. While IDEM did

upload the report to its public records database, the incident was apparently not reported to the United States Environmental Protection Agency (“USEPA”), local government officials, media, or the citizens that use the waters. According to news reports, the illegal October release—and U. S. Steel’s request for secrecy—became known to USEPA only after Surfrider’s lawyers discovered the report and drew the public’s attention to it. *See* Michael Hawthorne, *U.S. Steel tried to keep toxic spill into lake a secret; Group to file pollutant dumping suit*, CHI. TRIB. (Nov. 15, 2017) (“An EPA spokeswoman said Indiana officials didn’t tell the agency about the spill until Tuesday morning, following inquiries from the Tribune.”)

16. Further, because U. S. Steel’s report was not posted to the state’s database until several days after the incident, people surfing in the water adjacent to the Midwest Facility in the immediate aftermath of the illegal chromium discharge had no way of knowing that they were being exposed to elevated levels of chromium. *See* Affidavit of Dave Benjamin, Ex. K, ¶ 6; *see also* <https://www.youtube.com/watch?v=wkh7w3Pg3cc>.

17. On November 14, 2017, shortly after U. S. Steel’s illegal discharge of chromium in late October, Surfrider announced its intention to sue U. S. Steel. *See* Notice of Intent, Ex. A.

18. Subsequently, and after no government entity stepped forward to take any legal action on U. S. Steel’s documented and persistent CWA violations, Surfrider filed its citizen suit Complaint against U. S. Steel on January 17, 2018, alleging the violations it outlined in its Notice of Intent. *See* Surfrider Compl., Ex. B.

19. Shortly after Surfrider filed its Complaint, the City of Chicago (“the City”) filed its own Complaint on January 24, 2018, alleging substantially the same CWA claims as Surfrider, with an additional negligence claim for cost recovery related to monitoring the City had to conduct at its drinking water intake as a result of the April 2017 spill. *See* Compl., *City of Chicago v. United*

States Steel Corp., No. 18-cv-00033 (N.D. Ind. Jan. 24, 2018) ECF No. 1. On March 1, 2018, the Court granted Surfrider, the City, and U. S. Steel's Agreed Motion to consolidate the two cases under a single civil action number of 2:18-cv-00020. *See Order, Surfrider Found. v. United States Steel Corp.*, No. 18-cv-00020 (N.D. Ind. Mar. 1, 2018) ECF No. 14.

20. On March 9, 2018, U. S. Steel filed its Answer to Surfrider's Complaint, admitting to a substantial number of the alleged violations. *See United States Steel Corporation's Answer and Affirmative Defenses to Plaintiff's Compl., Surfrider Found. v. United States Steel Corp.*, No. 18-cv-00020 (N.D. Ind. Mar. 9, 2018) ECF. No. 17, ¶¶, 62, 63, 78, 82, 85, 92, 96, 101, 121 136, 151.

21. On April 2, 2018, the United States and State of Indiana contemporaneously filed the Government Complaint and a proposed Consent Decree purporting to resolve the allegations in the Government Complaint. *See Dkt. 2, Consent Decree (the "proposed CD")*.

22. On April 4, 2018, immediately after the filing of the Government Complaint and the accompanying proposed CD, U. S. Steel indicated it would seek to stay the consolidated case and Surfrider and the City of Chicago agreed to file a Joint Motion to Stay Proceedings in the consolidated case. The parties agreed to the Joint Motion to Stay in recognition that "the facts alleged in the Governments' Complaint and in [Surfrider's] Complaint relate to the same underlying factual issues and the claims asserted in each Complaint relate to a similar set of CWA violations by U. S. Steel." Joint Mot. for Stay of Proceedings Pending Entry of Consent Decree at 2, *Surfrider Found. v. U.S. Steel Corp.*, No. 2:18-cv-00020 (N.D. Ind. Apr. 04, 2018), ECF No. 22. The proposed stay was intended to provide an opportunity for the parties to review the proposed CD and technical plans to be submitted by U. S. Steel thereunder and to conduct related discussions. *Id.* at 3. The Court granted that motion on April 6, 2018. Order Granting

Joint Mot. for Stay of Proceedings Pending Entry of Consent Decree at 1, *Surfrider Found. v. U.S. Steel Corp.*, No. 2:18-cv-00020 (N.D. Ind. Apr. 06, 2018), ECF No. 24.

23. Since April, Surfrider has been in active communication with both the Government plaintiffs and U. S. Steel with respect to deficiencies and inadequacies of the proposed CD, among other issues. Surfrider has engaged in direct legal and technical communications with U. S. Steel, including providing U. S. Steel with questions and input from a technical expert. Surfrider has held frequent telephone conferences with the Government plaintiffs, in addition to sending email communications regularly on various substantive technical and legal issues. Surfrider has promptly provided the Government plaintiffs with newly-discovered information and discussed specific means by which the Governments and U. S. Steel could improve the proposed Consent Decree and technical submissions made thereunder.

24. On July 6, 2018, Surfrider submitted a twenty-five page, single-spaced set of comments outlining its concerns with the proposed Consent Decree and associated technical issues. *See* Surfrider Foundation, Comments on the Proposed Consent Decree in *United States et al. v. United States Steel Corporation*, Civ. A. No. 2:18-cv-00127 (N.D. Ind.), D.J. Ref. No. 90-5-2-1-06476/2 (July 6, 2018), (the “Surfrider Comments”) Ex. L.

25. On July 13, 2018, Surfrider filed a motion to lift the stay in its litigation. *See* Mot. to Lift Stay, *Surfrider Found. v. U.S. Steel Corp.*, No. 2:18-cv-00020 (N.D. Ind. Jul. 13, 2018), ECF No. 26. As of the date of this filing, that motion has been fully briefed for 30 days.

II. LEGAL BACKGROUND

26. The CWA, 33 U.S.C. § 1365(b)(1)(B), creates a blanket right for “any citizen” to intervene in a government enforcement action such as this case. That provision explicitly provides that “any citizen may intervene as a matter of right” in any civil action brought by the

United States or a State requiring compliance with the CWA's standards or limitations. 33 U.S.C. § 1365(b)(1)(B).

27. Under the CWA, 33 U.S.C. § 1365(g), a "citizen" is defined to mean "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g).

28. According to Rule 24(a) of the Federal Rules of Civil Procedure, a court "must permit anyone to intervene who (1) is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a).

29. Rule 24(a)(2) of the Federal Rules of Civil Procedure further grants a right to intervene to any party 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." Fed. R. Civ. P. 24(a)(2).

30. Rule 24(b)(1)(B) provides that the court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

III. APPLICATION

A. Surfrider Has a Right to Intervene Under Rule 24(a)(1).

31. Surfrider has an unconditional statutory right to intervene in this matter; the Court must, therefore, grant Surfrider's motion to intervene.

32. The CWA is a federal statute, and, per 33 U.S.C. § 1365(b)(1)(B), it provides an "unconditional right to intervene" as required to support intervention as of right under Rule 24(a)(1). *See, e.g., United States v. Metro. Water Reclamation Dist. of Greater Chi.*, 2012 WL 3260427, No. 1:11-cv-08859, at *3 (N.D. Ill. Aug. 7, 2012), *aff'd*, 792 F.3d 821 (7th Cir. 2015)

(in which similarly situated environmental group was found to have unconditional right to intervene under 33 U.S.C. § 1365(b)(1)(B)).

33. Surfrider is a “citizen,” as defined by the CWA, with respect to this matter because it and its members’ interests are or may be “adversely affected” by U. S. Steel’s ongoing violations of the CWA and its permit issued thereunder. As described above, Surfrider’s members use and enjoy Lake Michigan’s waters in the immediate vicinity of U. S. Steel’s illegal discharges, including by surfing at the adjacent Portage Lakefront beach. *See supra* ¶¶ 7–12.

34. U. S. Steel’s NPDES permit violations have adversely impacted and will continue to adversely impact Surfrider’s and its members’ interests in the use and enjoyment of Lake Michigan in and around Portage, Indiana. *See supra* ¶¶ 7–12.

35. Surfrider’s members’ enjoyment of Lake Michigan is also impaired because of their well-founded concerns that U. S. Steel’s poor maintenance and operations practices will lead to further discharges. *See Matushek Aff., Ex. G, ¶¶ 17–18; see also D’Amato Aff., Ex. H, ¶¶ 18–19.* Members’ current and future use and enjoyment of Lake Michigan and its shore will be impaired unless U. S. Steel is required to control discharges expeditiously and comprehensively as required by law and to meet all other relevant permit conditions including those relating to maintenance, monitoring, and notification.

36. Therefore, Surfrider and its members have interests in Lake Michigan and the areas adversely affected by U. S. Steel’s illegal water pollution alleged in the Government Complaint. Accordingly, Surfrider and its members also have a significant interest in participating in this litigation to ensure that any resolution of the Government Complaint—whether through the currently proposed Consent Decree or otherwise—prevents and deters future violations and protects and promotes local water quality.

37. Thus, pursuant to 33 U.S.C. § 1365(b)(1)(B), Surfrider, on behalf of itself and its members, is a “citizen” with an unconditional right to intervene in the Governments’ CWA enforcement action.

38. In sum, Surfrider meets all requirements for intervention as of right under the CWA and Rule 24(a)(1) of the Federal Rules of Civil Procedure, and, therefore, should be granted the status of Plaintiff-Intervenor. *See, e.g., Metro. Water Reclamation Dist. of Greater Chi.*, 2012 WL 3260427; *United States v. Metro. St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir. 1989) (reversing district court denial of environmental organization’s motion to intervene as of right in CWA case).

B. In the Alternative, Surfrider Has a Right to Intervene Under Rule 24(a)(2).

39. Even setting aside the express, unconditional right to intervene conferred by the CWA, Surfrider also has a right to intervene because it meets the requirements of Rule 24(a)(2). Each element of Rule 24(a)(2) is met here: First, Surfrider’s claims relate to the same subject matter as that raised in the Government Complaint. Second, disposition of the Government Complaint “may as a practical matter impair or impede [Surfrider’s] ability to protect its interest.” Fed. R. Civ. P. 24(a)(2). Third and finally, the existing parties to this action do not “adequately represent” Surfrider’s interests at stake here. *Id.*

40. First, Surfrider possesses “interest[s] relating to the ...transaction that is the subject of the [Government] action,” Fed. R. Civ. P. 24(a)(2), as illustrated by Surfrider’s [Proposed] Complaint-in-Intervention, which states CWA claims based on identical violation allegations as those put forth in the Government Complaint. *See* [Proposed] Complaint-in-Intervention, Ex. C, ¶¶ 94, 98–100, 102–08, 114. While Surfrider’s right to allege those claims is different than the Governments’ rights, in terms of its standing and the notice prerequisites in the CWA citizen-suit

provision, 33 U.S.C. § 1365, the substantive violations of law and underlying facts self-evidently relate to the subject matter of the Government Complaint because they are the same. Surfrider's leading role in holding U. S. Steel accountable for its CWA violations, evinced by its filing its own complaint approximately three months before the Governments did here, also demonstrates Surfrider's interest in the subject matter of this action. *See supra* ¶¶ 8, 13–16, 18–19.

41. Moreover, a facial comparison of the Surfrider Complaint with the Government Complaint demonstrates that the same subject matter is at issue in both separate cases, although the Surfrider Complaint alleges broader violations than those alleged in the Government Complaint. The bulk of the Government Complaint concerns the April 2017 spill, and some of the main facility upgrades contemplated in the proposed Consent Decree concern the specific pieces of equipment at issue in that spill. Though the subject matter at issue in the Surfrider Complaint is not identical or encompassed by the allegations in the Government Complaint, the April 2017 spill and maintenance violations that precipitated it are at the core of Surfrider's case as well. Additionally, many of the other CWA violations alleged in the Government Complaint are alleged in the Surfrider Complaint. *Compare* Government Complaint, Dkt. 1 ¶¶ 71–105, *with* Surfrider Complaint, Ex. B, ¶¶ 68–125.

42. Second, resolution of the Government Complaint through a binding consent decree or other final judgment will, by definition, resolve the claims in the Government Complaint in which Surfrider has an interest and could address certain of the violations of law alleged in the Surfrider Complaint and already admitted by U. S. Steel. *See Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 759 (7th Cir. 2004) (noting that agency enforcement actions can bar citizen-suits under *res judicata* or collateral estoppel doctrines if, as factual matter, relief required in agency action actually resolves underlying causes of violations

alleged in citizen suit) (citation omitted). Determining the effect of this litigation on Surfrider's independent suit will turn, to a significant extent, on how this litigation is ultimately resolved. *See id.* Because the disposition of the Government's Complaint has the potential to affect some of Surfrider's CWA claims that are stated in both its [Proposed] Complaint-in-Intervention and the Surfrider Complaint, the disposition "may as a practical matter impair or impede" Surfrider's "ability to protect its interest." Fed. R. Civ. P. 24(a)(2).

43. Third, the Government does not adequately represent Surfrider's interests in this matter. While the interests of environmental and other citizens' groups can overlap with those of government plaintiffs, those interests often remain separate and distinct. Governments must necessarily contemplate a broad range of goals, whereas the interests of citizens and non-profit groups like Surfrider are more specific and sharply defined. *See, e.g., In re Sierra Club*, 945 F.2d 776, 781 (4th Cir. 1991) (holding that because government is "concerned with the overall" program in controversy it "cannot be an adequate representative of environmental groups"); *Mausalf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996) (holding that intervenor's interest would not be adequately represented by government entity that must represent broader public); *Utah Ass'n of Crys. v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (noting that Government's interest is broader than, and in some cases opposed to, that of environmental groups). While the Government must necessarily balance a whole host of factors in deciding how to bring and resolve enforcement actions—covering disparate concerns like environmental protection, the allocation of enforcement resources, recovery of damages to its own property, and the balance of other regulatory, economic, and political interests of the violator and others—Surfrider's interest is focused exclusively on protecting the water and those who rely on and recreate in it.

44. In this case, Surfrider's interests are not only more focused on water quality than those of

the Government, which balances that interest against a host of other concerns, but Surfrider's interests are quite particular even as compared to other members of the general public. For example, Surfrider members regularly surf at the Portage Lakefront in the middle of winter, a time when other citizens rarely recreate on the water. *See* Bye Aff., Ex. D, ¶ 5. When they surf, Surfrider members remain immersed in the Lake for significantly longer stretches of time than warm-weather recreators like waders or swimmers. *C.f.* Benjamin Aff., Ex. K, ¶ 5.

45. Additionally, the Governments' history of inadequate oversight of U. S. Steel's Midwest Facility demonstrates the need for Surfrider to remain vigilant and to defend its particular interests in this case. Surfrider's [Proposed] Complaint-in-Intervention identifies CWA violations dating back several years, during which time no government agency enforced the law, which might have helped to prevent more recent violations by U. S. Steel. *See* Surfrider's [Proposed] Complaint-in-Intervention, Ex. C, ¶¶ 94, 98–100, 102–08, 114.

46. Further, that the Governments have negotiated a proposed CD that so grossly fails to protect Surfrider's interests demonstrates that the divergence of interests here is significant, concrete, and multi-faceted. Surfrider has submitted extensive public comments explaining the myriad shortcomings and failures of the proposed Consent Decree. *See* Surfrider Comments, Ex. L. The necessity of Surfrider's intervention and formal ongoing role in this litigation is particularly pronounced here, because many of the failures of the Consent Decree relate to technical requirements that are still being developed after the close of the public comment period and may be deferred until after the proposed Consent Decree is converted into a final judgment. *See* Surfrider Comments, Ex. L, at 8. Indeed, one reason that Surfrider's fundamental interest in preventing with certainty any future violations by U. S. Steel is not adequately represented by the Governments is that their proposed CD would finally resolve U. S. Steel's violations while the

central technical aspects of the injunctive relief remain undetermined.

47. It is also important to note that “[c]ourts should construe Rule 24(a)(2) liberally and should resolve doubts in favor of allowing intervention.” *Michigan v. U.S. Army Corps of Eng’rs*, No. 10-CV-4457, 2010 WL 3324698, at *9 (N.D. Ill. Aug. 20, 2010). Further, the requirement that a party be not adequately represented by the government “is satisfied where the applicant “shows that representation of his interest *may be inadequate*”—a “minimal” showing” is enough. *Tri-State Generation and Transmission Ass’n, Inc. v. N.M. Pub. Regulation Comm’n*, 787 F.3d 1068, 1072 (10th Cir. 2015) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972)) (noting also that “where a governmental agency is seeking to represent both the interests of the general public and the interests of a private party seeking intervention, we have repeatedly found representation inadequate for purposes of Rule 24(a)(2).”).

48. Even if the CWA and Rule 24(a)(1) did not compel granting intervention, which they plainly do, Surfrider would have a right to intervene pursuant to Rule 24(a)(2). As explained, *supra* ¶ 6, Surfrider and its members have a substantial interest in the health and safety of Lake Michigan and the beaches and waters in Portage, Indiana. Surfrider is entitled to intervene under Rule 24(a)(2) in order to ensure that its particular interests are protected adequately in this case.

C. Surfrider’s Motion to Intervene is Timely

49. Surfrider’s Motion to Intervene is timely, as required for intervention of right under Rule 24(a)(1) or (2), given that the Government filed its Complaint and the Proposed Consent Decree in this matter on April 2, 2018, and no further public actions have been made by any party, aside from the filing of appearances of counsel and the extension of the public comment period by the Department of Justice. *See, e.g., Metro. Water Reclamation Dist. of Greater Chi.*, 2012 WL

3260427 at *5 (granting motion to intervene filed over three months after lodging of proposed consent decree).

50. Surfrider has diligently pursued protection of its interests here through participating in the public comment process and engaging in direct communications with the Government plaintiffs and U. S. Steel since the Government Complaint was filed. The Government plaintiffs and U. S. Steel have been apprised of Surfrider's positions promptly throughout the period since the proposed CD was published.

51. As noted, the United States has provided the public an opportunity to comment on the proposed CD pursuant to 28 C.F.R. § 50.7(b) and extended that period of time, first for an additional 30-days and then for a subsequent additional 30 days as to the City of Chicago and Surfrider. According to counsel for the Governments, more than 2,700 public comments were submitted. The Government has shared some of those comments with Surfrider; those comments are significant, sophisticated, extensive and deeply critical of the proposed CD. We understand that the United States is in the process of considering those public comments and deciding whether to seek entry of the proposed CD, to withdraw that document and to submit a new or revised proposed CD, or to proceed to litigate its case against U. S. Steel.

52. U. S. Steel has also submitted numerous new technical documents to the Governments since the proposed CD was published. Some of these documents have been submitted to the Governments pursuant to the proposed CD—such as U. S. Steel's draft Operations and Maintenance Plan submitted in April, which was subsequently partially rejected by the Governments in May. Others have apparently been submitted only to the State of Indiana—such as U. S. Steel's July 17, 2018 report finding hexavalent chromium in groundwater at the site, which Surfrider brought to the attention of the Department of Justice and U. S. EPA. Since the

proposed Consent Decree was published, Surfrider has rapidly reviewed newly-available information and promptly provided its positions on that information to the Governments.

53. Since this case was filed, Surfrider has made every effort to be involved in discussions among the parties. Neither the Governments nor U. S. Steel can claim any undue prejudice or delay will be caused by Surfrider's intervention at this time because Surfrider has made its positions known in real-time.

D. In the Alternative, Surfrider Should Be Permitted to Intervene Pursuant to Rule 24(b)(1)(B).

54. While Surfrider has a right to intervene here under both subsections of Rule 24(a), in the alternative, Surfrider should be permitted to intervene under Rule 24(b)(1)(B) because its claims “share[] with the main action [] common questions of law [and] fact.” Fed. R. Civ. P. 24(b)(1)(B). Surfrider's [Proposed] Complaint-in-Intervention and the Government Complaint share the same claims of law and relate to the same basic underlying facts regarding U. S. Steel's violations of the CWA. *See supra* ¶¶ 2, 34.

55. Additionally, there is no chance for delay or prejudice stemming from this intervention for the same reasons that the motion is timely. Fed. R. Civ. Pro. 24(b)(3); *see supra* ¶¶ 45–48.

56. Surfrider would therefore, at a minimum, qualify for permissive intervention pursuant to Rule 24(b)(1)(B).

57. To an important degree, by serving its Notice of Intent, Surfrider has led and catalyzed the critical work of holding U. S. Steel legally accountable for its disregard of public health and the environment and its continuing violation of federal law; it must be allowed to see it through as a party to this case.

WHEREFORE, for the reasons set forth herein, Surfrider respectfully requests that this

Court enter an order granting leave to intervene as Plaintiff-Intervenor in this matter.

Dated: September 13th, 2018

Respectfully submitted,

By: /s/ Mark N. Templeton
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INDEX OF EXHIBITS

Exhibit Document Title

- A The Surfrider Foundation, Notice of Intent to Sue Letter (Nov. 14, 2017)
- B Complaint, *The Surfrider Foundation v. United States Steel Corporation*, No. 18-cv-00020 (N.D. Ind. Jan. 17, 2018)
- C [Proposed] Complaint-in-Intervention, *United States of America and the State of Indiana v. United States Steel Corporation*, No. 18-cv-00127 (N.D. Ind. Sept. 13, 2018) (with accompanying exhibits)
- D Affidavit of Amanda Bye
- E Affidavit of Steve Haluska
- F Affidavit of Courtney Shimenetto
- G Affidavit of Peter Matushek
- H Affidavit of Paul D'Amato
- I Indiana Department of Environmental Management, Inspection Summary/Noncompliance Letter (Dec. 11, 2017)
- J Letter from Joseph E. Hanning, U. S. Steel, to David Greinke, IDEM (Oct. 31, 2017)
- K Affidavit of Dave Benjamin
- L Surfrider Foundation, Comments on the Proposed Consent Decree in *United States et al. v. United States Steel Corporation*, Civ. A. No. 2:18-cv-00127 (N.D. Ind.), D.J. Ref. No. 90-5-2-1-06476/2 (July 6, 2018)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of September, 2018, a copy of the foregoing Motion to Intervene and accompany exhibits was filed electronically. Notice of this filing will be sent via electronic mail to the following counsel of record in this matter:

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