

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of

PORT OF OSWEGO AUTHORITY, et al.

Petitioners-Plaintiffs

For a Judgment Pursuant to CPLR Article 78
And for Declaratory Relief Pursuant to CPLR §
3001

-against-

PETE GRANNIS, et al.

Respondents-Defendants
-----X

Index No. 10296/2008

Justice Assigned:

OFFICE OF
ALBANY COUNTY
CONSENT COURTS
ALBANY, N.Y.
09 FEB 18 AM 11:56

**MEMORANDUM OF LAW IN SUPPORT OF
UNOPPOSED MOTION TO INTERVENE**

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The Lake Carriers' Association ("LCA"), by its unopposed motion, seeks to intervene in this joint Article 78 proceeding and declaratory judgment action as an additional Petitioner. The currently-named Petitioners seek to vacate certain unlawful conditions of the Clean Water Act Section 401 Water Quality Certification ("the 401 Certificate") issued by Respondents-Defendants New York State Department of Environmental Conservation and Commissioner Pete Grannis (together, "NYSDEC") on November 3, 2008. They also seek a declaratory judgment that the 401 Certificate applies to dischargers of pollutants from vessels in New York waters and does not apply to the mere transit of waters through New York waters.

LCA's members, which operate exclusively in the Great Lakes, are uniquely impacted by the 401 Certificate, which creates a new ballast water program for vessels that transit through New York waters. The ballast water program, as explained in the Petition, is unlawful for

several reasons. Because LCA's members will be forced to comply with requirements of that unlawful program and, therefore, stand to be directly and negatively affected by it, they seek leave to intervene in this proceeding as an additional Petitioner. LCA's motion is not opposed.

ARGUMENT

POINT I: LCA SHOULD BE PERMITTED TO INTERVENE IN THIS PROCEEDING PURSUANT TO C.P.L.R. § 7802.

Section 7802 of the C.P.L.R. grants the Court broad authority to permit interested persons to intervene in Article 78 proceedings. CPLR 7802 (d) states that a court "may allow other interested persons to intervene." This subdivision grants the Court broader power to allow intervention in an article 78 proceeding than is provided pursuant to either CPLR 1012 or 1013 in an action. *See Elinor Homes Co. v. St. Lawrence*, 494 N.Y.S.2d 889 (N.Y. App. Div.1985). The Court has discretion to allow intervention in a CPLR Article 78 proceeding at any time, provided the movant is an interested person. *Id.* LCA is clearly an interested person with respect to the 401 Certificate and this proceeding.

LCA is a not-for-profit corporation that represents U.S.-Flag vessel operators on the Great Lakes. LCA's 16 member companies operate 63 U.S.-Flag self-propelled vessels and integrated tug/barge units ranging in length from 383 to 1,013.5 feet. Cargo movement by LCA fleets and other U.S.-Flag Lakes operators has topped more than 125 million tons in a year. Iron ore, stone and coal are the primary commodities carried by LCA members. Other cargos include cement, salt, sand, and grain. The vast majority of cargos carried by U.S.-Flag Lakers move between U.S. ports, what is commonly referred to as the Jones Act trades. LCA's office is located at Suite 720, 20325 Center Ridge Road Rocky River, Ohio 44116.

LCA's member's vessels are subject to the 401 Certificate and the VGP. *See Verified Petition and Complaint at ¶¶1-4.*

Unlike some vessels owned or operated by currently-named Petitioners, all of LCA's members' vessels operate exclusively within the Great Lakes ecosystem (so-called "Lakers") and do not operate outside the Great Lakes ecosystem or otherwise engage in trans-oceanic shipping (so-called "Salties"). As such, all of LCA's members are uniquely impacted by Conditions One, Two and Three of the 401 Certificate, which create a new ballast water program for vessels that transit through New York waters, which include portions of Lake Erie and Lake Ontario. *See* Verified Petition and Complaint at 1, Exhibit A.

With regard to Condition One of the 401 Certificate, NYSDEC is imposing on LCA member vessels, which are not designed or certified for ocean operations, an impossible requirement that such vessels leave the St. Lawrence region and travel out into the ocean to either exchange the fresh water in the ballast tanks with ocean salt water or to flush the tanks with ocean water. *See* Verified Petition and Complaint at ¶9. Compliance with this condition is not only economically and environmentally harmful, but is impossible to carry out because LCA member vessels are prohibited as a matter of Canadian law from operating in ocean waters. *Id.* LCA member vessels are not designed to handle the open ocean conditions and thus are prohibited from entering the open ocean for public safety, vessel safety and environmental reasons. *Id.*

With regard to Conditions Two and Three of the 401 Certificate, NYSDEC is imposing a requirement on LCA member vessels to install ballast water treatment systems that can destroy all organisms in ballast water tanks even though such systems do not exist and, once they do exist, can only be installed on foreign-flagged vessels if such systems are first approved by the U.S. Coast Guard. *Id.* at ¶11. NYSDEC is requiring compliance with its unlawful ballast water conditions for LCA member vessels that transit through New York waters even if the vessels do

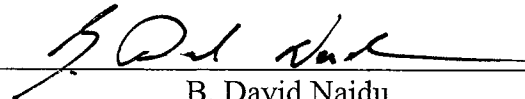
not discharge ballast water. *Id.* at ¶12. Both the federal Clean Water Act and New York Environmental Conservation Law regulate pollutant discharges, not vessel transit. NYSDEC has no authority to impose ballast water requirements on LCA member vessels that transit through New York waters but do not discharge ballast water in New York waters.

Demonstrating its interest in this proceeding, LCA, through the Shipping Industry Ballast Water Coalition, submitted comments to NYSDEC in opposition to the 401 Certificate, stressing, among other objections, that NYSDEC lacked authority to impose the conditions being challenged in this proceeding. A true and correct copy of the comment letter is attached hereto at Tab A. Further demonstrating its interest in this proceeding, LCA has filed Petitions for Review of the VGP pursuant to Section 509 of the Federal Water Pollution Control Act, 33 U.S.C. § 1369, in the U.S. Court of Appeals for the District of Columbia Circuit. *See Lake Carriers' Association v. Johnson, et al.* (D.C. Cir. Nos. 09-1001, 09-1010). Those matters are pending.

If permitted to intervene as an additional petitioner, LCA will, in the interest of expeditious review of the 401 Certificate, join in the Memorandum of Law In Support of Article 78 Petition-Complaint already filed and served by the currently-named Petitioners.

Dated: February 17, 2009

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