IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

OHIO VALLEY ENVIRONMENTAL COALITION, et al.,

Plaintiff,

v. **CIVIL ACTION NO: 3:02-0059**

CHRISTIE WHITMAN, Administrator, United States Environmental Protection Agency, et al.,

Defendants.

MUNICIPAL INTERVENORS' MOTION FOR SUMMARY JUDGMENT

The West Virginia Municipal Water Quality Association, the West Virginia Municipal League, and the Association of Metropolitan Sewerage Agencies (collectively, the "Municipal Intervenors"), by counsel, move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure for judgment upholding EPA's November 26, 2001 approval of West Virginia's antidegradation implementation procedures. The grounds for this motion are set forth in the accompanying memorandum of law.

Respectfully submitted,

WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION

WEST VIRGINIA MUNICIPAL LEAGUE

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

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MUNICIPAL INTERVENORS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The West Virginia Municipal Water Quality Association, the West Virginia Municipal League, and the Association of Metropolitan Sewerage Agencies (collectively, the "Municipal Intervenors"), by counsel, respectfully submit this memorandum in support of their Motion for Summary Judgment. In accordance with the Court's Order dated April 29, 2002, the Municipal Intervenors have cooperated with the Industrial Intervenors to avoid duplicative briefing. Accordingly, in addition to the further grounds briefly set forth below, the Municipal Intervenors rely upon the arguments and authorities set forth in the memoranda filed by the Industrial Intervenors and Defendant Administrator Whitman ("EPA").

I. INTRODUCTION

The West Virginia municipal associations represent the owners and operators of publicly owned treatment works ("POTWs"), or municipal wastewater treatment plants, throughout the

State of West Virginia. The Association of Metropolitan Sewerage Agencies ("AMSA"), whose members serve the majority of the sewered population of the United States and collectively treat and reclaim approximately 18 billion gallons of wastewater each day, is the Nation's leading voice on policy matters affecting municipal wastewater treatment services throughout the United States.

The Municipal Intervenors take seriously their critically important role in protecting public health and the environment, and are conscious of the need to do so efficiently. If the plaintiffs prevail in this litigation, they will effectively have re-written the State and, by implication, the long-standing National approach under the CWA to preventing water quality degradation. For no environmental or human benefit, that result would hinder the ability of local governments and wastewater treatment agencies to build or expand centralized treatment systems necessary to ensure the proper treatment of sewage, as well as to accommodate future growth and development necessary for a strong local, State and National economy.

For the reasons set forth below, the Municipal Intervenors submit that plaintiffs lack Article III standing because they have not and cannot establish that they would be harmed by the proper implementation of the challenged procedures to unknown future projects. If, however, the Court were to find standing for plaintiffs' preemptive attack, judgment on the merits should be granted in favor of EPA and the Municipal Intervenors because plaintiffs' preferences on how West Virginia should implement the antidegradation policy simply are not mandated by the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, or by EPA's federal antidegradation regulations, 40 C.F.R. § 131.12. Plaintiffs' claims assert nothing more than their opinions about, and disagreement with, policy decisions committed to the discretion of the State (and, to a lesser degree, to EPA in its limited role of reviewing State water quality standards and related

implementation policies). *See* CWA § 303(c), 33 U.S.C. § 1313(c).

II. PLAINTIFFS LACK STANDING

Of the original twenty-five plaintiffs (fifteen organizations and ten individuals), affidavits were provided for only eight organizations and two individuals as attachments to plaintiffs' memorandum in support of their motion for summary judgment. While these affidavits may be adequate to demonstrate standing in different circumstances (such as citizen enforcement of NPDES permit violations that have resulted in degraded water quality), they are insufficient to establish standing to challenge EPA's approval pursuant to section 303(c) of the CWA, 33 U.S.C. § 1313(c), of State antidegradation implementation procedures, which are intended to be applied in the future to various activities and under various circumstances.

To establish Article III standing, each Plaintiff must show that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 120 S. Ct. 693, 704 (2000). An organization has standing to sue on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.*

The party invoking federal jurisdiction bears the burden of establishing these elements. *See FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231, 110 S. Ct. 596, 608 (1990). They are an indispensable part of the plaintiffs' case. Each element must be supported in the same way as

any other matter on which the plaintiff bears the burden of proof, that is, with the manner and degree of evidence required at the successive stages of the litigation. *See Lujan v. National Wildlife Federation,* 497 U.S. 871, 883-89, 110 S. Ct. 3177, 3185-89 (1990). At the pleading stage, general factual allegations of injury may suffice because on a motion to dismiss it is presumed that general allegations embrace those specific facts that are necessary to support the claim. *National Wildlife Federation*, 497 U.S. at 889, 110 S. Ct. at 3189. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts which for purposes of the summary judgment motion will be taken to be true. Fed. Rule Civ. Proc. 56(e). At the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2137 (1992).

Plaintiffs' affidavits consist principally of statements noting the existence and effect of past or current water quality degradation. These statements do not help establish standing in this case. Though ***remediation of existing degradation*** is a valid and central concern of the CWA, it is not the purpose of an antidegradation policy and related implementation procedures. Rather, as the term implies, the purpose of an antidegradation policy is the ***prevention of further degradation*** in the future. *See* 40 C.F.R. § 131.12. Thus, the affiants' many statements regarding existing degradation are irrelevant to a standing analysis in this case, which is fundamentally about how States may choose to implement an antidegradation policy for preventing degradation in the future. [1]

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[1] Other CWA programs operate to remediate existing degradation, that is, to improve water quality sufficiently to meet designated uses where existing degradation precludes those uses from being enjoyed right now. *See, e.g.*, CWA § 402(a), 33 U.S.C. § 1342(a) and 40 C.F.R. Part 122 (permit requirements applicable to point sources, including effluent limitations necessary to avoid causing a violation of water quality standards); CWA § 319, 33 U.S.C. § 1329 (planning and management programs for addressing nonpoint source pollution); CWA § 303(d),

With the proper role of the antidegradation policy in mind, the next critical point in the standing analysis is whether the remaining statements in the affidavits establish injury-in-fact. Plaintiffs have not and cannot demonstrate a "concrete and particularized" injury because the implementation procedures in no way override the State's fundamental obligation to fully protect and maintain all existing instream water uses and the level of water quality necessary to protect those existing uses. This is the basic level of protection afforded all water bodies. 40 C.F.R. § 131.12(a)(1) ("Existing instream water uses and the level of quality necessary to protect the existing uses shall be maintained and protected"); 40 C.F.R. § 131.12(a)(2) ("the State shall assure water quality adequate to protect existing uses fully"). In other words, no degradation will be allowed that would preclude plaintiffs from enjoying whatever uses they enjoy today. [2]

Furthermore, in waters with quality better than necessary to protect designated uses, Tier 2, Tier 2.5 and Tier 3 antidegradation requirements, by definition, preserve that quality at levels beyond what is needed to support uses such as swimming, drinking, fishing and boating. This additional quality is essentially a margin of safety above and beyond that which is established in water quality standards as the desired quality necessary to support all designated uses, and it is clearly and undeniably protected by the implementation procedures. C.S.R. § 46-1-4.1.6. Even with the usual and customary exceptions to full-blown antidegradation review (*e.g.,* for insignificant or *de minimis* reductions not exceeding ten percent of the margin of safety, C.S.R. § 60-5-5.6.d), the implementation procedures do not in any way threaten compliance with the underlying water quality standards and plaintiffs' alleged enjoyment of the uses which those

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33 U.S.C. § 1313(d) and 40 C.F.R. §130.7 (plans specifying the total allowable loads of pollutants to an individual water body from both point and nonpoint sources).

[2] An "existing use" is a use actually attained in a water body on or after November 28, 1975, whether or not they are included in the state's water quality standards. 40 C.F.R. §§ 131.3(e) and 131.12(a)(l); C.S.R. §§ 46-1-2.8, 46-1-4.1.a and C.S.R. § 60-5-4-1.

water quality standards support.

In addition, if as a result of other CWA programs or any other reason, water quality improves to support additional uses in the future that do not exist today, those uses automatically become "existing uses" and the antidegradation policy and implementation procedures will protect those new uses as well. 40 C.F.R. § 131.3(e); C.S.R. §§ 46-1-2.8 and 46-1-4.1.a.

Given this legal framework which fully protects plaintiffs' uses from being eclipsed by future degradation, they are unable to demonstrate that there is a "substantial probability" that either an individual plaintiff or a member of a plaintiff organization will be injured. *See Louisiana Environmental Action Network v. EPA,* 172 F.3d 65, 68 (D.C. Cir. 1999).

This legal framework also demonstrates that plaintiffs' general worries and concerns are not "objectively reasonable" evidence of harm. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157 (4th Cir. 2000) (concluding that affiant's fear of health risks from recreational use of a water body was reasonable where allegedly defendant repeatedly discharged toxic chemicals in excess of permit limits required to be set at levels not interfering with attainment of water quality standards). Because their uses will be protected, plaintiffs' concerns amount to no more than the type of subjective apprehensions previously considered insufficient to establish standing. *See Los Angeles v. Lyons,* 461 U.S. 95, 103 S. Ct. 1660 (1983) (holding that a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat from the policy).

The statements in the affidavits expressing concern that degradation might occur in the future are simply too conjectural and hypothetical to establish standing. First, no information has been presented in any affidavit indicating that the activities that plaintiffs wish to regulate

differently is imminent or likely to occur in a water that any plaintiff uses. Instead, this case is a broad challenge to EPA's approval of West Virginia's antidegradation implementation procedures regulation, including dozens of different requirements potentially applicable in different circumstances that might or might not arise in the future. Rather, the Amended Complaint takes a "shotgun" approach as illustrated by the long list of challenged provisions in paragraphs 28.A through 28.S of the Amended Complaint.

Their failure to separately relate each challenged provision to an individual plaintiff is fatal. For example, where the water quality criteria for copper are, say, a maximum of 10 micrograms per liter (ug/l, or parts per billion) for protecting aquatic life and a maximum of 1,000 ug/l for protecting human health, would allowing copper levels to increase from 4 ug/l to 4.5 ug/l in a Tier 2 water under the 10% exemption have any impact on a plaintiff's paddling or swimming? Of course not. This miniscule change of 0.5 ug/l is far below the established human health criterion of 1,000 ug/l. Would changing the instream dissolved oxygen concentration from 7.1 mg/l to 7.0 mg/l have any effect whatsoever on the ability to catch fish that have more than adequate oxygen supplies at the State's dissolved oxygen criteria of 5.0 mg/l (minimum)? Again, the answer is obviously no.

This type of information is critical and insurmountable considering that the State's water quality program, including the implementation procedures, protects all of the plaintiffs' uses, as explained above. *See also American Petroleum Inst. v. EPA*, 216 F.3d 50, 63-67 (D.C. Cir. 2000) (holding in a challenge to an EPA regulation that four environmental organizations lacked standing to challenge EPA's refusal to classify a certain material as a "hazardous waste" because they did not establish that the presence of this material actually resulted in any harm to them); *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002) (no standing for similar reasons in another

challenge to an EPA regulation).

Considering the full protection that West Virginia's water quality standards provide for plaintiffs' uses and the extremely general and speculative nature of their concerns about the implementation procedures, plaintiffs have not and cannot establish standing. Under these circumstances, the only course is to deny review to those "who seek to do no more than vindicate their own value preferences through the judicial process," *Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S. Ct. 1361, 1369 (1972), and sustain the West Virginia Legislature's policy choices reflected in the challenged implementation procedures.

III. THE LIMITED POTW EXEMPTIONS FROM TIER 2 AND TIER 2.5 SHOULD BE UPHELD

The Court should uphold the limited exemptions from Tier 2 review, C.S.R. § 60-5-5.6.c, and Tier 2.5 review, C.S.R. § 60-5-6.1, for efforts to alleviate *bona fide* public health risks from failing septic systems and untreated or inadequately treated sewage.[3]

The exemptions specifically apply to combined sewer overflow ("CSO") reduction or elimination projects. A CSO is a discharge of untreated wastewater from a wastewater collection system that conveys sanitary wastewaters and storm water in the same pipe. CSOs generally occur during wet weather when storm water flows exceed the capacity of the combined system. There are approximately 60 CSO systems in West Virginia. The limited exemptions are appropriate for several reasons.

First and foremost, the exemptions facilitate the elimination of serious public health risks from untreated or inadequately treated sewage. In fact, it is difficult to imagine how a CSO

[3] Plaintiffs have not moved for summary judgment on their claim regarding the similar exemption from Tier 2.5 review at C.S.R. § 60-5-6.1. *See* Compl., ¶ 28.Q.

reduction or elimination project would not pass a full-blown Tier 2 analysis, if that process were required by the State, given the obvious need for and importance of addressing frequent overflows presenting significant health risks. In fact, a local program to address CSOs is "necessary" and "important," to use the language of Tier 2 of the federal antidegradation policy, because such a program is required in accordance with the CSO Policy recently codified at 33 U.S.C. § 1342(q).

Second, the State has conditioned the exemption on achieving a net decrease in overall pollutant loads, which demonstrates an environmental benefit in addition to paramount public health benefits. Plaintiffs complain of the net reduction requirement as being too general and thus not protective enough. However, the State could legally have provided less protection by designating all CSO receiving waters for Tier 1 (rather than the higher protection provided by Tier 2) based on the presence of untreated wastes. It is reasonable, therefore, for the State in exercising its discretion in establishing a higher level of antidegradation protection, to provide a tailored exemption for particularly worthy public health projects subject to the additional safeguard of the "net decrease" condition. For the same reason, it would be inappropriate for EPA, in its limited approval role, to have disproved this State decision. *See* CWA § 303(c), 33 U.S.C. § 1313(c) (regarding state and federal roles in water quality standards adoption); CWA § 101(b), 33 U.S.C. 1251(b) (stating the CWA's purpose of preserving the primary responsibility of the States for pollution control).

Third, consistent with EPA's support of various antidegradation approaches that enable States to focus their limited resources on deserving matters, this provision not only helps State government but also helps local governments and wastewater authorities make wise use of the limited local resources available to pursue important but generally extremely expensive CSO

control projects.[4]

Fourth, as explained above in the context of standing, all existing uses must be completely protected. These limited exemptions to Tier 2 or Tier 2.5 review in no way compromise this critical protection. Though expressed in a slightly different way than the principal and most common *de minimis* exemption – the ten and twenty percent significance thresholds set forth in C.S.R. § 60-5-5.6.d – these exemptions are also appropriate *de minimis* exemptions.[5]

Finally, for these POTW-related exemptions, two other processes in West Virginia effectively work together to ensure a Tier 2-type review despite the exemptions. One is the Public Service Commission's process for obtaining the required certificate of public convenience and necessity to construct wastewater facilities. This ensures that these projects are necessary to achieve important societal objectives. *Compare* W.Va. Code § 24-2-11 (requiring a certificate of public convenience and necessity) *with* 40 C.F.R. § 131.12(a)(2) (allowing significant lowering of water quality when necessary for important social or economic reasons).[6] The other process is the legislative process. The involvement and approval of the West Virginia General Assembly, as the lawmaking body elected by the citizens of this State, in coordination with EPA, fully satisfies expectations of governmental coordination and public participation under 40 C.F.R. §

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[4]Extensive information on the tremendous wastewater infrastructure funding gap nationwide is available from EPA (www.epa.gov/epahome/headline_093002.htm) and the Water Infrastructure Network (www.win-water.org).

[5] Longstanding usage of significance thresholds, or *de minimis* exemptions, in antidegradation implementation across the Nation is addressed at length in EPA's and Industry Intervenors' briefs and therefore will not be addressed again here.

[6] The issuance of a certificate of public convenience and necessity by the Public Service Commission not only serves the same purpose as the comparable element of Tier 2, but it would dictate the outcome of Tier 2 analysis. In terms of standing, this means that plaintiffs' claims relative to the limited POTW exemptions are not redressable by an order requiring Tier 2 review.

131.12(a)(2). To require more would be needlessly redundant and would contravene the CWA itself. *See* 33 U.S.C. § 1251(f) ("to the maximum extent possible the procedures utilized for implementing this Act [the CWA] shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government").

For all of these reasons, the limited POTW exemptions should be upheld.

IV. CONCLUSION

For the foregoing reasons, the Municipal Intervenors' Motion for Summary Judgment should be granted and plaintiffs' Motion for Summary Judgment denied.

Respectfully submitted,

WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION

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CERTIFICATE OF SERVICE

I hereby certify that this 14th day of May, 2003, copies of the foregoing Municipal Intervenors' Motion for Summary Judgment and Municipal Intervenors' Memorandum in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment were mailed first class, postage prepaid to:

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