

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION**

MISSOURI COALITION FOR THE ENVIRONMENT	)	
	)	
	)	
Plaintiff,	)	CASE NUMBER 2:03-CV-04217-NKL
	)	
v.	)	JUDGE: Nanette K. Laughrey
	)	
MICHAEL O. LEAVITT, Administrator of the United States Environmental Protection Agency, <i>et al.</i> ,	)	
	)	
	)	
Defendants.	)	

**REPLY SUGGESTIONS IN SUPPORT OF MOTION TO INTERVENE OF  
THE ASSOCIATION OF METROPOLITAN SEWERAGE  
AGENCIES AND THE URBAN AREAS COALITION**

**I. INTRODUCTION AND SUMMARY**

Proposed intervenors the Association of Metropolitan Sewerage Agencies (“AMSA”) and the Urban Areas Coalition (“UAC”) (collectively “Intervenors”), respectfully submits this reply in support of their Motion to Intervene in the above-captioned action. This reply addresses the arguments raised in Plaintiff Missouri Coalition for the Environment’s (“MCE’s”) April 30, 2004, Suggestions in Opposition to the Motion to Intervene of the Association of Metropolitan Sewerage Agencies and the Urban Areas Coalition (“MCE’s Suggestions”).

MCE makes two arguments against the requested intervention: (1) MCE asserts that Intervenors’ motion was untimely; and (2) MCE asserts that Intervenors have failed to demonstrate a recognized interest at stake in the litigation. For the reasons set forth below,

MCE's position on each argument is incorrect and Intervenor respectfully request that their intervention be allowed by this Court.

## II. LAW AND ARGUMENT

### A. Intervenor's Motion was Timely Filed.

Rule 24(a) authorizes intervention as of right upon timely motion by the applicant. Whether a motion to intervene is timely "is determined from all the circumstances of the case." Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 998 (8<sup>th</sup> Cir. 1993). The Eighth Circuit has recognized that "[n]o ironclad rules govern this determination," *id.*, and has delineated several factors that courts consider in making such a determination, including any prejudice that the intervention may cause to other parties, how far the litigation has progressed before the motion to intervene is filed, the reason for the proposed intervenor's delay in seeking intervention and prior knowledge of the pending action. *See id.* (citing Arkansas Elec. Energy Consumers v. Middle S. Energy, Inc., 772 F.2d 401, 403 (8th Cir. 1985)).

The Eighth Circuit's flexibility in granting intervention is evident in Mille Lacs. In that case, landowners filed their motion to intervene eighteen months after the suit had commenced and nine months after the deadline for filing motions to add parties. *Id.* at 998. The Court observed that the applicants had received ample notice of the lawsuit and that the issues involved in the case could affect their land rights, but the Court emphasized that the underlying litigation had not progressed to such a point that the proposed intervention would have delayed the trial or otherwise prejudiced any of the parties. *Id.* Accordingly, the Court ruled that the motions to intervene should have been granted as timely filed. *Id.*

The mere fact that Intervenor-applicants may have had knowledge of this action prior to filing their Motion does not render the Motion untimely. Mille Lacs demonstrates that intervention is appropriate even where an applicant has prior knowledge of the action, where the action could affect the applicant's recognized interest. The Court in Mille Lacs observed that it was "obvious" that the intervenor applicants' rights might be affected and rejected their assertion that they did not have adequate notice. *Id.* at 999. Nonetheless, the Court granted intervention.

This case has not proceeded to such a point that intervention would cause delay or prejudice any of the parties. This is not a case like Arkansas Elec. Energy Consumers v. Middle South Energy, Inc., 772 F.2d 401 (8<sup>th</sup> Cir. 1985), cited in MCE's Suggestions, in which the district court granted numerous motions to intervene in an expedited case involving preliminary and permanent injunction hearings, but denied a motion to intervene filed on the day briefs were due, two days before hearing. *Id.* at 402. Nor is this a case like Minnesota Milk Producers Ass'n v. Glickman, 153 F.3d 632 (8<sup>th</sup> Cir. 1998), also cited in MCE's Suggestions, where a motion to intervene was rejected because it was filed post-judgment. *See id.* at 646. To the contrary, this action – which does not involve the urgency or abbreviated timeframes of the injunction proceedings involved in Arkansas Elec. Energy Consumers – was commenced only six months before Intervenor filed their Motion. Following several extensions of time granted by the Court, EPA filed an Answer less than two months before Intervenor filed their Motion. Discovery has just concluded and, as MCE recognized, substantive briefing on the merits will not begin for another month. *See* MCE's Suggestions at 4.

Intervention will not result in prejudice or delay because Intervenor does not seek to conduct or reopen discovery, nor do they seek to extend any pre-existing case management orders. Intervenor desires to participate in settlement discussions and briefing, if necessary, to

address issues concerning the timing and budgetary impacts of the relief sought by Plaintiff. See Affidavit of Jeff Theerman ¶15; Affidavit of John D. Reece ¶15; Affidavit of Mary E. West ¶15 (all attached hereto). There is no possibility that Intervenor’s participation will have any disruptive effect on the proceedings or result in any prejudice to any existing party. Under the Eighth Circuit’s broad standard for determining timeliness of motions to intervene, and given the general proposition of law that Rule 24(a) governing intervention “should be liberally construed with all doubts resolved in favor of the proposed intervenor” South Dakota ex rel Barnett v. U.S. Dep’t of Interior, 317 F.3d 783, 785 (8th Cir. 2003), intervention in this case is proper and timely.

**B. Intervenor Have a Significant and Recognizable Interest In the Subject Matter of This Action.**

The Eight Circuit has recognized that “the “interest” test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process . . . .” SEC v. Flight Transp. Corp., 699 F.2d 943, 949 (8<sup>th</sup> Cir. 1983) (quoting Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)); *see also* United States v. Union Electric Co., et al., 64 F.3d 1152, 1162 (8<sup>th</sup> Cir. 1995) (quoting Flight Transp. Co.). In order to further the Eighth Circuit position that Rule 24(a) should be liberally construed, the interest requirement should be interpreted broadly. *See, e.g.*, Natural Resources Defense Council v. U.S. EPA, 99 F.R.D. 607, 609 (D.D.C. 1983) (NRDC v. U.S. EPA) (stating that the interest prong of Rule 24(a)(2) “has been interpreted in broad terms”).

Intervenor AMSA’s members operate municipal wastewater treatment plants under federal and state laws and regulations in cities and towns across the United States, including in Missouri. Intervenor UAC’s members are wastewater and storm water utilities in the State of Missouri that own and operate publicly owned treatment works (“POTWs”) in Missouri. Intervenor’s member agencies hold National Pollutant Discharge Elimination System (“NPDES”)

permits pursuant to CWA § 402(a), 33 U.S.C. § 1342(a), authorizing the discharge of municipal treated sewage and other treated wastewaters to the waters of the United States, including waters in Missouri. Those NPDES permits include effluent limits, operational requirements, sampling and monitoring requirements, and other obligations which are required by the federal Clean Water Act, Missouri clean water statutes, and the regulations implementing those laws. *See* Affidavit of Jeff Theerman ¶5; Affidavit of John D. Reece ¶5; Affidavit of Mary E. West ¶5.

Among other relief sought, the Complaint seeks to compel U.S. EPA to order the Missouri Department of Natural Resources to designate all Missouri surface water bodies as “whole body contact recreation,” which is the classification requiring the most stringent effluent limits on POTWs such as those owned and operated by Intervenor’s members. *See* Affidavit of Jeff Theerman ¶7; Affidavit of John D. Reece ¶7; Affidavit of Mary E. West ¶7. Under the relief sought by Plaintiffs, the only way for MDNR to determine that a water should not be designated as “whole body contact recreation” is if a “use attainability analysis” (“UAA”) is conducted for such water and demonstrates that such classification could not be met. *See id.* As discussed below, MDNR has indicated that it will not have the resources to perform the necessary UAAs, and that the costs of such UAAs will need to be borne by Intervenor-applicants in many cases.

The receiving waters for several of Intervenor’s treatment plants are currently designated as unclassified or impaired water bodies. *See* Affidavit of John D. Reece ¶8; Affidavit of Mary E. West ¶8. Redesignating those receiving waters as whole body contact will require more stringent effluent limits for many, if not all, of the pollutants currently regulated in Intervenor’s NPDES permit(s), *see id.*, and the installation of disinfection facilities at several large wastewater treatment plants. *See* Affidavit of Jeff Theerman ¶8. More stringent effluent limits will require additional capital expenditures by Intervenor through the addition of new or

additional treatment technology and equipment, *see* Affidavit of Jeff Theerman ¶8; Affidavit of John D. Reece ¶8; Affidavit of Mary E. West ¶8, and additional public cost and expense to achieve compliance with new standards for combined sewer overflows and possibly storm water runoff. *See* Affidavit of Jeff Theerman ¶8. These enhancements could require Intervenor-applicants to increase the water and sewer rates charged to the Missouri citizens they serve.

In addition, changes in the specific effluent limits listed in the Complaint in Counts One through Sixteen will also require additional expenditure by Intervenors to attain compliance with new limits. *See* Affidavit of Jeff Theerman ¶9; Affidavit of John D. Reece ¶9; Affidavit of Mary E. West ¶9. Development of the effluent limits will necessitate significant resources and effort by not only MDNR, but by regulated entities and other interested parties as well. *See id.* As alluded to earlier, in response to this lawsuit, MDNR is considering requiring dischargers to conduct UAAs on receiving streams because MDNR may not have the personnel or financial resources to conduct such assessments to meet a court deadline. *See* Affidavit of Jeff Theerman ¶11; Affidavit of John D. Reece ¶11; Affidavit of Mary E. West ¶11. At an October 24, 2003, stakeholder meeting, MDNR proposed that major dischargers be responsible for conducting the UAAs necessary to redesignate a receiving water classified for whole body contact as a result of this lawsuit. *See id.* Based on statements by MDNR representatives at the October 24, 2003, stakeholder meeting there is substantial likelihood that MDNR will require dischargers to conduct UAAs, at significant expense and expenditure of resources or face potentially unattainable compliance requirements. *See* Affidavit of Jeff Theerman ¶12; Affidavit of John D. Reece ¶12; Affidavit of Mary E. West ¶12.

Any associated costs must be accommodated in Intervenors' annual budgets. *See* Affidavit of Jeff Theerman ¶13; Affidavit of John D. Reece ¶13; Affidavit of Mary E. West ¶13.

Accordingly, any deadlines that are set as the result of this action will have an immediate impact on the budget planning and forecasting of Intervenors, *see id.*, and will unduly delay and jeopardize high priority sewer system repair and improvement projects that have been extensively studied and for which improvements are underway and funding has been obtained. *See* Affidavit of Mary E. West ¶ 13.

Additionally, because MDNR will rely significantly on input from POTWs in the assessment and promulgation of new water quality standards and effluent limits, POTWs must allocate the necessary budget and personnel resources to participate in such efforts. *See* Affidavit of Jeff Theerman ¶14; Affidavit of John D. Reece ¶14; Affidavit of Mary E. West ¶14. Generally, MDNR relies on regulated entities such as Intervenors to provide information, comment, analysis and review during consideration of new water quality standards and effluent limitations and involvement by the regulated community is integral to development of rules that are technically supportable and justified. Affidavit of Jeff Theerman ¶10; Affidavit of John D. Reece ¶10; Affidavit of Mary E. West ¶10. For these reasons, Intervenors' members are uniquely situated to provide the court with necessary information for the court's and parties' consideration in the development of any compliance schedules in a negotiated settlement or final court order if the court finds in Plaintiff's favor.

Considering Intervenors' interests in this action as demonstrated through the attached affidavits, Sierra Club v. U.S. Environmental Protection Agency, 995 F.2d 1478 (9<sup>th</sup> Cir. 1993) is directly on point. In that case, the City of Phoenix was permitted to intervene because the case might have resulted in development of a toxic control strategy for the receiving waters where the City's two wastewater treatment plants discharged, thus impacting the City's NPDES permits. The Ninth Circuit held that the City's possession of NPDES permits allowing the discharge of

wastewater to impaired waters constituted a sufficient protectable interest and that the lawsuit would affect that interest by requiring EPA to “change the terms of permits it issues to the would be intervenor, which permits regulate the use of that real property.” *Id.* at 1482. The court concluded that these interests fall squarely within the class of interests traditionally protected by law. *Id.*

Similarly, Intervenors’ members have real property interests in their NPDES permits and disposition of this action or any settlement that results in any change to Missouri’s standards will directly impact Intervenors’ Missouri members’ compliance obligations and operating costs, affecting those property interests. Intervenors’ members will need to expend significant sums in order to remain in compliance with their NPDES permits and, as public entities, Intervenors’ members represent the interests of their citizens and ratepayers, who would ultimately bear the increased costs of compliance. The mere fact that MCE’s Complaint does not explicitly reference Intervenors’ members’ treatment plants does not diminish the direct and significant impact that resolution or adjudication of this case could have on Intervenors’ property interests. The result of this lawsuit will have significant impact on all dischargers to Missouri waters and Missouri citizens. For this reason, it furthers important public policy to grant Intervenors Motion. Accordingly, Intervenors have a significant and recognizable interest in the subject matter of this proceeding.



### **III. CONCLUSION**

Based on the foregoing and for the reasons set forth in Intervenors Motion to Intervene and Memorandum in Support, previously filed with the Court, Intervenors are entitled to intervene in this action as a matter of right under Rule 24(a)(2) and, alternatively, should be permitted to intervene in this action under Rule 24(b)(2).

Dated: May 17, 2004

Respectfully submitted,

s/ Alexandra Dapolito Dunn

Alexandra Dapolito Dunn (DC Bar # 428526)  
General Counsel  
Association of Metropolitan Sewerage Agencies  
1816 Jefferson Place, N.W.  
Washington, D.C. 20036-2505  
(202) 533-1803  
Email: adunn@amsa-cleanwater.org

s/ David W. Burchmore

David W. Burchmore (Ohio Bar # 0034490)  
Steven C. Bordenkircher (Ohio Bar # 0069671)  
Squire, Sanders & Dempsey, L.L.P.  
4900 Key Tower  
127 Public Square  
Cleveland, Ohio 44114-1304  
(216) 479-8779  
Emails: dburchmore@ssd.com  
sbordenkircher@ssd.com

Attorneys for Intervenor-Applicant AMSA

s/ Thomas J. Grever

Terry J. Satterlee (Missouri Bar # 23695)  
Thomas J. Grever (Missouri Bar # 53487)  
Lathrop & Gage, L.C.  
2345 Grand Boulevard, Suite 2800  
Kansas City, MO 64108-2684  
(816) 460-5812  
Emails: tsatterlee@lathropgage.com  
tgrever@lathropgage.com

Attorney for Intervenor-Applicants UAC

## CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2004, I electronically filed the foregoing *Reply Suggestions In Support Of Motion To Intervene* with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Edward J. Heisel  
Missouri Coalition for the Environment  
6267 Delmar Boulevard, Suite 2-E  
St. Louis, Missouri 63130  
[eheisel@moenviron.org](mailto:eheisel@moenviron.org)

Bruce A. Morrison  
Elsa Steward  
Kathleen G. Henry  
Great Rivers Environmental Law Center  
705 Olive Street, Suite 614  
St. Louis, Missouri 63101-2208  
[bamorrison@greatriverslaw.org](mailto:bamorrison@greatriverslaw.org)

Michele L. Walter, Trial Attorney  
United States Department of Justice  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
[Michele.walter@usdoj.gov](mailto:Michele.walter@usdoj.gov)

Charles M. Thomas, MO #28522  
Assistant United States Attorney  
Charles Evans Whittaker Courthouse  
400 East 9<sup>th</sup> Street, Room 5510  
Kansas City, Missouri 64106  
[Charles.thomas@usdoj.gov](mailto:Charles.thomas@usdoj.gov)

s/ Thomas J. Grever  
Thomas J. Grever  
Attorney for Intervenor Applicant UAC

STATE OF MISSOURI                    )  
  ) SS.  
COUNTY OF JACKSON                )

AFFIDAVIT OF JOHN D. REECE,  
LITTLE BLUE VALLEY SEWER DISTRICT

Before me, the undersigned authority, on this date personally appeared John D. Reece, who after being first duly sworn, deposed and stated as follows:

1. I am the Executive Director for the Little Blue Valley Sewer District in Jackson County, Missouri.
2. I am over the age of 18 years and am fully competent to make this affidavit. I have personal knowledge of all the facts stated herein.
3. The Little Blue Valley Sewer District is a member of the Association of Metropolitan Sewerage Agencies (“AMSA”), and the Urban Areas Coalition (“UAC”), which are associations of publicly operated treatment works [POTWs] that provide for the exchange of wastewater treatment information and developments among the members (“member POTWs”) and with federal and state regulating agencies.
4. In my capacity as Executive Director, my job duties include: manage and direct the operation of the District, establish current and long range objectives, maintain current knowledge of state and federal regulations, oversee the District’s financial structure, determine staffing levels, maintain effective communication with District customers, coordinate work of consultants and engineers, report District activities to the Board of Trustees, and work with District customers for the betterment of the District.
5. As part of my duties, I am responsible for obtaining the National Pollutant Discharge Elimination System (NPDES) permit authorizing treated wastewater discharges from the Atherton Wastewater Treatment Plant into the Missouri River. This NPDES permit includes effluent limits, operational requirements, sampling and monitoring requirements, and other obligations which are required by the federal Clean Water Act, Missouri clean water statutes, and the regulations implementing those laws. I am familiar with the requirements of the NPDES permits, and with the statutes and regulations requiring the specific terms of the NPDES permits.
6. I have reviewed the Complaint filed by the Plaintiffs, Missouri Coalition for the Environment, in action Missouri Coalition for the Environment v. Horinko, filed in the United States District Court, Western District of Missouri, Case No. 03-4217-CV. The Plaintiff generally asks the court to compel the United States Environmental Protection Agency to require the Missouri Department of Natural Resources (“MDNR”) to develop and impose new, more stringent water quality standards for most Missouri

surface water bodies.

7. Among other relief sought, the Complaint seeks to compel U.S. EPA to order the Missouri Department of Natural Resources to designate all Missouri surface water bodies as "whole body contact recreation," which is the classification requiring the most stringent effluent limits on treatment plants such as the Atherton Wastewater Treatment Plant. Alternatively, under the relief sought by Plaintiffs, the only way that MDNR could determine that a water should not be designated as "whole body contact recreation" is if a "use attainability analysis" ("UAA") is conducted for such water and demonstrates that such classification could not be met.

8. With regard to the Missouri River, it is currently designated as an impaired water body. Redesignating the Missouri River as whole body contact will require more stringent effluent limits for many, if not all, of the pollutants currently regulated in Atherton Wastewater Treatment Plant's NPDES permit. More stringent effluent limits will likely require additional capital expenditures by the Little Blue Valley Sewer District through the addition of new or additional treatment technology and equipment.

9. In addition, changes in the specific effluent limits listed in the Complaint in Counts one through sixteen will also require additional expenditure by the Little Blue Valley Sewer District to attain compliance with new limits. Development of the effluent limits will necessitate significant resources and effort by not only MDNR, but by regulated entities and other interested parties as well.

10. MDNR also relies on regulated entities such as the Little Blue Valley Sewer District to provide information, comment, analysis and review during consideration of new water quality standards and effluent limitations. Involvement by the regulated community is integral to development of rules that are technically supportable and justified, and therefore less susceptible to legal challenge. MDNR has already convened meetings of interested stakeholders to discuss and consider methods by which new water quality standards and effluent limits should be developed. These meetings began on October 24, 2003 and continue today. I personally have attended or the District has been represented at these meetings.

11. I am aware that MDNR is considering requiring dischargers such as the Atherton Wastewater Treatment Plant to conduct UAAs on receiving streams, because MDNR may not have the personnel or financial resources to conduct such assessments to meet a court deadline. At the October 24, 2003 stakeholder meeting, MDNR proposed that major dischargers be responsible for conducting UAAs in an attempt to avoid redesignation of the receiving water as whole body contact. Attachment A is a summary of the meeting I received from Becky Shannon of MDNR, who facilitated the meeting. MDNR's proposals concerning UAAs are discussed at pages 1 and 2 of Attachment A.

12. Based on statements by MDNR representatives at the October 24, 2003 stakeholders meeting and at other times, I believe that there is substantial likelihood that MDNR will require dischargers to conduct UAAs, or be faced with potentially

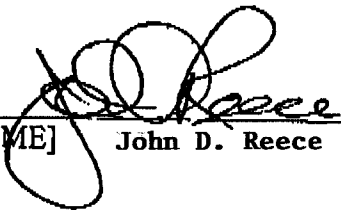
unattainable compliance requirements. Conducting a UAA would require significant expense and resources by the Little Blue Valley Sewer District.

13. The additional costs associated with compliance with updated standards must be accommodated in the Little Blue Valley Sewer District's annual budgets. Accordingly, any deadlines that are set as the result of the *MCE v. Horinko* case for the promulgation of new standards, or for other actions that will directly impact regulated entities, will have an immediate impact on the budget planning and forecasting of the Little Blue Valley Sewer District. The District's budget is paid by fourteen user entities based on volumes of wastewater flow contributed. Cost of major wastewater plant improvements to meet whole body contact regulations would be paid for by the District customers. District customers would be required to pass this cost on to citizens in their communities through increased utility rates.

14. Furthermore, because MDNR will rely significantly on input from POTWs in the assessment and promulgation of new water quality standards and effluent limits, POTWs must allocate the necessary budget and personnel resources to participate in such efforts. For this reason, the members of the Urban Areas Coalition and AMSA are uniquely situated to provide the court with necessary information for the court's and parties' consideration in the development of any compliance schedules in a negotiated settlement or final court order if the court finds in Plaintiff's favor.

15. The members of the Urban Areas Coalition and AMSA, if they are granted intervention in the *MCE v. Horinko* case, do not seek to conduct discovery from the parties, nor will they seek to extend any pre-existing case management orders. They seek only to have meaningful participation in settlement discussions and briefing, if necessary, to address issues concerning the timing and budgetary impacts of the relief sought by Plaintiff.

Further Affiant sayeth naught.

  
[NAME] John D. Reece

Subscribed to and sworn to before me this 17th day of May, 2004.

  
Notary Public

DENISE FORRESTER  
Notary Public - Notary Seal  
STATE OF MISSOURI - Jackson County  
My Commission Expires Feb. 10, 2007

STATE OF MISSOURI                    )  
  ) SS.  
COUNTY OF Randolph                )

AFFIDAVIT OF Mary E. West

Before me, the undersigned authority, on this date personally appeared Mary E. West, who after being first duly sworn, deposed and stated as follows:

1. I am the Director of Public Utilities for the City of Moberly in Moberly, Missouri.
2. I am over the age of 18 years and am fully competent to make this affidavit. I have personal knowledge of all the facts stated herein.
3. The City of Moberly is a member of the Association of Metropolitan Sewerage Agencies (“AMSA”), and the Urban Areas Coalition (“UAC”), which are associations of publicly operated treatment works [POTWs] that provide for the exchange of water treatment information and developments among the members (“member POTWs”) and with federal and state regulating agencies.
4. In my capacity as Director of Public Utilities, my job duties include: overseeing daily operations of the City of Moberly Wastewater Treatment Facility and the sewer collection system, prepare and administer budgets, hire and train staff, determine, recommend and oversee construction of capital improvement projects, maintenance and upgrades to the sewer and wastewater treatment facilities, recommend rates, assure that facilities meet and follow all pertinent regulations and requirements, communicate with the public, city manager and City Council regarding issues, policies, and problems within the system.
5. As part of my duties, I am responsible for obtaining the National Pollutant Discharge Elimination System (NPDES) permit(s) authorizing treated wastewater discharges from the City of Moberly Wastewater Treatment Facility into an unnamed tributary to Coon Creek. These NPDES permits include effluent limits, operational requirements, sampling and monitoring requirements, and other obligations which are required by the federal Clean Water Act, Missouri clean water statutes, and the regulations implementing those laws. I am familiar with the requirements of the NPDES permits, and with the statutes and regulations requiring the specific terms of the NPDES permits.
6. I have reviewed the Complaint filed by the Plaintiffs, Missouri Coalition for the Environment, in action Missouri Coalition for the Environment v. Horinko, filed in the United States District Court, Western District of Missouri, Case No. 03-4217-CV. The Plaintiff generally asks the court to compel the United States Environmental

Protection Agency to require the Missouri Department of Natural Resources (“MDNR”) to develop and impose new, more stringent water quality standards for most Missouri surface water bodies.

7. Among other relief sought, the Complaint seeks to compel U.S. EPA to order the Missouri Department of Natural Resources to designate all Missouri surface water bodies as “whole body contact recreation,” which is the classification requiring the most stringent effluent limits on treatment plants such as the City of Moberly Wastewater Treatment Facility. Alternatively, under the relief sought by Plaintiffs, the only way that MDNR could determine that a water should not be designated as “whole body contact recreation” is if a “use attainability analysis” (“UAA”) is conducted for such water and demonstrates that such classification could not be met.

8. With regard to the unnamed tributary to Coon Creek, it is currently designated as unclassified. Redesignating the tributary to Coon Creek, or (Coon Creek) as whole body contact will require more stringent effluent limits for many, if not all, of the pollutants currently regulated in the City of Moberly’s NPDES permit(s). More stringent effluent limits will likely require additional capital expenditures by the City of Moberly through the addition of new or additional treatment technology and equipment.

9. In addition, changes in the specific effluent limits listed in the Complaint in Counts two (2) through six (6) and ten (10) through sixteen (16) will also require additional expenditure by the City of Moberly to attain compliance with new limits. Development of the effluent limits will necessitate significant resources and effort by not only MDNR, but by regulated entities and other interested parties as well.

10. MDNR also relies on regulated entities such as the member POTWs to provide information, comment, analysis and review during consideration of new water quality standards and effluent limitations. Involvement by the regulated community is integral to development of rules that are technically supportable and justified, and therefore less susceptible to legal challenge. MDNR has already convened at least two (2) meetings of interested stakeholders to begin discussion and consideration of the methods by which new water quality standards and effluent limits should be developed. These meetings were held on October 24 and November 4, 2003. I personally attended both of the meetings.

11. I am aware that MDNR is considering requiring dischargers such as the City of Moberly Public Utilities to conduct UAAs on receiving streams, because MDNR may not have the personnel or financial resources to conduct such assessments to meet a court deadline. At the October 24, 2003 stakeholder meeting, MDNR proposed that major dischargers be responsible for conducting UAAs in an attempt to avoid redesignation of the receiving water as whole body contact. Attachment A is a summary of the meeting I received from Becky Shannon of MDNR, who facilitated the meeting. MDNR’s proposals concerning UAAs are discussed at pages 1 and 2 of Attachment A.

12. Based on statements by MDNR representatives at the October 24, 2003 stakeholders meeting and at other times, I believe that there is substantial likelihood that



MDNR will require dischargers to conduct UAAs, or be faced with potentially unattainable compliance requirements. Conducting a UAA would require significant expense and resources by the City of Moberly Department of Public Utilities.

13. The additional costs associated with compliance with updated standards must be accommodated in the City of Moberly's annual budgets. Accordingly, any deadlines that are set as the result of the *MCE v. Horinko* case for the promulgation of new standards, or for other actions that will directly impact regulated entities, will have an immediate impact on the budget planning and forecasting of the City of Moberly.

In 2000 and 2001, the City of Moberly conducted a capacity and condition study of the wastewater treatment facility, lift stations and collection system. This study identified \$15.6 million in high priority projects to repair and upgrade the City's system. Since the City of Moberly is a combined sewer community, several of the projects included separation of storm water from the combined sewer system. The majority of the projects, however, were collection system projects. The City of Moberly passed a bond issue and a 412% sewer rate increase in November of 2002 to finance the repairs. The City is on the Clean Water State Revolving Fund fundable list. The City participated with the Missouri Department of Natural Resources in the planning of these projects, and in the assignment of priorities for each identified problem. Additional treatment at the City's combined sewer overflow points and/or at the Wastewater Treatment Facility will necessitate a shifting of priorities and will leave a number of high priority issues unresolved in the collection system. This will result in even more problems at combined sewer overflows and the wastewater treatment plant, because the sewers will not have been repaired. Furthermore, in order to participate in the State Revolving Fund, a facility plan has to be submitted nearly a year in advance of the closing, detailing the projects proposed, alternatives considered, approach selected, and estimated costs. This facility plan has already been submitted to the Department of Natural Resources for our next phase of projects. Phase I of the projects is already underway and should be completed within the next (twelve) 12 months. To change our focus now, we would have to entirely rewrite the facility plan, develop alternatives and funding estimates, and get public and DNR approvals. Failure to do so would result in loss of our standing in the fundable pool. The City of Moberly has shown great progress in addressing sewer problems in the last four years. However, to change direction now would impact our credibility with the citizens and ratepayers. Additionally, further significant rate increases would negatively impact the economic development that the City is beginning to experience.

14. Furthermore, because MDNR will rely significantly on input from POTWs in the assessment and promulgation of new water quality standards and effluent limits, POTWs must allocate the necessary budget and personnel resources to participate in such efforts. For this reason, the members of the Urban Areas Coalition and AMSA are uniquely situated to provide the court with necessary information for the court's and parties' consideration in the development of any compliance schedules in a negotiated settlement or final court order if the court finds in Plaintiff's favor.

15. The members of the Urban Areas Coalition and AMSA, if they are granted intervention in the *MCE v. Horinko* case, do not seek to conduct discovery from the

parties, nor will they seek to extend any pre-existing case management orders. They seek only to have meaningful participation in settlement discussions and briefing, if necessary, to address issues concerning the timing and budgetary impacts of the relief sought by Plaintiff.

Further Affiant sayeth naught.

Mary E. West  
Mary E. West

Subscribed to and sworn to before me this 13<sup>th</sup> day of May, 2004.



LINDSEY D. COLLEY  
Randolph County  
My Commission Expires  
February 23, 2008

Lindsey D. Colley  
Notary Public

STATE OF MISSOURI                    )  
  ) SS.  
COUNTY OF ST. LOUIS                )

AFFIDAVIT OF JEFF THEERMAN

Before me, the undersigned authority, on this date personally appeared Jeff Theerman, who after being first duly sworn, deposed and stated as follows:

1. I am the Acting Executive Director for the Metropolitan St. Louis Sewer District (“MSD”) in St. Louis, Missouri.

2. I am over the age of 18 years and am fully competent to make this affidavit. I have personal knowledge of all the facts stated herein.

3. The MSD is a member of the Association of Metropolitan Sewerage Agencies (“AMSA”), and the Urban Areas Coalition (“UAC”), which are associations of publicly operated treatment works (“POTWs”) that provide for the exchange of water treatment information and developments among the members (“member POTWs”) and with federal and state regulating agencies.

4. In my capacity as Acting Executive Director, I am responsible for all MSD operations including treatment plant and collection system operations, budget, and oversight.

5. As part of my duties, I am responsible for obtaining the National Pollutant Discharge Elimination System (NPDES) permit(s) authorizing treated wastewater discharges from the Bissell Wastewater Treatment Facility (WWTF), Coldwater Creek WWTF, Lemay WWTF, Meremac WWTF (under construction) and the Missouri River WWTF into the Missouri and Mississippi Rivers. These NPDES permits include effluent limits, operational requirements, sampling and monitoring requirements, and other obligations which are required by the federal Clean Water Act, Missouri Clean Water Statutes, and the regulations implementing those laws. I am familiar with the requirements of the NPDES permits, and with the statutes and regulations requiring the specific terms of the NPDES permits.

6. I have reviewed the Complaint filed by the Plaintiffs, Missouri Coalition for the Environment, in action Missouri Coalition for the Environment v. Horinko, filed in the United States District Court, Western District of Missouri, Case No. 03-4217-CV. The Plaintiff generally asks the court to compel the United States Environmental Protection Agency to require the Missouri Department of Natural Resources (“MDNR”) to develop and impose new, more stringent water quality standards for most Missouri surface water bodies.

7. Among other relief sought, the Complaint seeks to compel U.S. EPA to order the Missouri Department of Natural Resources to designate all Missouri surface water bodies as “whole body contact recreation,” which is the classification requiring the more stringent effluent limits on treatment plants such as the Bissell WWTF, Coldwater Creek WWTF, Lemay WWTF, Meremac WWTF (under construction) and the Missouri River WWTF. Alternatively, under the relief sought by Plaintiffs, the only way that MDNR could determine that a water body should not be designated as “whole body contact recreation” is if a “use attainability analysis” (“UAA”) is conducted for such water and demonstrates that such classification could not be met.

8. There are thirty-four (34) water bodies within the MSD service area, they are: Antire Creek; Aubuchon Creek; Black Creek; Bonhomme Creek; Caulks Creek; Coldwater Creek; Cowmire Creek; Creve Coeur Creek; Deer Creek; Fee Fee Creek; Fenton Creek; Fishpot Creek; Grand Glaize Creek; Gravois Creek; Kiefer Creek; Little Antire Creek; Louiselle Creek; Maline Creek; Martigney Creek; Mattese Creek; Meremac River; Mill Creek; Mississippi River; Missouri River; River Des Peres; Shady Grove Creek; Smith Creek; Spring Branch Creek; Sugar Creek; Two Mile Creek; Watkins Creek; Wildhorse Creek; Williams Creek; and Yarnell Creek. Designating all of these streams as whole body contact will require the installation of disinfection facilities at five of the largest wastewater treatment plants in Missouri, namely: the Bissell WWTF, Coldwater Creek WWTF, Lemay WWTF, Meremac WWTF (under construction) and the Missouri River WWTF NPDES permit(s). The installation of disinfection will require additional capital expenditures by MSD through the addition of new or additional treatment technology and equipment. MSD will also endure additional cost and expenses in achieving compliance with these standards for our combined sewer overflows and possibly even storm water runoff.

9. In addition, changes in the specific effluent limits listed in the Complaint in Counts 1 through 16 will also require additional expenditure by MSD to attain compliance with new limits. Development of the effluent limits will necessitate significant resources and effort by not only MDNR, but by regulated entities and other interested parties as well.

10. MDNR also relies on regulated entities such as the member POTWs to provide information, comment, analysis and review during consideration of new water quality standards and effluent limitations. Involvement by the regulated community is integral to development of rules that are technically supportable and justified, and therefore less susceptible to legal challenge. MDNR has already convened at least two (2) meetings of interested stakeholders to begin discussion and consideration of the methods by which new water quality standards and effluent limits should be developed. These meetings were held on October 24 and November 4, 2003. MSD had representation at both of these meetings.

11. I am aware that MDNR is considering requiring dischargers such as MSD to conduct UAAs on receiving streams, because MDNR may not have the personnel or financial resources to conduct such assessments to meet a court deadline. At the October 24, 2003 stakeholder meeting, MDNR proposed that major dischargers be responsible for

conducting UAAs in an attempt to avoid redesignation of the receiving water as whole body contact. Attachment A is a summary of the meeting I received from Becky Shannon of MDNR, who facilitated the meeting. MDNR's proposals concerning UAAs are discussed at pages 1 and 2 of Attachment A.


12. Based on statements by MDNR representatives at the October 24, 2003 stakeholders meeting and at other times, I believe that there is substantial likelihood that MDNR will require dischargers to conduct UAAs, or be faced with potentially unattainable compliance requirements. Conducting a UAA would require significant expense and resources by MSD.

13. The additional costs associated with compliance with updated standards must be accounted for in MSD's annual budget and long-term capital improvement program. Accordingly, any deadlines that are set as the result of the *MCE v. Horinko* case for the promulgation of new standards, or for other actions that will directly impact regulated entities, will have an immediate impact on the annual budget and long-term capital improvement program planning and forecasting of MSD. MSD's budgetary and planning impacts due to the changes sought by MCE will be enormous. The changes sought by MCE will require the installation of disinfection facilities at five of the largest wastewater treatment plants in Missouri. MSD will also endure additional cost and expenses in achieving compliance with these standards for our combined sewer overflows and possibly even storm water runoff.

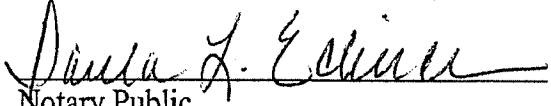
14. Furthermore, because MDNR will rely significantly on input from POTWs in the assessment and promulgation of new water quality standards and effluent limits, POTWs must allocate the necessary budget and personnel resources to participate in such efforts. For this reason, the members of the Urban Areas Coalition and AMSA are uniquely situated to provide the court with necessary information for the court's and parties' consideration in the development of any compliance schedules in a negotiated settlement or final court order if the court finds in Plaintiff's favor.

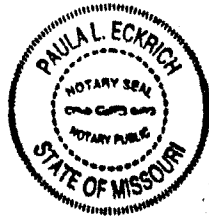
15. The members of the Urban Areas Coalition and AMSA, if they are granted intervention in the *MCE v. Horinko* case, do not seek to conduct discovery from the parties, nor will they seek to extend any pre-existing case management orders. They seek only to have meaningful participation in settlement discussions and briefing, if necessary, to address issues concerning the timing and budgetary impacts of the relief sought by Plaintiff.

Further Affiant sayeth naught.

  
Jeff Sherman

Subscribed to and sworn to before me this 14<sup>th</sup> day of May, 2004.

  
Notary Public



**PAULA L. ECKRICH**  
NOTARY PUBLIC—STATE OF MISSOURI  
ST. LOUIS COUNTY  
MY COMMISSION EXPIRES: MAR. 23, 2007