IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	CASE NUMBER 1: 02CV01361
v.	)	JUDGE: Henry H. Kennedy
CHRISTIE TODD WHITMAN, Administrator, U.S. Environmental Protection Agency, *et al.*,	)	
Defendants	)	

MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE AS PLAINTIFF OF THE
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

I. INTRODUCTION AND FACTUAL BACKGROUND

On July 3, 2002, two state-wide associations of municipal wastewater treatment agencies, located in the states of Pennsylvania and Tennessee, and one individual city, located in the state of Arkansas, brought this action against the U.S. Environmental Protection Agency ("EPA") and three of its Regional offices (EPA Regions III, IV and VI). The Plaintiffs' Complaint asserts that Regions III, IV and VI have issued binding mandates that prohibit the delegated state permitting authorities from authorizing the widespread practice of "blending," "slipstreaming" or "recombination" in National Pollutant Discharge Elimination System ("NPDES") permits issued to Publicly Owned Treatment Works ("POTWs") within their jurisdictions, even though the Clean Water Act ("CWA"), its implementing regulations and EPA headquarters policy all agree that such practice is lawful. Similarly, the Complaint alleges that Regions III and IV have prohibited the permitting of certain emergency outfall structures, located in sanitary sewer

collection systems upstream from POTW treatment plants, even though the CWA, its implementing regulations and EPA headquarters policies agree such permitting is lawful and that discharges from such outfalls are illegal unless they are included in an NPDES permit. The Complaint alleges further that Regions III and IV have issued binding dictates that such emergency overflow structures cannot be permitted unless they are required to meet the "secondary treatment" standard – a CWA standard which applies only to POTWs and not to the collection system. Finally, the Complaint alleges that U.S. EPA headquarters has unlawfully withheld or unreasonably delayed action to restrain these Regions from imposing such improper mandates on the regulated entities and delegated permitting authorities within their jurisdictions.

The Association of Metropolitan Sewerage Agencies ("AMSA"), now seeks to intervene in this proceeding as a party plaintiff in order to protect and preserve the interests of its members nationwide. AMSA is a national, non-profit trade association, acting on behalf of its members, which own and operate POTWs throughout the United States. AMSA member agencies hold 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.

AMSA, which has represented the interests of the nation's POTWs and municipal wastewater treatment agencies since 1970, is comprised of over 270 POTW members who collectively serve the majority of this country's sewered population and treat over 18 billion gallons of wastewater each day. AMSA strives to maintain a leadership role in the development and implementation of scientifically-based, technically-sound, and cost-effective environmental programs for protecting public and ecosystem health. AMSA's members operate municipal wastewater treatment plants under federal and state laws and regulations in cities and towns across the United States, including each of the states located in EPA Regions III, IV and VI.

AMSA members include 24 agencies in EPA Region III (which covers the states of Pennsylvania, West Virginia, Virginia, Maryland, Delaware and the District of Columbia), 51 agencies in Region IV (which covers the states of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee), and 25 agencies in Region VI (which covers the states of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas).

AMSA is entitled to intervene as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The unlawful dictates imposed by Regions III, IV and VI, and EPA Headquarters' failure to reverse those dictates, will impair and impede the interests of AMSA members in treating and discharging municipal wastewater, and in addressing public health concerns due to untreated or inadequately treated sewage. For the reasons discussed below, the existing Plaintiffs may not adequately represent the interests of AMSA's members, which are located in each of the affected states within Regions III, IV and VI, as well as in states in other EPA Regions that will be impacted by the outcome of these proceedings.

Alternatively, the Court should grant permissive intervention. There are common questions of law and fact between AMSA's claims and the Plaintiff's action. Intervention would promote judicial efficiency by reducing the prospects of future litigation by AMSA and/or its individual members to protect their interests. As a representative of municipal wastewater treatment agencies throughout the United States, AMSA will provide the Court with a broader perspective on the impacts and appropriateness of Plaintiffs' claims and the relief sought.

II. ARGUMENT

A. AMSA IS ENTITLED TO INTERVENE AS OF RIGHT.

Rule 24(a) of the Federal Rules of Civil Procedure provides:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest

> relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Accordingly, Rule 24(a)(2) establishes three prerequisites for intervention as of right: "there must be an adequate interest, a possible impairment of that interest and a lack of adequate representation of that interest by existing parties." Dimond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986); *see also* Nuesse v. Camp, 385 F.2d 694, 699 (D.C. Cir. 1967). In addition, the application for intervention must be timely. Dimond at 193.

1. AMSA Claims a Sufficient Interest In the Property Which is the Subject of This Action

As the D.C. Circuit noted in Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967), "in the intervention area 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." *See also* Natural Resources Defense Council Inc. v. United States EPA (NRDC v. U.S. EPA), 99 F.R.D. 607, 609 (D.D.C. 1983), *quoting* Foster v. Gueory, 655 F.2d 1319, 1324 (D.C. Cir. 1981). Accordingly, Rule 24(a)(2)'s interest requirement "has been interpreted in broad terms". NRDC v. U.S. EPA, 99 F.R.D. 607, 609 (D.D.C. 1983); *accord*, Nader v. Ray, 363 F. Supp. 946 (D.D.C. 1973).

In Natural Resources Defense Council (NRDC) v. Costle, 561 F.2d 904 (D.C. Cir. 1977), the D.C. Circuit held that two separate groups of manufacturers were entitled to intervene as of right in an action brought by various environmentalist groups against U.S. EPA after a settlement agreement had been reached requiring the Agency to issue regulations under the CWA regulating certain toxic discharges. Because the manufacturers almost certainly would be affected by the U.S. EPA regulations to be promulgated as a result of the litigation, the Court of Appeals

endorsed the District Court's finding that the intervenor applicants had "properly claimed an interest in the subject of the action." *Id.* at n. 27.

NRDC v. U.S. EPA, 99 F.R.D. 607, 609 (D.D.C. 1983), involved a challenge by several labor and environmentalist groups of U.S. EPA procedures for the regulation of pesticides. The plaintiffs sought an order enjoining U.S. EPA's regulatory procedures, setting aside prior Agency actions under those procedures and requiring the Agency to submit a plan to reassess its prior decisions thereunder. *Id.* at 609. Several pesticide manufacturers and pesticide industry representatives sought to intervene in the action as defendants. *Id. at 608.* The Court held that the intervenor applicants had a "substantial and direct interest" in the subject of the litigation, because the plaintiffs sought to challenge prior Agency decisions which had been in the intervenor applicants' interests. *Id.* at 609. Consequently, the Court held that the applicants were entitled to intervention of right. *Id.* at 610.

Similarly, AMSA clearly has a sufficient interest in the subject of this action. Members of AMSA are adversely impacted and will be adversely impacted by EPA Region III, IV and VI mandates that NPDES permits cannot allow blending, and by EPA Region III and IV mandates that emergency outfalls cannot be permitted and/or that SSOs are subject to secondary treatment standards. If AMSA members that currently blend are prohibited from blending, the results will include (1) decreased treatment efficiency and possible exceedance of permit limits; (2) washout of biomass and solids from the treatment facility; (3) bypass of raw sewage from the headworks; and/or (4) surcharging in the collection system. Members of AMSA will need to expend significant sums in order to eliminate blending even though the existing treatment facilities (*i.e.*, those utilizing blending) achieve applicable effluent limitations.

Many members of AMSA also have emergency outfall structures located in their sanitary sewer collection systems, and will be adversely impacted by Region III and IV mandates that discharges from such structures cannot be authorized in NPDES permits and/or that such discharges are required to meet the "secondary treatment" standards of the CWA. In order to avoid sanctions by EPA Regions III and IV in connection with such discharges, members of AMSA will be required to spend more money on facilities and pollution control than is otherwise required by law.

AMSA's interests are closely analogous to those of the intervenors in NRDC v. U.S. EPA and NRDC v. Costle, both of which involved similar challenges to governmental agencies' regulatory and permitting procedures. Consequently, AMSA's participation in this lawsuit will further the public interest in "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Thus, AMSA clearly claims a sufficient interest in the subject matter of this proceeding for intervention as of right under Rule 24(a)(2).

2. The Disposition of This Action May As a Practical Matter Impair or Impede AMSA's Ability to Protect Its Interest

In Nuesse v. Camp, 385 F.2d 694, 701 (D.C. Cir. 1967), the D.C. Circuit discussed the 1966 amendment of Rule 24(a) which added the language authorizing intervention of right based upon the mere possibility that "disposition of the action may as a practical matter impair or impede" an intervenor applicant's ability to protect its interest in the litigation:

> This alteration is obviously designed to liberalize the right of intervene in federal actions. Interestingly, an earlier draft would have required that the judgment "substantially" impair or impede the interest, but that higher barrier was deleted in the course of approving the amendment.

(Citations omitted). Its opinion further noted that the "revitalized federal rules" call for consideration of the "practical consequences" of the failure to allow the intervenor applicant to advance its "own theories both of law and fact in the trial . . . of the pending case." *Id.* at 702.

In NRDC v. Costle, 561 F.2d 904 (D.C. Cir. 1977), the D.C. Circuit held that the manufacturer groups' interests might be impaired as a practical matter unless they were permitted to intervene, even though they would have been able to challenge the CWA regulations to be promulgated by U.S. EPA under the terms of the settlement agreement in a separate proceeding. The Court of Appeals noted that

> in the leading case of *Nuesse v. Camp,* this court read Rule 24(a)(2) as looking to the "practical consequences" of denying intervention, even where the possibility of future challenge to the regulation remained available. Judicial review of regulations *after* promulgation may, "as a practical matter," afford much less protection than the opportunity to participate in post-settlement proceedings that seek to ensure sustainable regulations in the first place, with no need for judicial review.

Id. at 909 (emphasis in original; footnote omitted). Therefore, the Court concluded "it is not enough to deny intervention under [Rule] 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome litigation." *Id.* at 910. The Court also noted that involvement of the industry intervenors "may lessen the need for future litigation to protect their interests." *Id.* at 911.

Similarly, in NRDC v. U.S. EPA, 99 F.R.D. 607, 609 (D.D.C. 1983), this Court determined that the pesticide manufacturers' interests might in fact be practically impaired if they were not permitted to intervene in that action. Although the plaintiffs argued that they only sought to challenge EPA's procedures rather than any substantive standards, the Court nonetheless found that the intervenors' interests would be practically impaired if these regulatory procedures were invalidated,

> because they would have to start over again demonstrating to EPA the safety of their pesticide products. The possibility that even preliminary decisions of EPA relating to the intervenors' pesticide products would be set aside satisfies the practical impairment of interest requirement.

Id. at 609, *citing* NRDC v. Costle, 561 F.2d 904 (D.C. Cir. 1977) and Environmental Defense Fund, Inc., v. Costle, 79 F.R.D. 235 (D.D.C. 1978).

In this case, the actions of the Defendant EPA Regions and the failure of EPA Headquarters to restrain those actions will as a practical matter adversely impair and impede the interests of AMSA and its members in operating existing public infrastructure and constructing new public facilities. Granting this motion to intervene is essential to provide an adequate opportunity for AMSA to present its views and protect its members' interests.

3. AMSA's Interest Is Not Adequately Represented

The D.C. Circuit has ruled on several occasions that an intervenor applicant's burden of showing that its interest is not adequately represented by the existing parties is a "minimal" one: "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." NRDC v. Costle, 561 F.2d 904, 911 (D.C. Cir. 1977), citing Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 (1972); *accord,* Dimond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) (an intervention applicant's burden of showing inadequate representation of his interest "is not onerous. The applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate."). And in Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967), the D.C. Circuit noted that the adequate representation language in Rule 24(a)(2) "underscores both the burden on those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention."

The circumstances of the Intervenor-Applicant in the present case are most similar to those in Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967), where the D.C. Circuit noted that a State banking commissioner was entitled to intervene as an additional plaintiff in an action brought by a private bank challenging the Comptroller of the Currency's authority to authorize another bank within the State to open a branch. Even though the Commissioner and the plaintiff bank advanced the same legal theory, the Court found that their interests were different: "The interest that the state bank is suing to protect is its own commercial integrity, while the interest sought to be promoted by the Commissioner is the 'competitive equality' of national and state banks in general." *Id.* at 703. It further noted that the "tactical similarity of the present legal contentions of the state bank and the state commissioner does not assure adequacy of representation or necessarily preclude the Commissioner from the opportunity to appear on his own behalf." *Id.*

The existing Plainiffs in this proceeding represent a portion of the regulated entities within a single state in each of EPA Regions III, IV and VI (*i.e.* Pennsylvania, Tennessee and Arkansas). AMSA's membership includes not only additional agencies in those states, but also agencies that own and operate POTWs in ***every*** state within the affected Regions. Thus, AMSA's members operate under NPDES permits issued by delegated state permitting agencies whose policies and procedures have been directed in similar, but not identical ways by the EPA Regions that oversee their activities. Moreover, AMSA is a national association whose members are located in each of the ten EPA Regions, including those which have not been directly sued in this proceeding but whose policies and application of the law will be affected by its outcome. Many of these Regions' positions on the issues raised in this proceeding are unclear at this time

or have been deliberately held in abeyance pending further clarification from EPA headquarters or the courts.

Consequently, AMSA is in a unique position to provide a comprehensive presentation of the legal and factual context of the actions taken by the EPA Regions in this matter. Moreover, AMSA has for many years been an active participant at the national policy-making level in efforts to forge a consistent, national policy on sanitary sewer overflows ("SSOs"), and it has more recently been directly involved in urging EPA Headquarters to resolve the confusion over the blending issue. Representatives of AMSA member agencies served on the SSO Subcommittee of EPA's Wet Weather Federal Advisory Committee from its inception in 1995, and were present at meetings where the differences between EPA Headquarters and several of the EPA Regions regarding the permitting of SSOs and the applicability of the secondary treatment standard first became prominent. AMSA representatives urged EPA at that time, and in subsequent correspondence and meetings, to develop a single agency position on these issues.

On the blending issue, AMSA sought assistance from the EPA Assistant Administrator for Water in the fall of 2000 to resolve the growing differences that had arisen between EPA Headquarters policy and the dictates of several EPA Regions. In 2002, AMSA submitted written comments to EPA Headquarters on a draft national policy designed to address the blending issue as well as other issues involved in the permitting of wet weather discharges. Most recently, AMSA provided U.S. EPA with statistical information, based upon a survey of its member agencies, documenting that a large number of POTWs across the country were designed, constructed (often with state and/or federal funding), and in many cases formally permitted to blend peak wet weather flows.

In light of the national perspective of its members, and the long-standing involvement of AMSA in the efforts to encourage EPA Headquarters to develop a consistent national approach to the issues involved in this case, AMSA's motion to intervene clearly satisfies the "minimal" burden under Rule 24(a)(2) of showing that representation of AMSA'S interests by the existing parties "may be" inadequate.

4. AMSA's Motion to Intervene is Timely

Rule 24(a) authorizes intervention as of right upon "timely" motion by the applicant. Whether a motion to intervene is timely "'is to be determined from all the circumstances.'" NRDC v. Costle, 561 F.2d 904 (D.C. Cir. 1977). As the Court of Appeals explained:

> The amount of time that elapsed since the litigation began is not in itself the determinative test of timeliness. Rather, the court should look to the related circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already in the case.

Id. at 907 (*quoting* Hodgson v. United Mine Workers of America, 473 F.2d 118, 129 (1972)).

In NRDC v. Costle, the industry groups filed their motions to intervene approximately three years after the case was filed and after the existing parties had reached a proposed settlement agreement. Nonetheless, because the industry intervenors sought to participate in the administration of the settlement agreement rather than to upset the settlement agreement itself, the Court of Appeals determined that their intervention would not unfairly prejudice the existing parties. 561 F.2d at 908. Accordingly, the Court ruled that the motions to intervene should have been ruled timely. *Id.* The Court of Appeals reached a similar result in Dimond v. District of Columbia, 792 F.2d 179 (D.C. Cir. 1986), when it ruled that a post-judgment motion for intervention was timely where such intervention would not prejudice any existing party.

Here, timeliness is not a concern. This action was commenced only a few weeks ago, and the answer of the federal government defendants has not yet been filed. At this very early

stage, there is no possibility that AMSA's participation will have any disruptive effect on the proceedings or result in any prejudice to any existing party. Accordingly, AMSA's motion clearly is timely.

B. ALTERNATIVELY, AMSA SHOULD BE PERMITTED TO INTERVENE UNDER FED. R. CIV. P. 24(b)

Even if AMSA did not meet the criteria for intervention of right, which it does, it would satisfy the requirements for permissive intervention. Under Rule 24(b)(2), permissive intervention is appropriate when "an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24 is construed broadly as a tool to fully litigate the issues with all interested parties in one proceeding rather than encouraging piecemeal litigation. NRDC v. Costle, 561 F.2d at 910-11 (D.C. Cir. 1977); see also Feller v. Brock, 802 F.2d 722, 729 (4th Cir. 1986) ("liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process"). Rule 24(b) "provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact." Nuesse v. Camp, 385 F.2d 694, 704 (D.C. Cir. 1967).

In this case, allowing AMSA to intervene would promote judicial efficiency by reducing the prospects of future litigation by the Association or its members to protect their interests. AMSA's intervention in this action at this early stage would not unduly delay or prejudice the adjudication of the rights of the original parties in any way. The participation of AMSA would not result in an unmanageable number of parties and clearly would be "compatible with efficiency and due process." Consequently, AMSA should be permitted to intervene under Rule 24(b) in order to facilitate the resolution of its common claims of law and fact in one proceeding consistent with the principles of judicial economy.

III. CONCLUSION

Accordingly, because AMSA clearly has an interest in the subject matter of this litigation, the disposition of this action may as a practical matter impair or impede AMSA's ability to protect that interest, and none of the Plaintiffs can adequately represent AMSA's unique national perspective and the interest of its members in the administration of the Clean Water Act throughout all of the states in EPA Regions III, VI and VI, AMSA is entitled to intervene in this action as a matter of right under Rule 24(a)(2).

Alternatively, because AMSA's claims have many issues of law and fact in common with the main action, and its participation at this early stage of this proceeding would not cause undue delay or prejudice any existing party, AMSA should be permitted to intervene in this action under Rule 24(b)(2).

Dated: August 16, 2002

Respectfully submitted,

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