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

MISSOURI COALITION FOR THE ENVIRONMENT, Plaintiff, v. MICHAEL O. LEAVITT, Administrator of the United States Environmental Protection Agency, and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	Case Number: 03-4217-CV-C-NKL

PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO THE MOTION TO INTERVENE OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES AND THE URBAN AREAS COALITION

Plaintiff Missouri Coalition for the Environment ("MCE") files this opposition to the motion to intervene of the Association of Metropolitan Sewerage Agencies and the Urban Areas Coalition (the "Associations"). The Associations move for both intervention as of right and permissive intervention. MCE opposes both grounds of the motion.

MCE does not dispute the general requirements for intervention as of right set forth on page four of the Associations' Suggestions in Support. However, as further explained below, MCE opposes the motion to intervene as of right on the grounds that it was not timely and that it failed to demonstrate that the Associations have a recognized interest that stands to be impaired by the outcome of this litigation.

MCE does not dispute the general requirements for permissive intervention set forth on page fourteen of the Associations' Suggestions in Support, but adds that the

timeliness requirement also applies to motions for permissive intervention. MCE opposes the motion for permissive intervention on the grounds that it was untimely and that such intervention would unduly delay and prejudice the adjudication of MCE's claims.

I. The Associations' Motion Should be Denied on the Ground that it was Untimely.

The Associations delayed moving to intervene until six months after the lawsuit was filed, at a time when discovery is complete, and just before substantive briefing is to begin. Members of the Associations were aware of the litigation shortly after it was filed, and the filing of the litigation was well publicized. Allowing intervention at this late date would likely delay the resolution of this action and would prejudice the existing parties. The motion is therefore untimely and should be denied.

"In determining whether intervention should be allowed, either as a matter of right or permission, the threshold question is whether a timely application has been filed. Fed. R. Civ. P. 24. The decision as to timeliness is committed to the district court's discretion." *Arkansas Elec. Energy Consumers v. Middle South Energy*, 772 F.2d 401, 403 (8th Cir. 1985). *See also NAACP v. New York*, 413 U.S. 345, 365 (1972). The Eighth Circuit has adopted a four part test in determining whether a motion to intervene is timely: 1) how far the litigation has progressed at the time of the motion; 2) the prospective intervenor's prior knowledge of the pending action; 3) the reason for the delay in seeking intervention; and 4) the likelihood of prejudice to the parties in the action. *Minnesota Milk Producers Ass'n v. Glickman*, 153 F.3d 632, 646 (8th Cir. 1998).

A. The Associations Delayed Their Motion Until Six Months After the Litigation Was Filed, When Discovery is Complete and Briefing on the Merits is About to Begin.

The Associations delayed filing their motion to intervene until six months after the lawsuit was filed, at a time when discovery is complete and substantive briefing of the merits is about to begin. The Court's Scheduling Order sets the discovery cutoff date for May 10th, and the time for filing discovery motions has already passed. *See* Order of March 26, 2004. Briefs on the merits are to be filed on June 18, 2004. *See* Order of April 29, 2004.

The existing parties have already propounded and responded to discovery. MCE has expended considerable time and effort reviewing and collecting documents for production to Defendants, and has produced thousands of pages of documents from its files. In addition, in response to Defendants' detailed discovery requests on the issue of standing, MCE has expended many hours communicating with its members about their use of the state's waters and providing this information to Defendants. With discovery now concluded, MCE is in the process of preparing its motion for summary judgment on the merits.

The nature of this case allows it to move more quickly toward resolution than many others. *See Arkansas Elec. Energy Consumers*, 772 F.2d at 403 (noting the importance of considering the nature of the litigation when determining timeliness); *NAACP*, 413 U.S. at 345 (finding that intervention request coming roughly four months after case was filed and at a "critical stage" in the litigation was untimely). The issues involved largely turn on the interpretation of statutes and regulations, with few if any anticipated factual disputes, and there is not a need for extensive or phased discovery, nor

the use of expert witnesses. Substantive briefing on the merits will begin on June 18th and it is highly likely that this case will be resolved through motions for summary judgment.

2. The Associations' Members Had Knowledge of the Litigation Shortly After it Was Filed, and Have Been on Notice of the Key Issues and the Possibility of Litigation for Much Longer.

The Associations' members were well aware of the litigation shortly after it was filed, as they attended "stakeholder meetings" at which the litigation was discussed. *See* Exh. A.[1] The filing of the litigation was also well publicized, including articles in the *Kansas City Star*, *Springfield News-Leader* and *Missouri Lawyers Weekly*. *See* Exh. B. In fact, pursuant to the Clean Water Act, MCE had to serve on the Defendants a 60 day notice of intent to sue, and it was well known to affected industries that the state was far behind in meeting its duty of adopting adequate water quality standards.

3. The Associations Have Offered No Reason for the Delay in Filing Their Motion to Intervene.

The Associations' motion offers no explanation for their six month delay in filing the motion to intervene.

4. MCE Would Be Highly Prejudiced by Any Delay or Backtracking in this Case.

MCE and its members would be prejudiced by any further delay in the setting of adequate water quality standards for the State of Missouri. The Missouri Department of

[1] Exhibit A is the attendance roster from two stakeholder meetings convened by the Missouri Department of Natural Resources shortly after this litigation was filed, on October 24, 2003, and November 4, 2003. The purpose of the meetings was to discuss, as had been done in stakeholder meetings three years earlier, how to amend Missouri's water quality standards to protect the use of "whole body contact recreation" or "WBCR". The failure of the state to designate WBCR for most of the state's waters is at issue in MCE's Complaint. Attending the meetings were representatives of the Associations' members, including the St. Louis Metropolitan Sewer District, the City of Moberly and the City of Kansas City.

Natural Resources and Missouri Clean Water Commission have repeatedly failed to establish adequate standards, in some cases ignoring applicable legal requirements for twenty years. *See* Exhibit A to Complaint, p.23 (noting that EPA has expressed concern with Missouri's failure to establish pathogen limits since at least 1984).

MCE and its members are seeking through this litigation to finally have in place adequate water quality standards that are protective of the environment and public health. *See Arkansas Elec. Energy Consumers*, 772 F.2d at 403 (noting that public interest considerations justify moving litigation rapidly). In a case very similar to this one, the Eleventh Circuit has upheld the denial of intervention by industry trade associations, stating that "an action which seeks to preserve the environment from further deterioration deserves refuge from the undue delay that would result from appellant's intervention." *Manasota-88, Inc. v. Tidwell*, 896 F.2d 1318, 1323 (11th Cir. 1990).[2]

In addition to the harm that would come from any further delay in the setting of adequate water quality standards, MCE reiterates that the existing parties have already expended considerable time and effort propounding and responding to discovery, and that phase of the case is now complete. Responses to discovery have been made and no depositions are scheduled before the discovery cutoff on May 10th. Any reopening of the discovery process would be highly prejudicial to MCE, requiring a duplication of effort, the incurring of additional expense, and a delay in the resolution of the case. MCE requests that, if the Court grants the motion to intervene, that it also make clear that the

[2] The facts regarding the prejudice that would accrue to MCE are also grounds for denying the Associations' motion for permissive intervention. A key element of the standard for permissive intervention is whether granting the motion would unduly delay or prejudice the adjudication of the existing parties' claims. *See South Dakota ex rel. Barnett v. U.S. Dept.*, 317 F.3d 783, 787 (8th Cir. 2003). "The decision to grant or deny a motion for permissive intervention is wholly discretionary." *Id.*

Associations "must take the lawsuit as they find it" and that they are not entitled to have the litigation started anew just because they waited too long to seek intervention. *Little Rock Sch. Dist. v. Pulaski Cty. Sch. Dist.*, 738 F.2d 82, 85 (8th Cir. 1984). *See also Newport News, Etc. v. Peninsula Shipbuilders*, 646 F.2d 117, 122 (4th Cir. 1981).

II. The Associations Have Failed to Demonstrate a Recognized Interest at Stake in the Litigation.

The Associations' motion lacks any specific information regarding their or their members' interest in this litigation. While the Associations make assertions regarding the alleged consequences that would ensue if MCE prevailed, there are no details offered as to which water quality standards impact their operations, which of their treatment plants would be affected, or which provisions of their permits might have to be modified. There were no affidavits filed in support of the motion containing any of these facts, only bare bones allegations in the motion. Even if the allegations were taken as true, there is insufficient support for their motion to intervene. It is impossible to know from the motion whether the Associations have a recognized interest that may be affected by the outcome of this litigation.

Non-parties seeking to intervene bear the burden of establishing each of the required elements for intervention. *See Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985)("The applicant has the burden of proving each of the four elements of intervention as of right; the lack of one element requires that the motion to intervene be denied."). The Associations' motion to intervene should be denied due to their failure to demonstrate the existence of a recognized interest and how such interest would be impacted by the outcome of this litigation.

The Associations cite several cases in support of their motion. Each is distinguishable. In *Sierra Club v. U.S. EPA*, 995 F.2d 1478 (9th Cir. 1993), the court noted that the complaint referred specifically to two plants operated by the would-be intervenor, and that the plaintiff wanted the court to order that EPA change the intervenor's permits. *Id.* at 1480-81. Here, there is no evidence in the Associations' motion to link the water quality standards at issue to any of their members' plants or permits, much less allegations in the Complaint regarding specific facilities as existed in *Sierra Club.*

Water quality standards are generic limits or procedures that usually apply statewide, or at least to entire water bodies. They only implicate specific facilities or permits if a facility is shown to be causing, or threatens to cause, a violation of the standard. The opinion in *Sierra Club* indicates that the standards advocated by the plaintiff were being violated, and that promulgation of such standards would work an immediate effect on the would-be intervenor's permits. Here, there is no such evidence offered by the Associations in support of their motion. *See Silver v. Babbitt*, 166 F.R.D. 418, 427-28 (D. Ariz. 1994)(drawing distinction, in the context of intervention, between government actions that have immediate impacts on regulated industries and those with more distant, unquantifiable impacts); *Manasota-88, Inc.*, 896 F.2d at 1323.

Similarly, in *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977), the settlement at issue established specific effluent limitations that clearly applied to the industries that sought intervention. *Id.* at 906, 908 (indicating that the settlement was to result in promulgation of effluent limitations under 33 U.S.C. §1317). Effluent limits are much more direct in their effect upon regulated industries than are

water quality standards. Such effluent limits apply "at the end of the pipe" and impose very definite requirements on facilities that discharge pollutants into waterways.

Water quality standards may have implications for the setting of permit or effluent limits, but will not require modification of existing permits unless such standards are currently being violated. The Associations provided no evidence that their facilities are currently contributing to a violation of the standards that the EPA has identified as being necessary to comply with the Clean Water Act, and that MCE is now advocating for. Only if the Associations' facilities are contributing to a violation of such standards would their existing permits need to be modified as a result of an MCE victory in this case.

Finally, the Associations cite *NRDC v. U.S. EPA*, 99 F.R.D. 607 (D.D.C. 1983), which is similarly distinguishable. In *NRDC v. U.S. EPA*, the underlying suit involved a challenge to regulatory procedures applied by EPA to the registration of pesticides. *Id.* at 608. The court's opinion notes that the plaintiff's complaint alleged that the intervenors' pesticides were specifically at issue because they were in the midst of the regulatory process when the suit was filed. *Id.* at 608-09. In fact, if the plaintiffs were successful, the court noted, the regulatory process that had already reached preliminary decisions regarding the intervenors' pesticides would have been set aside, and EPA would have been required to reconsider the safety of such pesticides. *Id.* at 609. Again, the Associations have not provided any evidence, nor even made allegations, of specific circumstances in which their or their members' facilities would be affected by the outcome of this litigation.

Finally, should MCE prevail, there will be ample opportunity for the Associations to comment on, and to challenge, any subsequent federal rulemaking setting adequate

standards for the state of Missouri. The Associations acknowledge at page three of their Suggestions in Support that they are involved in all aspects of regulatory development to protect the interests of their members. In addition, if the setting of new standards does require modification of their permits, there will also be adequate comment and appeal procedures during that process.

Conclusion

In conclusion, the Associations waited too long to file their motion to intervene, delaying until six months after the case was filed and at a critical time when substantive briefing is about to begin. In addition, the Associations have not provided sufficient information to support the allegation that they have recognized interests that stand to be impaired by the outcome of this litigation. For both of these reasons, the motion to intervene should be denied.

Respectfully submitted,

/s/ Edward J. Heisel
EDWARD J. HEISEL, Mo. Bar # 51746
Missouri Coalition for the Environment
6267 Delmar Boulevard
St. Louis, Missouri 63130
Telephone: (314) 727-0600
Facsimile: (314) 727-1665

Bruce A. Morrison, Mo. Bar # 38359
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, MO 63101-2208
Phone: (314) 231-4181
Fax: (314) 231-4184

Counsel for Plaintiff

Certificate of Service

I hereby certify that on April 30, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Michele L. Walter United States Department of Justice P. O. Box 23986 Washington, DC 20026-3986 (202) 514-3376 Fax : (202)514-8865 Email: michele.walter@usdoj.gov	Alexandra Dapolito Dunn General Counsel Association of Metropolitan Sewerage Agencies 1816 Jefferson Place, N.W. Washington, D.C. 20036-2505 adunn@amsa-cleanwater.org
Charles M. Thomas Office of the United States Attorney 400 E. 9th St. 5th Floor Kansas City, MO 64106 (816) 426-3122 Fax : (816) 426-3165 Email: charles.thomas@usdoj.gov	David W. Burchmore Steven C. Bordenkircher Squire, Sanders & Dempsey, L.L.P. 4900 Key Tower 127 Public Square Cleveland, Ohio 44114-1304 dburchmore@ssd.com sbordenkircher@ssd.com
Terry J. Satterlee Thomas J. Grever Lathrop & Gage, L.C. 2345 Grand Boulevard, Suite 2800 Kansas City, Missouri 64108-2684 tsatterlee@lathropgage.com tgrever@lathropgage.com	

s/Edward J. Heisel

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Edward J. Heisel, Mo. Bar # 51746
Missouri Coalition for the Environment
6267 Delmar Boulevard
St. Louis, Missouri 63130
(314) 727-0600 (phone)
(314) 727-1665 (fax)