**BEFORE THE ENVIRONMENTAL APPEALS BOARD**
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C.**

In the Matter of:

Government of the District of Columbia,
Municipal Separate Storm Sewer System,
NPDES Permit No. DC 0000221,
reissued effective August 19, 2004

Friends of the Earth and
Defenders of Wildlife

Petitioners,

U.S. Environmental Protection Agency,
Region III,

Respondent

Docket No:
NPDES Appeal No:

# MOTION FOR LEAVE TO INTERVENE IN SUPPORT OF THE PERMIT BY THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE CSO PARTNERSHIP, THE WEST VIRGINIA MUNICIPAL LEAGUE, AND THE VIRGINIA MUNICIPAL LEAGUE

The National League of Cities (NLC), the National Association of Flood and Stormwater Management Agencies (NAFSMA), the Association of Metropolitan Sewerage Agencies (AMSA), the CSO Partnership, the West Virginia Municipal League ("WVML"), and the Virginia Municipal League ("VML") (collectively, the "Movants") respectfully move this Board for Leave to Intervene and file a response to the Petition for Review in support of the permit issued by Respondent Region III ("the Region") of the U.S. Environmental Protection Agency ("U.S. EPA"). In support thereof, the Movants state as follows:

The members of the Movants represent city governments and a large number of city and county public works organizations responsible for the operation, oversight and management of municipal storm sewer systems, as well as agencies, companies and professionals involved in ensuring that such systems are designed, operated and maintained in compliance with applicable laws and regulations. The Movants and their members have a history of working on the policies, rules, and requirements that underlie the stormwater permitting program. The Movants and their members are concerned that the relief requested in this case, and the positions advocated by the Petitioners, if accepted by the Board, could make it impossible for Movants' members within EPA Region III and nationwide to comply with stormwater discharge permits and stormwater related obligations under EPA's Total Maximum Daily Load ("TMDL") program. The Movants and their members have a significant interest in this proceeding to ensure that Petitioners' efforts to change existing law regarding the regulation of municipal stormwater are not successful.

NLC is the country's largest and oldest national organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States cities, villages and towns, and more than 135,000 local elected officials. NLC's members include municipal governments that own and operate municipal separate storm sewer systems ("MS4s") throughout the states of Delaware, Maryland, Pennsylvania, Virginia, West Virginia and the District of Columbia (the "District"), whose MS4 permit programs are supervised by Region III.

NAFSMA is a national non-profit association of municipalities, special purpose public districts, and state agencies. Its members represent a broad nationwide spectrum of flood control, water conservation, stormwater management, wastewater, and other water-related districts, bureaus, departments, and other instruments of state and local government. NAFSMA's 130

member agencies serve a combined population of approximately fifty (50) million people. Many of NAFSMA's member agencies are located within Region III of U.S. EPA.

AMSA represents the interests of nearly 300 of the nation's wastewater treatment agencies. AMSA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day. Numerous AMSA members are regulated by the Clean Water Act's permit program for municipal separate storm sewer systems. Many of AMSA's member agencies, including the District of Columbia Water and Sewer Authority, are located within Region III of U.S. EPA.

The CSO Partnership is dedicated to representing the interests of the approximately 800 communities with combined sewer systems nationwide. The CSO Partnership's approximately 80 members are located across the country and include the District of Columbia Water and Sewer Authority along with numerous other cities regulated by U.S. EPA Region III. The CSO Partnership's members strive to protect public health and the environment in an affordable and cost-effective manner. They are regulated under federal and state laws regarding water pollution control. The CSO Partnership's members have invested hundreds of millions of dollars in the planning, design, permitting and construction of facilities to control the overflow of storm water and sanitary sewage in their communities. Many of the CSO Partnership members hold MS4 permits to discharge storm water, similar to the permit at issue in this case.

WVML is a statewide, nonprofit, nonpartisan association of cities, towns and villages established in 1968 to assist local governments and advance the interest of the citizens who reside within the WVML's municipal members. WVML represents 99% of the citizens residing in the state's 234 municipalities. Many of WVML's members are regulated under EPA's MS4

permitting program and hold permits similar to the one at issue in this case. An adverse decision by the EAB would impact EPA Region III's approach to issuing MS4 permits in West Virginia.

VML is a statewide, nonprofit, nonpartisan association of city, town and county governments established in 1905 to improve and assist local governments through legislative advocacy, research, education and other services. The membership includes all 39 cities in the state, 156 towns and 16 urban counties. Many of VML's members are regulated under EPA's MS4 permitting program and hold permits similar to the one at issue in this case. An adverse decision by the EAB would impact EPA Region III's approach to issuing MS4 permits in Virginia.

The Movants seek to Intervene in this proceeding because current EPA regulations do not provide for the filing of *amicus* briefs prior to the Board's decision to grant review. *See* 40 CFR Part 122. At the time that the Petitioners' previous challenge to this permit was filed on August 11, 2000, Movants AMSA, NAFSMA and NLC notified this Board of their desire to participate as *amici curiae* in the event that the Board issued an order granting review of the case. By letter dated September 22, 2000, those Movants asked to be placed on the mailing list for any public notice issued pursuant to 40 CFR § 124.10 in order to be apprised of the briefing schedule established by the Board. Unfortunately, after receiving supplemental briefs from both the Petitioner and the Respondent, and hearing oral argument on several issues raised in the case (including the question whether MS4 permits must ensure compliance with state water quality standards), the Board issued a published opinion without granting review of the Petition. *In Re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323 (EAB, 2/20/04) (hereinafter referred to as "*DC MS4 I*"). Movants recognize that *DC MS4 I*, which was an order denying review in part and remanding in part, did not constitute "final

agency action" and has not yet been subject to judicial review. Nevertheless, the Board's decision, to a certain extent, crystallized its legal conclusions and has shaped the actions of Region III in responding to the remand and reissuing the District's MS4 permit.[1]

## ISSUES OF CONCERN TO THE MOVANTS

Movants seek Leave to Intervene and file a response to the Petition for Review in order to address the following issues of concern. Movants are prepared to demonstrate that, with respect to each of these issues, the Petitioner cannot establish that the Region acted in a manner that was clearly erroneous, an abuse of discretion, or otherwise unlawful, and the Petition should therefore be denied.

### 1. The Clean Water Act Requires Controls in Municipal Stormwater Permits to Reduce the Discharge of Pollutants to the "Maximum Extent Practicable," and Does Not Require Specific Narrative or Numeric Limits to Ensure Compliance with State Water Quality Standards or TMDLs.

In an earlier case before this Board, one of the Petitioners involved in this proceeding (Defenders of Wildlife) argued that certain MS4 permits issued to five Arizona municipalities by Region IX of U.S. EPA were unlawful because they failed to contain numeric effluent limitations in order to meet applicable state water quality standards. *In re Arizona Municipal Storm Water Permits*, 7 E.A.D. 646 (E.A.B. 1998). Region IX took the position in that proceeding that the permits involved must meet water quality standards, but argued that numeric effluent limitations were not required and that the "best management practices" ("BMPs") included in the permits

[1] In *DC MS4 I*, the key issue whether the District's permit would ensure compliance with state water quality standards was remanded for further action by Region III. Consequently, with respect to that issue the Board's Order did not constitute a final agency action and was not subject to judicial review. Because of this quirk in EPA's procedural regulations, the Board has in past cases entertained motions to intervene that were filed by parties other than the permittee or the permitting authority. *See In re Tenn. Valley Auth.*, CAA Docket No. 00-6 (EAB, June 16, 2000) (denying environmental groups' motion to intervene, but granting leave to file non-party briefs); *In re DPL Energy Montpelier Elec. Generating Station*, 9 E.A.D. 695, 696 (EAB 2001) (noting that EPA's Office of General Counsel and EPA Region V's Office of Regional Counsel had been allowed to intervene as *amici curiae* and to file a brief). In the event that the Board elects not to allow the Movants to Intervene in the present case, Movants ask that, in the alternative, leave be granted for Movants to participate and file a brief as *amici curiae*.

were sufficient to ensure compliance. *Id.* at 654-58. This Board agreed with Region IX and denied the petition for review. *Id.* at 659.

The Defenders of Wildlife appealed the Board's decision to the Ninth Circuit Court of Appeals, arguing once again that MS4 permits are required to include numeric effluent limitations to ensure compliance with state water quality standards. *Defenders of Wildlife v. Browner*, 191 F.3d 1167 (9th Cir. 1999). Although it upheld the Board's decision to deny the petition for review, the Ninth Circuit ruled categorically that § 402(p)(3)(b)(iii) of the Clean Water Act, enacted in 1987, had established a new and separate standard for municipal stormwater discharges, and that the Act does not require such discharges to comply with § 301(b)(1)(C) (which requires discharges to achieve any limitations necessary to meet state water quality standards) or with other provisions of the Act that ordinarily apply to all NPDES permits. Instead, the Court of Appeals held that MS4 permits are required only to reduce the discharge of pollutants to the "maximum extent practicable" ("MEP"), which is a "lesser standard" than § 301 imposes on other types of discharges.[2] *Id.* at 1165. If § 301 continued to apply to MS4 discharges, the Court reasoned, the "more stringent" requirements of that section would always control. *Id.* at 1166. After giving careful consideration to the language and context of the Act, its legislative history, and prior case law, the Court concluded that "the text of § [402](p)(3)(B), the structure of the Water Quality Act as a whole, and this Court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with § [301](b)(1)(C)."

[2] The court observed, in dicta, that the MEP standard allows EPA to include "such other provisions as the Administrator determines appropriate for the control of pollutants," and thus allows the "discretion" to require compliance with water quality standards. 191 F.3d at 1166. However, that discretion is necessarily confined by the limits of practicability imposed by the first clause of § 402(p)(3)(B)(iii). In other words, EPA may direct an MS4 permittee to comply with water quality standards, but only "to the maximum extent practicable."

The Petitioners clearly seek in this proceeding to take another bite at the same apple. Because the identical parties are involved (the Defenders of Wildlife and U.S. EPA), principles of collateral estoppel should preclude the Petitioners from re-litigating exactly the same issues that they have previously lost before this Board and in the Court of Appeals. More importantly, however, it should be noted that precisely the same arguments and authorities cited by the Petitioners in this proceeding were already raised and rejected in the *Arizona* cases. As explained below, those spurious authorities include the requirements of CWA § 301(b)(1)(C) (which do not apply to MS4 permits); EPA's general permit regulations at 40 CFR § 122.4(d) (which require permits to comply only with "applicable" water quality requirements); and the EPA General Counsel memorandum dated January 9, 1991(which erroneously concluded that MS4 permits must comply with *both* CWA § 402(p)(3)(B)(iii) *and* CWA § 301(b)(1)(C)). *See* Petition at 7.

This Board first acknowledged the holding of *Defenders* in a footnote to its decision in *In re: Storm Water Discharge Permit for the Municipal Separate Storm Sewer System of Anchorage, Alaska*, NPDES Appeal No. 99-1 (E.A.B. Nov. 23, 1999), at 7 n.10. Subsequently, after discussing the legislative history of CWA § 402(p)(3)(B)(iii) in *In re: City of Irving, Texas Municipal Separate Storm Sewer System*, 10 E.A.D. 111, 118-19 (E.A.B. 2001), this Board recognized that (1) "the requirements for an MS4 permit differ considerably from the technology-based treatment standards and numeric effluent criteria required of other end of pipe dischargers," (2) Congress created the MEP standard to allow permit writers flexibility to tailor permits to site-specific factors, (3) pollutant controls "may be different in different permits," and (4) not all the types of controls listed in CWA § 402(p)(3)(B)(iii) are required to be used in each permit.

The Ninth Circuit's decision has also been relied upon by other courts and administrative tribunals for the proposition that the CWA does not require MS4 discharges to comply with state water quality standards. *See, e.g. Mississippi River Revival, Inc. v. Minnesota Pollution Control Agency*, No. C1-01-23 (Minn. App. July 31, 2001), 2001 Minn. App. LEXIS 855, *13-*15; *Mississippi River Revival, Inc. v. City of St. Paul*, No. 01-1887, slip op. at 13-16 (D. Minn. Dec. 2, 2002), 2002 U.S. Dist LEXIS 25384, *15-*19; *In the Matter of Building Industry Association of San Diego County et al.*, Order WQ 2001-15, slip op. at 6-8 (Calif. SWRCB Nov. 15, 2001), 2001 Cal. ENV LEXIS 16, *10-*14. The Ninth Circuit itself recently reaffirmed its holding that the MEP standard is the only standard applicable to MS4 discharges, in *Environmental Defense Center v. EPA*, 319 F.3d 398 ($9^{th}$ Cir. 2003).

However, in its earlier decision involving the permit at issue in this proceeding, this Board elected not to follow the rationale of *Defenders*, apparently because Region III stated during oral argument that it was "not relying upon the Ninth Circuit's conclusion that EPA has the authority to require less than strict compliance with water quality standards." *DC MS4 I*, 10 E.A.D. at 331 n.9 and 341, n.19. Instead, the Board focused upon EPA's "longstanding" NPDES permit regulations at 40 CFR § 122.4(d), which prohibits the issuance of an NPDES permit "when imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states;" and § 122.44(d), which provides that a permit "must contain effluent limits" for a particular pollutant when the Agency determines that the discharge causes, has the reasonable potential to cause, or contributes to an excursion of the water quality standard for that pollutant. *DC MS4 I*, 10 E.A.D. at 335.

Movants disagree with the Board's earlier analysis of this issue for several reasons. First, Petitioners' claims turn the "discretion" discussed by the Ninth Circuit on its head, by implying

that MS4 permits must ensure compliance with water quality standards unless EPA exercises its discretion to allow less than strict compliance. To the contrary, what the Ninth Circuit said was that the Clean Water Act does *not* require strict compliance with water quality standards unless EPA determines that such compliance is necessary to control pollutants.[3] *Defenders*, 191 F.3d at 1166. Second, Petitioners' interpretation of EPA's general permit regulations in 40 CFR Part 122 ignores the qualifier in § 122.4(d) which mandates compliance only with "*applicable*" water quality requirements, as well as the opening sentence of § 122.44, which contains the essential proviso that "each NPDES permit shall include conditions meeting the following requirements *when applicable*" (emphasis added). Indeed, 40 CFR § 122.44 contains a variety of different provisions that apply only to certain types of NPDES permits (*e.g.* § 122.44(c), which applies only to treatment works treating domestic sewage; 122.44(d)(7), which applies only to ocean discharges; or 122.44(j), which applies only to POTWs). Many of the requirements in § 122.44 simply *do not apply* to MS4 permits, including the requirements to comply with technology-based effluent limitations and standards promulgated under CWA § 301 (§ 122.44(a)); to comply with other effluent limitations and standards under CWA §§ 301, 302, 307, 318 and 405 (§ 122.44(b)); to achieve water quality standards (§ 122.44(d)); and to comply with technology-based controls for toxic pollutants (§ 122.44(e)). By way of contrast, § 122.44(k)(2) (which allows the use of BMPs in lieu of numeric limits in MS4 permits) *does* apply to MS4 discharges (but, obviously, does *not* apply to other types of NPDES permits).

Finally, even if the "longstanding" requirements of 40 CFR §122.4(d) and 44(d) *did* apply to MS4 permits, their effect would have been negated by the 1987 amendments to the Clean Water Act, which *replaced* the requirement to comply with state water quality standards

[3] Moreover, as noted above, EPA's discretion to require strict compliance is still confined by the MEP standard established in the first clause of § 402(p)(3)(B)(iii).

and other provisions of the Act with the new MEP standard for MS4 discharges. The Agency's regulations cannot be more broad than the statute which authorizes them. Given the plain language of CWA § 402(p)(3)( B)(iii), application of the Agency's pre-existing general permit regulations in 40 CFR § 122.4(d) and 44(d) to MS4 permits would be *ultra vires*.

Because the Clean Water Act does not require the permit at issue in this proceeding to ensure strict compliance with state water quality standards, Region III's decision not to include numeric effluent limitations in the permit was not clearly erroneous, an abuse of discretion, or otherwise unlawful. Accordingly, the Petition for Review should be denied with regard to that issue. Similarly, the Petitioners' contention that, even if numeric limits are not required, the Region must demonstrate that the BMPs used in the permit will be sufficient to ensure compliance with water quality standards is inapposite and should be dismissed as well. *See* Petition at 12. Likewise, the argument that the "narrative" water quality standards language in the permit is inadequate to assure compliance with standards must also fail, because the permit is not required to ensure compliance with water quality standards to begin with. *See* Petition at 13. Even if that were not the case, as this Board observed in *DC MS4 I*, "there is no statutory or regulatory provision that requires use of narrative limits." 10 E.A.D. at 341.

The Petitioners' argument that the permit is unlawful because it does not require compliance with all applicable TMDLs, Petition at 16-18, must also be rejected for the reasons discussed above. TMDLs, which are established under CWA § 303(d), are not self-implementing, but are enforced only by incorporating water quality-based effluent limitations in NPDES permits through the authority of CWA § 301(b)(1)(C). Because § 301 does not apply to MS4 permits, the requirement to ensure compliance with TMDLs can be no more stringent than the requirement to meet water quality standards in the first instance. The regulation cited by

Petitioners for the principle that permits must be "consistent with the assumption and requirements of any available wasteload allocation for the discharge," 40 CFR § 122.44(d)(1)(vii)(B), is inapposite for the reasons explained above: the opening sentence of § 122.44 makes it clear that NPDES permits must include conditions meeting the requirements set forth in that rule only "*when applicable*." U.S. EPA recently addressed the application of § 122.44(d)(1)(vii)(B) to MS4 permits in the November 22, 2002 Memorandum from Robert H. Wayland, III and James A. Hanlon, entitled "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs." In that Memorandum, at 4, EPA states that, in light of CWA § 402(p)(3)(B)(iii), limits implementing TMDLs in MS4 permits "should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits."

Petitioners' argument that EPA may rely on BMPs in lieu of numeric limits only where numeric limits are "infeasible," Petition at 11, has already been dealt with by this Board on several occasions. In *Arizona Municipal MS4 Permits*, 7 E.A.D. at 658-59, the Board found that the use of BMPs in lieu of numeric effluent limitations was consistent with EPA's general permit regulations and with its "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits," 61 Fed. Reg. 57425, 57426 (Nov. 6, 1996). This portion of the Board's decision was upheld by the Ninth Circuit in *Defenders*, 191 F.3d at 1166-67. In *City of Irving MS4*, 10 E.A.D. at 118, n.13, the Board noted that, because stormwater discharges are highly variable both as to flow and pollutant type and concentration, and stormwater permits are issued on a system-wide basis, they are largely incompatible with numeric effluent calculation methodologies. Finally, as the Board noted in *DC MS4 I*, 10 E.A.D. at 337, a

provision specifically allowing the use of BMPs in MS4 permits was added to § 122.44(k) of the Agency's NPDES permit regulations in 1999.

Petitioners also argue that the District has not demonstrated that its storm water management plan will reduce pollution to the "maximum extent practicable" as required by CWA § 402(p)(3)(b)(iii), because the district has not "quantified" the amount of reductions in any pollutant, and the permit does not contain "measurable goals." Petition at 20-21. The Board has already addressed this contention appropriately in *DC MS4 I*, where it stated that:

> Petitioners' emphasis on the *amount* of reduction achieved for the various pollutants is misplaced. The key question under section 402(p)(3)(B) of the statute is what is practicable. Here, taking into account the full range of considerations before it, the Region concluded that the BMPs required by the permit collectively represent the maximum practicable effort to reduce pollution from the District's MS4.

10 E.A.D. at 349 (footnotes omitted). Just as the Clean Water Act does not require MS4 permits to meet specific numeric water quality-based effluent limitations, it does not require that specific amounts of pollutant reduction (whether in terms of pounds removed or percent of total load reduced) be incorporated in the permit or calculated by the permitting agency. Instead, it is the technical feasibility and economic achievability of implementing the controls imposed on the discharger that determines what complies with the "maximum extent practicable" standard.

**2. The Clean Water Act Does Not Require TMDLs to be Implemented in MS4 Permits through the Imposition of Daily Average Effluent Limitations.**

Another issue of major concern to the Movants is Petitioners' contention that the "permit fails to specify daily loads as mandated by the CWA." Petition at 19. Petitioners note that they are currently challenging TMDLs in the U.S. District Court for the District of Columbia on the same basis – because the TMDLs were expressed in average annual or seasonal loads, rather than being required to "meet the Act's mandate for daily loads." Petition at 19.

Movants believe that the interpretation of the Act advanced by Petitioners – that permits and TMDLs must be expressed in daily terms – is based on a faulty reading of the CWA and is fundamentally inconsistent with twenty years of program implementation by EPA and delegated states nationwide. We note that the Second Circuit Court of Appeals recently considered this very question and held that Petitioners' reading of the Act places undue importance on one word in the statute and is an "overly narrow reading" which loses sight of the overall structure and purpose of the Clean Water Act. *Natural Resources Defense Council v. Muszynksi*, 289 F.3d 91, 98 (2d Cir. 2001). In rejecting an argument identical to Petitioners', the Court found Petitioners' suggested reading of the statute to be "absurd." *Muszynksi*, 289 F.3d at 99.[4]

Not only is Petitioners' argument based on an incorrect interpretation of § 303(d) of the Act, but the argument that the Act requires daily limits conflicts with § 402(p)(3), governing municipal storm water, and with § 402(q), governing combined sewer overflows. The requirement in CWA § 402(p)(3) that municipal storm water be controlled "to the *maximum extent practicable*," is inconsistent with Petitioners assertion that storm water permit limits must be expressed only as a quantity of pollutant over a 24-hour day. The BMP-based control programs authorized by § 402(p) cannot be squared with Petitioners' contention that daily effluent limits in permits are required for all sources by § 303(d). There is a world of difference between BMPs and the daily effluent limits sought by Petitioners.

Petitioners' argument that the CWA requires permits to be expressed in terms of daily loads of pollutants is also in conflict with CWA § 402(q). Section 402(q) incorporates by reference into the Act EPA's "Combined Sewer Overflow Control Policy" ("CSO Policy").

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[4] Petitioner Friends of the Earth has also raised this same argument before the U.S. District Court for the District of Columbia in *Friends of the Earth v. EPA*, Case No. 04-92 (RMU). The case, which is still pending, challenges two TMDLs for the Anacostia River.

Significantly, the CSO Policy is based upon an annual average approach rather than on daily averages. Petitioners' assertion that the CWA requires permits to be expressed only as a quantity of pollutant over a day is fundamentally inconsistent with CWA § 402(q).

A decision in favor of the Petitioners on this issue would have profound impacts on the Movants' members who are subject to (1) MS4 storm water permits, (2) combined sewer overflow control requirements, (3) TMDLs established using other than daily loadings and (4) other federal and state regulatory programs using other than daily loadings as the basis for their pollution control approaches. Municipalities with MS4 permits simply have no practicable way to comply with daily limits. Moreover, EPA and the States have already established hundreds of TMDLs using annual or seasonal limits which could potentially be invalidated by a decision in favor of the Petitioners requiring such TMDLs to impose daily loadings.

Finally, Movants will explain that numerous other federal and state pollution control programs would be adversely impacted by a decision adopting the Petitioners' position. By memorandum dated March 3, 2004, EPA provided its basis for expressing effluent limits for nitrogen and phosphorous for hundreds of permits (including storm water permits) governing discharges to the Chesapeake Bay as *annual* average limits instead of daily, weekly, or monthly average effluent limitations.[5] In the memo, EPA concluded that its regulations allow it to impose annual limits where the other limitations would be "impracticable." *See* 40 C.F.R. § 122.45(d). EPA explained that daily, weekly or monthly limits would be virtually impossible to calculate because of how nutrients react in the Bay ecosystem. Thus, Petitioners' requested relief would put EPA Region III in the untenable position of having to develop daily limits when it is impracticable for the Agency to do so. The fact that stormwater discharges would not be able to

[5] See http://www.epa.gov/npdes/pubs/memo_chesapeakebay.pdf.

comply with daily limits even if they could be calculated by the Agency further highlights the error in Petitioners' argument and the widespread implications to Movants from a decision by the Board favorable to the Petitioners.

**CONCLUSION**

For each of the foregoing reason, the Movants ask that their motion be granted and that they be given leave to Intervene and file a response to the Petition for Review in support of the permit at issue in this proceeding.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion for Leave to Intervene in Support of the Permit was served by regular first class U.S. Mail, postage prepaid, this 9th day of November, 2004, upon the following:

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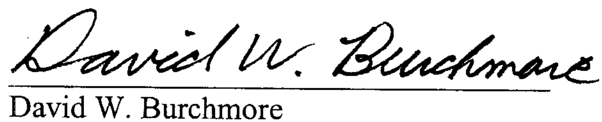

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