

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The NATIONAL CORN GROWERS ASSOCIATION and)	
The NATIONAL CHICKEN COUNCIL)	
)	No. 00-1384
Petitioners,)	and Consolidated Cases
)	
v.)	
)	
CAROL M. BROWNER, Administrator,)	
United States Environmental Protection Agency)	
and ENVIRONMENTAL PROTECTION AGENCY)	
)	
Respondents.)	

**MOTION FOR LEAVE TO INTERVENE OF THE
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES**

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, the Association of Metropolitan Sewerage Agencies ("AMSA") hereby moves to intervene in the above-captioned action for the review of the U.S. Environmental Protection Agency's ("EPA's") final rule entitled "Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation," ("Final Rule") published in the Federal Register on July 13, 2000, at 65 Fed. Reg. 43,586. By this motion AMSA also moves pursuant to Circuit Rule 15(b) to intervene in American Farm Bureau Fed'n v. Browner, Civ. No. 00-1320 (Jul. 18, 2000), American Farm Bureau Fed'n v. Browner, Civ. No. 00-1341 (Jul. 28, 2000), American Forest & Paper Ass'n v. EPA, Civ. No. 00-1353 (Aug. 1, 2000), and all other subsequently consolidated cases seeking review of EPA's Final Rule. In accordance with Rule 15(d) and Rule

26, this motion is filed within 30 days after the National Corn Growers Association and the National Chicken Council filed their petition for review on August 24, 2000.

ARGUMENT

Federal Rule of Appellate Procedure 15(d) requires that a motion for leave to intervene in proceedings to review an agency action include a "concise statement of interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d). AMSA's motion to intervene should be granted because the interests of its members as municipal point source dischargers are not represented adequately by any of the existing parties and will be significantly affected by the outcome of these proceedings. Furthermore, although Federal Rule of Civil Procedure 24 does not control the resolution of this motion, AMSA's interests and grounds for intervention would also satisfy the policies underlying that rule.¹

¹Federal Rule of Civil Procedure 24(a)(2) governs intervention as of right in federal district courts. Fed. R. Civ. P. 24(a)(2). The United States Supreme Court has noted that "the policies underlying intervention [under the Federal Rules of Civil Procedure] *may be applicable* in appellate courts." Int'l Union v. Scofield, 382 U.S. 205, 216 n. 10 (1965) (emphasis added).

Rule 24 has been interpreted to require:

- (1) the application to intervene must be timely;
- (2) the applicant must demonstrate a legally protected interest in the action;
- (3) the action must threaten to impair that

1. AMSA's Interests Warrant Intervention

AMSA has represented the interests of the nation's publicly owned treatment works ("POTWs") and municipal wastewater treatment agencies since 1970. The mission of AMSA is 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 over 250 POTW members serve the majority of this country's sewer population and treat over 18 billion gallons of sewage each day. AMSA's members include point source dischargers permitted to discharge treated effluent under the Clean Water Act's ("CWA's") National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342.

Approximately 80 to 85% of AMSA's POTW members are located on impaired waterbodies listed as "water quality limited segments" pursuant to CWA § 303(d), 33 U.S.C. § 1313(d). Many of these impaired waters are influenced significantly by both rural and urban nonpoint source pollution. The development of TMDLs for these waters and the calculation of load and wasteload allocations directly affect the protected interests of AMSA's members by changing the terms and conditions of their NPDES permits in order to achieve necessary pollutant

interest; and (4) no party to the action can be an adequate representative of the applicant's interests.

S.E.C. v. Prudential Securities, Inc., 136 F. 3d 153, 156 (D.C. Cir. 1998).

load reductions. TMDLs developed pursuant to EPA's Final Rule (as shaped by the outcome of this action) will likewise directly impact the terms and conditions of AMSA's members' NPDES permits. Such direct impacts on the protected interests of AMSA's members warrant intervention in these proceedings. See Sierra Club v. U.S.E.P.A., 995 F.2d 1478, 1485-6 (9th Cir. 1993) (granting intervention to a POTW in an action brought against EPA because the Clean Water Act protects the rights of point source dischargers to operate in accordance with the terms and conditions of their NPDES permits and creates a substantial interest in an action that may have the effect of changing those terms).

AMSA and its members have remained extensively involved in the development and implementation of the TMDL process in order to protect these interests. Specifically, AMSA and its members: (1) participated on EPA's TMDL Federal Advisory Committee Act ("FACA") Committee formed to assist the Agency in the development of proposed revisions to the TMDL program (published by EPA in the Federal Register at 64 Fed. Reg. 46,012 (Aug. 23, 1999)); (2) submitted comments on these proposed revisions on January 19, 2000; and (3) are active in the development of several individual TMDLs for impaired waterbodies located across the country. Furthermore, AMSA recently successfully defended EPA's authority under CWA § 303(d) to include nonpoint sources in the TMDL process in Pronsolino v. Marcus, 91 F. Supp. 2d 133 (N.D. Cal. 2000), *appeal docketed*, No. 00-16026 (9th Cir. Jun. 7, 2000). Pronsolino involved many of the same issues expected to be raised in these proceedings and was brought by some of the same entities petitioning for review of EPA's Final Rule, including the American Farm Bureau Federation ("Farm Bureau") and American Forest and Paper Association. AMSA remains actively involved in the appeal of the Pronsolino decision to the U.S. Court of Appeals for the Ninth Circuit.

The findings of this Court on the issues raised by the Petitioners will specifically affect the NPDES permits held by AMSA's members and other point source dischargers. For example, in its "Petitioner's Statement of Issues" ("SOI") (the only statement of issues filed with the Court to date), the Farm Bureau indicates that it will challenge whether EPA's Final Rule may lawfully require the listing and development of TMDLs for waters impaired by nonpoint sources pursuant to CWA § 303(d). (Pet'r SOI ¶¶1, 3). Unlike the Farm Bureau and several of the other Petitioners, AMSA believes strongly that the TMDL program must encompass both point and nonpoint sources of water quality impairment. To be successful, EPA's TMDL program must include a mix of regulatory controls and voluntary, incentive-based programs applicable to *all* sources of pollution. As the United States District Court for the Northern District of California held in Pronsolino, the CWA's TMDL process deemed "[n]o substandard river or water . . . immune by reason of its sources of pollution." 91 F. Supp. 2d at 1356. "To have excluded the large number of rivers and waters polluted by agricultural and logging runoff would have left a chasm in the otherwise 'comprehensive' statutory scheme." Id. at 1347. If the Petitioners were to prevail on this issue in this action, however, the primary sources of water quality impairment in this country today would be eliminated from the TMDL process, and the entire burden for improving the quality of impaired waters would be foisted upon POTWs and other point source dischargers. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY AND U.S. DEPARTMENT AGRICULTURE, CLEAN WATER ACTION PLAN: RESTORING AND PROTECTING AMERICA'S WATERS 9 (1998).

2. AMSA's Interests Are Not Adequately Represented

The interests of AMSA and its members will not be represented adequately by existing parties to these proceedings because AMSA's interests diverge from those of the existing parties on the issues raised by the Petitioners to date. AMSA disagrees with Petitioners that will argue that

nonpoint sources should not be included in the TMDL process. Furthermore, the Farm Bureau also stated its intent to address "[w]hether the Rule unlawfully requires TMDLs established pursuant to CWA Section 303(d)(1)(C) to include implementation plans." (Pet'r SOI ¶ 4). In contrast, AMSA believes that implementation plans are an essential part of an effective TMDL. Without implementation plans, TMDLs will be reduced to mere exercises in mathematical modeling devoid of any means to implement and achieve the reductions necessary to attain water quality standards.

Although AMSA disagrees with several positions expected to be taken by Petitioners, this does not mean that AMSA fully supports all aspects of EPA's Final Rule, or that the interests of AMSA's members will be represented adequately by the Agency. On the contrary, AMSA objects to several provisions of the Final Rule expected to be challenged by the Petitioners. For example, AMSA agrees with the Farm Bureau that this Court should review whether EPA's Final Rule "unlawfully vests USEPA with authority to review, object to and reissue environmentally significant state-issued NPDES permits that have been administratively-continued after expiration." (Pet'r SOI ¶ 8).

Furthermore, neither EPA nor any other party share the unique interests of AMSA's members. EPA and other Respondents that may be joined will be concerned primarily with defending the foundations, policies, and provisions of the Final Rule rather than how it will impact POTWs. EPA is charged with protecting the public health and welfare and serving the broad public interest by, in this case, seeking to improve the quality of impaired waters. EPA does not and will not represent the interests of municipal point source dischargers, and has so stated. As a consequence, if the Petitioners prevail on issues crucial to AMSA's members (particularly whether nonpoint sources should be included in the TMDL process), AMSA expects EPA will focus the

TMDL process on achieving water quality standards by imposing stricter wasteload reductions and corresponding discharge limits entirely on POTWs and other point source dischargers.

Finally, it is important to note that AMSA will not seek to expand these proceedings by raising issues beyond those raised by Petitioners. Given its unique interests and position, however, AMSA reserves the right to brief issues raised in support of either Petitioners or the Respondent, depending upon the issue and its impacts on the interests of AMSA's members. AMSA expects additional petitions for review will be filed prior to November 24, 2000, and that the full range of issues that will form the basis of these proceedings is not yet known.

CONCLUSION

For the reasons stated above, AMSA's motion to intervene should be granted pursuant to Federal Rule of Appellate Procedure 15(d).

Respectfully submitted,

Date: September 25, 2000 By: _____

LaJuana S. Wilcher
D. Randall Benn
Paul C. Freeman
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728
(202) 986-8000

Counsel for Intervenor-Applicant Association of
Metropolitan Sewerage Agencies