IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
(Huntington Division)

OHIO VALLEY ENVIRONMENTAL COALITION, *et al*.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:02-CV-59
CHRISTIE WHITMAN, Administrator, United States Environmental Protection Agency,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF THE JOINT MOTION TO INTERVENE OF WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION, WEST VIRGINIA MUNICIPAL LEAGUE, AND ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

The West Virginia Municipal Water Quality Association, the West Virginia Municipal League, and the Association of Metropolitan Sewerage Agencies (collectively, the "Municipal Associations") state the following in support of their Joint Motion to Intervene.

I. INTRODUCTION

Fifteen citizen organizations and ten individuals challenge the United States Environmental Protection Agency's ("EPA's") decision to approve a West Virginia regulation entitled Antidegradation Implementation Procedures. They allege that EPA violated the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and its own regulations in issuing this approval decision.

The Municipal Associations seek to intervene as party defendants. Together, their membership includes hundreds of publicly owned treatment works ("POTWs") – commonly known as sewage treatment plants – in West Virginia, plus nearly 300 additional POTWs in

other communities throughout the United States. The Municipal Associations' members discharge treated wastewater to surface waters under the authority of National Pollutant Discharge Elimination System ("NPDES") permits issued by the West Virginia Department of Environmental Protection ("DEP").

The Municipal Associations are entitled to intervene of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The relief Plaintiffs seek will impair and impede their members' interests in treating and discharging municipal wastewater, addressing public health concerns due to untreated or inadequately treated sewage, and accommodating future economic growth and development in West Virginia. By the participation of the national Association of Metropolitan Sewerage Agencies, the Municipal Associations also represent the interests of POTWs nationwide in this potentially precedent-setting litigation. The existing parties do not represent these interests.

Alternatively, the Court should grant permissive intervention. There are common questions of law and fact between the Municipal Associations' defenses and the Plaintiffs' action. Intervention would promote judicial efficiency by reducing the prospects of future litigation by the Municipal Associations and their individual members to protect their interests. As representatives of citizen, commercial and industrial ratepayers throughout West Virginia and beyond, the Municipal Associations will provide the Court with a broader perspective on the impacts and appropriateness of Plaintiffs' claims and the relief sought.

II. STATUTORY AND REGULATORY BACKGROUND

The Complaint challenges the implementation of the federal Clean Water Act by West Virginia and EPA. The relevant provision of the statute requires each state to adopt water quality

standards for surface waters and submit them to the EPA Administrator for approval if they meet minimum legal requirements. 33 U.S.C. § 1313(c)(2). A water quality standard consists of one or more "designated uses" of a waterbody and "water quality criteria" specifying the amount of various pollutants that may be present in the waterbody and still protect its designated use. *Id*.

By regulation, EPA also requires states to develop and adopt a statewide "antidegradation policy" restricting water quality degradation relative to applicable water quality standards. 40 C.F.R. § 131.12. A state's antidegradation policy must be consistent with and at least as stringent as the federal antidegradation policy. 40 C.F.R. § 131.12(a). West Virginia has adopted and EPA has approved an Antidegradation Policy at least as stringent as the federal policy. *See* 46 C.S.R. 1-4. Plaintiffs do not challenge the state's Policy.

By regulation, each state is also required to identify the methods for implementing its antidegradation policy. *Id.* § 131.12(a). Effective July 2, 2001, West Virginia adopted by legislative rule certain Antidegradation Implementation Procedures explaining how it will implement its Antidegradation Policy. 60 C.S.R. 5. In 2001, DEP submitted the Implementation Procedures to EPA for review, and EPA approved them. Plaintiffs challenge EPA's decision to approve this state regulation.

III. THE MUNICIPAL ASSOCIATIONS

The West Virginia Municipal Water Quality Association ("MWQA") is a non-profit association comprised of 24 local governmental entities that own and operate POTWs serving a substantial majority of the sewered population of West Virginia. The MWQA's mission is to protect public health and the environment efficiently and cost-effectively and to ensure that West Virginia's water quality programs are based on sound science and regulatory policy.

The West Virginia Municipal League is a statewide, nonprofit, nonpartisan association of cities, towns and villages established to assist local governments and advance the interests of the citizens who reside therein. The membership includes 90 percent of the 234 municipalities in the state.

The Association of Metropolitan Sewerage Agencies ("AMSA") has represented the interests of the nation's POTWs and municipal wastewater treatment agencies since 1970. AMSA is comprised of over 270 POTW members who 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 in West Virginia.

IV. ARGUMENT

A. Intervention of Right

The Municipal Associations are entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Rule 24(a)(2) provides, in relevant part, that an applicant is entitled to intervene in an action

> 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.

The United States Court of Appeals for the Fourth Circuit applies the following four-part test to determine whether to allow intervention: (1) whether the motion to intervene is timely; (2) whether the applicant has an interest relating to the property or transaction which is the subject of the action; (3) whether the disposition of the action, as a practical matter, may impair or impede the applicant's ability to protect that interest; and (4) whether the existing parties to the lawsuit cannot adequately represent the applicant's interests. *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (quoting *Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n*, 646 F.2d 117 (4th Cir. 1981)).

The Fourth Circuit interprets Rule 24(a) broadly in favor of intervention of right. 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." *Feller*, 802 F.2d at 729 (citing *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). As explained below, the Municipal Associations satisfy all four criteria and, accordingly, are entitled to intervene of right.

1. <u>The Municipal Associations' Motion is Timely</u>

In determining whether an intervention motion is timely, the Fourth Circuit considers how far the suit has progressed, the prejudice which delay caused by the motion might cause the other parties, and the reason for tardiness in moving to intervene. *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990). The general rule is that a motion to intervene is considered timely until the case has progressed to trial. *Union Nat'l Bank v. Superior Steel Corp.*, 9 F.R.D. 124, 127 (W.D. Pa. 1949). A motion to intervene as of right is timely when the issues in the action have yet to be framed. *Kozak v. Wells*, 278 F.2d 104, 107-09 (8th Cir. 1960) (motion to intervene was certainly timely when all answers, except for the answer of a non-principal defendant, had yet to be filed).

Here, timeliness is not a concern. The Municipal Associations have moved to intervene before EPA has filed an Answer in this matter and within the 60-day time period allowed for EPA to do so. *See* Fed. R. Civ. P. 12(a)(3). As the lawsuit has not yet progressed beyond filing and service of the Complaint, there is no conceivable prejudice or delay to the original parties due to timing of the intervention.

2. The Municipal Associations Have a Substantial Interest

Rule 24(a) does not specify the nature of the interest required for a party to intervene of right. The Fourth Circuit has opined that "what is obviously meant . . . is a significantly protectable interest." *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (citing *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). The intervenor's claim simply needs to bear a close relationship to the dispute between existing litigants; it should be direct rather than remote or contingent. *Dairy Maid Dairy, Inc. v. United States*, 147 F.R.D. 109, 111 (E.D. Va. 1993).

The Municipal Associations' interests bear a close relationship to the dispute before this Court. The Municipal Associations seek to preserve their members' ability to treat sewage and discharge treated wastewater into the waters of West Virginia in accordance with their NPDES permits, which now are or in the future will be based on the challenged Implementation Procedures. Plaintiffs seek to overturn several provisions of the Implementation Procedures that are directly applicable to the members of the Municipal Associations, including provisions contained therein at the specific request of the Municipal Associations.

Plaintiffs generally argue that the state does not have the discretion to establish, nor EPA the discretion to approve, *de minimis* exemptions from antidegradation review and restrictions. For example, they challenge an exemption from "Tier 2" antidegradation review for a POTW constructed to alleviate a public health concern associated with failing septic systems or

inadequately treated sewage, including combined sewer overflow reduction projects, *see* Compl. ¶ 28.C, an exemption for *existing* public wastewater infrastructure, *see* Compl. ¶ 28.D, an exemption from "Tier 2" review for expansions or improvements to POTWs and public benefit activities by governmental entities, *see* Compl. ¶ 28.F, and an exemption from "Tier 2.5" review for the expansion of public facilities to alleviate public health concerns associated with failing septic systems or untreated or inadequately treated sewage where there will be a net decrease in overall pollutant loadings, *see* Compl. ¶ 28.Q, among others.[1]

The restrictions Plaintiffs seek will hinder the ability of the Municipal Associations' members to operate existing municipal wastewater infrastructure in accordance with existing or renewed permits and to construct new or expanded public facilities to accommodate economic growth and development. Those restrictions, in turn, will affect the nature and cost of requirements that members of the Municipal Associations must impose on the citizens and businesses that use their sewerage systems (*e.g.*, sewer rates). The relief sought by Plaintiffs could also lead to substantial economic dislocation, curtailment of essential governmental services, and adverse public health and welfare impacts.

Case law supports intervention of right under these circumstances. Ownership of wastewater treatment plants that would be subject to permit requirements as a result of litigation has been determined to be a "significantly protectable interest" meriting intervention of right. In *Sierra Club v. EPA*, the United States Court of Appeals for the Ninth Circuit ruled that the City of Phoenix, which held permits issued under the Clean Water Act for wastewater treatment

[1] The Municipal Associations do not intend to address any of the challenged provisions of the Implementation Procedures that are relevant solely to industrial rather than municipal dischargers. *See, e.g.,* Compl. ¶ 28.B (discussing surface coal mining activities).

facilities, had a protectable interest with respect to the compilation of lists of waters not meeting water quality standards and the identification of point sources discharging to those waters. *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993). The Ninth Circuit summarized best when it said:

> The legitimate interests of persons discharging permissible quantities of pollutants pursuant to NPDES permits are explicitly protected by the [Clean Water] Act. 33 U.S.C. § 1342. ***Because the Act protects the interest of a person who discharges pollutants pursuant to a permit, and the City of Phoenix owns such permits, the City has a protectable interest.*** These permits may be modified by control strategies issued as a result of this litigation, so the City's protectable interest relates to this litigation.

Id. at 1485-86 (emphasis supplied); *see also United States v. City of Niagara Falls*, 103 F.R.D. 164, 166 (W.D.N.Y. 1984) (unincorporated association of businesses had protectable interest in Clean Water Act litigation affecting the requirements under which the treatment plant treating their wastes was to operate).

The interests of the Municipal Associations are even more direct than those at issue in *Sierra Club*. The City of Phoenix's interest was contingent on a possible action by EPA at a later time. It was uncertain whether changes to the City's permits would be required unless and until specific waters and sources of pollutants were targeted by EPA for regulation. Nevertheless, the Court of Appeals held that the City's intervention was appropriate. *Id.* at 1486. Here, the members of the Municipal Associations discharge to waterbodies that are in fact subject to West Virginia's new Antidegradation Implementation Procedures. Certain provisions at issue pertain specifically to POTWs. By law, the challenged regulation will be applied to the Municipal Associations' members when their existing permits are renewed and when new permits are requested. Thus, an adverse disposition of this action is even more likely to have a direct and

immediate effect on interests of the Municipal Associations' members than the outcome of the *Sierra Club* case would have had on the City of Phoenix.

Judge Haden reached essentially the same conclusion in allowing five non-profit West Virginia trade associations to intervene in *Ohio Valley Environmental Coalition Inc. v. Browner*, which was another water quality standards-related case in this District. As is the case here, the *Ohio Valley* plaintiffs sought to require EPA to undertake actions with respect to water quality regulation. Like the Municipal Associations' members, the members of the trade associations allowed to intervene in *Ohio Valley* discharged pursuant to NPDES permits, and it was possible that the litigation would affect the terms and conditions of their NPDES permits. The Court granted intervention of right. Order at 1, *Ohio Valley Environmental Coalition Inc. v. Browner*, No. 2:95-0529 (S.D.W. Va. Nov. 28, 1995) (granting motion to intervene) (attached as Exhibit 1).

In Maryland, Judge Harvey allowed the Maryland Association of Municipal Wastewater Agencies ("MAMWA"), a sister association of movant West Virginia Municipal Water Quality Association, to intervene in similar water quality standards-related litigation. The plaintiffs in that case sought to establish the nondiscretionary duties of EPA to identify waters in Maryland that did not meet water quality standards and to establish plans to improve the quality of those waters. Mem. and Op. at 6, *Sierra Club v. EPA*, No. H-97-3838 (D. Md. Jan. 20, 1998) (granting motion to intervene) (attached as Exhibit 2). The Court recognized that MAMWA had a significantly protectable interest that would be impaired if the litigation were allowed to proceed without its presence because the ability of MAMWA's members to continue with previously approved discharges could be affected by the litigation. *Id.* at 8. In granting MAMWA's motion to intervene, the Court relied on the observation of the Ninth Circuit that it is one thing to hold

that only the government can be a defendant in a suit where the statute regulates only government action, "but quite another to exclude permit-holding property owners from a [Clean Water Act] suit where the statute directly regulates their conduct." *Id*. (citing *Sierra Club*, 995 F.2d at 1485).

Movant AMSA has a proven record of successful and beneficial participation as an intervenor in precedent-setting Clean Water Act cases. For example, AMSA participated as an intervenor in a case involving the Clean Water Act's coverage of nonpoint sources in EPA's total maximum daily load ("TMDL") program in *Pronsolino v. Marcus*, 91 F. Supp. 1337 (N.D. Cal. 2000), and in Ninth Circuit on appeal, *Pronsolino v. Marcus*, Nos. 00-16026 and 00-16027 (9th Cir. 2001). The D.C. Circuit granted AMSA's intervention in a key case challenging EPA's July 2000 TMDL regulations. Order at 1, *American Farm Bureau Federation v. Browner*, No. 00-1320 (D.C. Cir. Dec. 19, 2000) (attached as Exhibit 3). As recently as last week, the District of Columbia District Court granted AMSA's participation as an intervenor in two cases challenging EPA's failure to complete regulations under Clean Air Act Section 129 and 112(k). *See respectively*, Order at 1, *Sierra Club v. Whitman*, Civ. No. 01-1578 (D.D.C. Mar. 12, 2001) (attached as Exhibit 4), *and* Order at 1, Sierra *Club v. Whitman*, Civ. No. 01-1548 (D.D.C. March 12, 2001) (attached as Exhibit 5). Finally, AMSA has been an intervenor in a lengthy CWA case entitled *Gearhart v. Whitman*, Civ. No. 89-6266-HO, in the District Court of Oregon, regarding allowable pollutant concentrations in sewage sludge.

In each of these cases, the requirement of a substantial interest was satisfied by the same circumstance present here, specifically that the litigation concerned the development or implementation of regulations governing the operations of POTWs.[2] Because the Plaintiffs have

[2] There are numerous other examples of courts allowing trade associations of regulated entities to intervene in water quality standards-related litigation under the Clean Water Act. *See,*

targeted provisions of the Implementation Procedures relevant to POTWs, the Municipal Associations have a substantial interest in this case.

3. The Relief Sought in This Case Will Impair and Impede the Municipal Associations' Ability to Protect Their Interests

The significantly protectable interest of the Municipal Associations' members in treating and discharging wastewater will be impaired by an adverse disposition of this action. Plaintiffs seek relief in the form of an order reversing and remanding EPA's approval of DEP's Antidegradation Implementation Procedures. If Plaintiffs prevail, this will result in significant alterations to the existing regulations governing the present and future operations of public treatment facilities by members of the Municipal Associations.

For example, their members (1) will be required to undergo additional procedures and expend additional resources to obtain a new NPDES permit or reissuance of an existing permit; (2) will be required to expend additional resources or limit operations to comply with more stringent discharge limitations; (3) may not be able to construct and operate essential public infrastructure to address public health concerns; and (4) will be unable to defend the provisions of the Antidegradation Implementation Procedures which they negotiated during the state's stakeholder process, and thereby will have been denied meaningful participation in the rulemaking process. It might even be argued that they would be unable to challenge issues presented in this action in future individual permit proceedings under principles of *stare decisis*.

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e.g., Idaho Sportsmen's Coalition v. Browner, 951 F. Supp. 962 (W.D. Wash. 1996) (intervention of industrial association permissible in citizen suit to require EPA to develop plans to meet water quality standards); *Idaho Conservation League, Inc. v. Russell*, 946 F.2d 717 (9th Cir. 1991) (trade associations were permitted to intervene as defendants in Clean Water Act suit brought by special interest environmental groups against EPA); *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517 (9th Cir. 1995) (dischargers holding NPDES permits allowed to intervene in litigation regarding regulation of their receiving waters).

The relief Plaintiffs seek would adversely impair and impede the interests of the Municipal Associations and their members in operating existing public infrastructure and constructing new public facilities. Granting this motion to intervene is essential to provide an adequate opportunity to present their views and protect their interests. It will also assist the Court in understanding the practical ramifications of Plaintiffs' allegations and the relief they seek.

4. Interests of the Municipal Associations Are Not Adequately Represented

When a party seeking to intervene "has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance." *James City County v. EPA*, 131 F.R.D. 472, 474 (E.D. Va. 1990) (citing *Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)). However, the burden of demonstrating inadequate representation is minimal. An applicant for intervention need only show that representation of that party's interests "may be" inadequate, not that representation will in fact be inadequate. *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972)); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204 F.R.D. 301, 306 (S.D.W. Va. 2001).

The Municipal Associations are comprised of regulated entities whose interests in this litigation are considerably different than the named defendant, who is the chief regulator. *See Kentuckians for the Commonwealth,* 204 F.R.D. at 306 (interests of regulated industry are diverse from those of the regulator for purposes of intervention). The principal purpose of the Clean Water Act is not the regulation of EPA, but rather the regulation of public and private

parties, such as the members of the Municipal Associations. The restrictions sought by Plaintiffs will impose compliance obligations on the Municipal Associations' members, and not on EPA. The regulated community, including the members of the Municipal Associations, are the real targets of this litigation.

Furthermore, these increased compliance costs and the inability to provide more treatment capacity to accommodate population or industrial growth that will result from an adverse disposition of this action present significant economic concerns for the members of the Municipal Associations. These economic concerns, which can be considered by the Court, are not shared by EPA. Mem. and Op. at 8, *Sierra Club v. EPA*, No. H-97-3838 (D. Md. Jan. 20, 1998) (granting motion to intervene) (citing *United States v. City of Niagara Falls*, 103 F.R.D. at 166 (W.D.N.Y. 1984)) (Exhibit 2 hereto); *see also Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (concluding that government's representation of timber industry's interest was inadequate); *Conservation Law Foundation v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (finding fishing groups' interest not adequately represented by Secretary of Commerce by whom fishing groups were regulated); *National Farm Lines v. ICC*, 564 F.2d 381, 384 (10th Cir. 1977) (a regulatory agency seeking to protect both the public interest and the interest of a private intervenor undertakes a "task which is on its face impossible"); *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (noting the differing scope of interests between regulated entities, whose principal interest is in protecting their operations, and the more narrowly focused interest of regulatory agencies in implementing the law); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 896 (N.D. Cal. 1984) (commenting that ultimate interests of a trade association "clearly differ" from those of EPA).

Because EPA does not share the Municipal Associations' interests in the proceeding, and the Municipal Associations have more particularized ultimate objectives than EPA, EPA does not adequately represent their interests. For this and the foregoing reasons, the Municipal Associations have a right to intervene.

B. Permissive Intervention

Even if the Municipal Associations do not meet the criteria for intervention of right, which they do, they 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 at 729 ("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").

In this case, allowing the Municipal Associations to intervene would promote judicial efficiency by reducing the prospects of future litigation by their members to protect their interests. The Municipal Associations are not asserting any unrelated cross-claims, counterclaims, or other claims that might cause undue delay. Significantly, the Municipal Associations, through their members, represent citizen, commercial, and industrial ratepayers throughout the State of West Virginia. For the reasons stated throughout this brief, they should be allowed permissive intervention in order to facilitate the resolution of its common claims of law and fact in one proceeding consistent with the principle of judicial economy.

V. CONCLUSION

The Municipal Associations satisfy the four criteria for intervention of right under Rule 24(a)(2). They also satisfy the requirements for permissive intervention under Rule 24(b)(2). Accordingly, the Municipal Associations respectfully request that this Court allow them to intervene as party defendants and to file the proposed Answer.

Respectfully submitted,

WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION

WEST VIRGINIA MUNICIPAL LEAGUE

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

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