IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FARM BUREAU FEDERATION, et al,	)	
Plaintiffs	)	
	)	
v.	)	**Case No. 11-CV-00067-SHR**
	)	**(Judge Rambo)**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant,	)	
and	)	
PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION,	)	
Proposed Intervenors.	)	

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS CASES

UNITED STATES DISTRICT COURT CASES

UNITED STATES CONSTITUTION

UNITED STATES STATUTES

FEDERAL RULES OF CIVIL PROCEDURE

PROCEDURAL HISTORY

Pennsylvania Municipal Authorities Association ("PMAA") respectfully submits this Memorandum of Law in support of its Motion to Intervene as a Party Defendant.

Plaintiffs have commenced suit challenging the United States Environmental Protection Agency's ("EPA") Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment (the "Chesapeake Bay TMDL" or "TMDL"). In Plaintiffs' First Amended Complaint ("Complaint") they allege, *inter alia*, that the TMDL violates the Clean Water Act and EPA Regulations (First Claim for Relief); the TMDL is arbitrary and capricious (Second Claim for Relief); EPA failed to provide for public notice and comment required by the Administrative Procedures Act (Third Claim for Relief); and the TMDL is *ultra vires* (Fourth Claim for Relief).

PMAA now files this Motion to Intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2), or alternatively by permission pursuant to Fed. R. Civ. P. 24(b)(1) to address Plaintiffs' claims concerning the TMDL's current pollutant loading allocations and corresponding reductions. PMAA takes no position at this time concerning the remaining claims raised by the Plaintiffs, but reserves the right to do so at a later date.

Plaintiffs' claims, challenge, in part, the Bay TMDL's "approach" under which all pollutant source sectors (including both point sources and non-point sources) contribute equitably to improve the water quality of the Bay. TMDLs are a "zero sum game," thus, if Plaintiffs succeed in reducing or eliminating their allocated pollutant loading, the natural result would be to shift a greater burden of such reductions to point sources, such as the Pennsylvania wastewater treatment plants ("WWTPs"), including those owned and/or operated by PMAA members and funded by local rate payers. This legal risk is a critical concern for PMAA's members, many of which have recently completed, are in the process of completing, or are planning to complete major capital investments to comply with the allocations and associated reductions assigned to their WWTPs under the Bay TMDL. If Plaintiffs prevail in reducing or eliminating their allocated pollutant loading, then the aforementioned public investments made by Pennsylvania WWTPs may have been wasted because such investments would have been used to comply with requirements that are no longer applicable. PMAA seeks to avoid such an outcome.

As further explained below, PMAA meets the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure for intervention as of right or, in the alternative, should be permitted to intervene pursuant to Fed. R. Civ. P. 24(b)(1).

STATEMENT OF FACTS

PMAA is an association that represents approximately 720 sewer and water authorities in Pennsylvania, which collectively provide water and sewer infrastructure services to over 6 million Pennsylvania citizens. The mission of PMAA is to assist authorities in providing services that protect and enhance the environment, promote economic vitality and the general welfare of the Commonwealth and its citizens. Pennsylvania's Chesapeake Bay Tributary Strategy, previously adopted by the Pennsylvania Department of Environmental Protection (DEP), identified more than 180 WWTPs in the Pennsylvania portions of the Susquehanna and Potomac River basins that would have to meet nutrient reduction requirements in order to address water quality issues in the Chesapeake Bay. Nearly half of these WWTPs are municipal authorities and are represented by the government relations efforts of PMAA.

In addition to representing these members before both DEP and EPA on Bay issues, PMAA has also acted as a clearinghouse for information, and point of contact for all of the impacted treatment plants in Pennsylvania. PMAA was an active member of the DEP Stakeholders Group on the Bay Tributary Strategy, and continues to be actively involved in several current workgroups convened by DEP to implement the Bay TMDL in Pennsylvania.

Moreover, PMAA was the major participant in the Point Source Workgroup ("Workgroup") convened by DEP to address municipal point source issues in Pennsylvania related to the Chesapeake Bay. The Workgroup was composed of nearly 30 members from the local government sector, homebuilders, environmental organizations, DEP, EPA and agriculture. Fifteen members of the Workgroup were from PMAA including staff, engineers, wastewater treatment plant managers and attorneys. PMAA members were active participants in the exchange of information, development of spreadsheets, research and evaluation of treatment methods, cost delineations, and development of trading scenarios.

STATEMENT OF QUESTIONS INVOLVED

1) Should this Court grant PMAA's Motion to Intervene as of right pursuant to Fed R. Civ. P. 24(a)(2) where PMAA's application for intervention is timely, PMAA has a sufficient interest in the litigation, PMAA's interest may be impaired or affected as a result of the litigation, and PMAA's interest is not adequately represented by an existing party in the litigation?

Suggested Answer: **YES.**

2) Alternatively, should this Court grant PMAA's Motion to Intervene by permission pursuant to Fed. R. Civ. P. 24(b)(1) where PMAA's position and the underlying action share a common question of law and fact?

Suggested Answer: **YES.**

3) To the extent that this Honorable Court may require a party to establish standing to intervene as of right, does PMAA satisfy the standing requirements under Article III of the United States Constitution?

Suggested Answer: **YES.**

ARGUMENT

I. PMAA MEETS THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT.

PMAA is entitled to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2) because it satisfies the following criteria:

> "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation."

Choike v. Slippery Rock University of Pennsylvania, 297 F. App'x 138, 140 (3d Cir. 2008) (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987)).

A. PMAA's Motion is Timely.

In determining whether an intervenor's motion is timely, the Court must consider "all the circumstances," including, "(1) [h]ow far the proceedings have gone when the movant seeks to intervene, (2) the prejudice which resultant delay might cause to other parties, and (3) the reason for the delay." *Id.* at 140. As the Third Circuit has noted, "the critical inquiry is: what proceedings of substance on the merits have occurred?" *Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc*., 72 F.3d 361, 369 (3d Cir. 1995).

This lawsuit has not progressed to any proceedings of substance on the merits, so PMAA's intervention at this stage will not cause any prejudice to the litigants. Plaintiffs filed the Complaint on April 4, 2011, and EPA responded on

April 21, 2011. EPA has yet to produce the extensive administrative record for this complex agency action, and substantive briefing would not begin until the aforementioned record becomes available. As such, the litigants will suffer no conceivable prejudice or delay if PMAA is permitted to intervene.

B. PMAA has a "Significantly Protectable" Interest.

PMAA has a "significantly protectable" interest sufficient to support mandatory intervention. In order to prove that a party satisfies this requirement of Rule 24(a)(2), "the lawsuit in which the party seeks to intervene must present 'a tangible threat to a legally cognizable interest.'" *Westra Construction, Inc. v. U.S. Fidelity & Guaranty Co*., 546 F. Supp. 2d 194, 201 (M.D. Pa. 2008) (quoting *Mountain Top*, 72 F.3d at 366). This requirement "is a practical guide designed to dispose of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *United States v. Eilberg*, 89 F.R.D. 473, 474 (E.D. Pa. 1980).

As point source dischargers, PMAA's members have an interest in the amount of nutrients that they are authorized to discharge as well as the amount of nutrients and sediments other sources are permitted to discharge. If Plaintiffs ultimately succeed in reducing or eliminating their allocated pollutant loading, then the interests of point source dischargers, such as PMAA's members, would be adversely affected because they would be required to comply with any new

restrictions to address a revised loading scenario. Undoubtedly, these new restrictions will increase the amount of money required to be invested by these entities and their rate payers.

Other courts have recognized that ownership of WWTPs, which could be subject to future permit limit determinations as a result of litigation over preliminary regulatory decisions, is a "significantly protectable interest" meriting intervention as of right. *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993). In *Sierra Club*, the Ninth Circuit ruled that the City of Phoenix, which held permits issued under the CWA for WWTP discharges, had a protectable interest with respect to the compilation of lists of impaired waters and the identification of point sources discharging to those waters. *Id.* at 1478. As the Ninth Circuit summarized

> 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.

Here, PMAA's interests are comparable, if not more direct than those at issue in *Sierra Club*. In *Sierra Club*, the City of Phoenix' interest was speculative in nature because it was only contingent on EPA first deciding whether to list Phoenix' receiving waters for regulation before a control strategy would be

required. Therefore, it was uncertain whether changes to the city's permits would be required until specific waters were listed by EPA and a control strategy subsequently developed. Notwithstanding the speculative nature of the city's interest, the Ninth Circuit granted intervention as of right. *Id.* at 1486.

PMAA's member WWTPs discharge into bodies of water that are upstream of waters listed for TMDL development and, like the facilities and lands owned by Plaintiffs' members, are now subject to the limits imposed by the Bay TMDL. Thus, PMAA has a legally cognizable interest in their members' NPDES permit limits based on nutrient allocations in the Bay TMDL.

C. PMAA's Interests will be Prejudiced by an Adverse Decision.

PMAA's interest in their members' WWTPs' ability to continue to discharge wastewater will be affected an adverse disposition in this action. As required by the Federal Rules of Civil Procedure, proposed intervenors as of right must "demonstrate that their interest might become affected or impaired, as a practical matter, by the disposition of the action in their absence." *Mountain Top*, 72 F.3d at 361 (citing *United States v. Alcan Aluminum, Inc*., 25 F.3d 1174, 1185 n.15 (3d Cir.1994)).

Simply put, if Plaintiffs succeed in reducing or eliminating their allocated pollutant loading, then the remaining sectors, such as the WWTPs owned and/or operated by PMAA's members, would likely be subject to even greater reductions

to their allocations to make up for the loss of these non-point source pollutant reductions. If the Plaintiffs obtain such relief, then the result would be greater reliance on WWTP reductions in Pennsylvania and costly new upgrades or restrictions on municipal operations to meet such reductions.[1] This has a direct impact on PMAA's members as the owners and/or operators of these facilities.

D. Existing Parties Cannot Adequately Represent PMAA's Interests.

Federal law also requires that the proposed intervenor show that "the representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). A proposed intervenor may meet this minimal burden by showing that "its interests, though similar to those of an existing party, are nevertheless sufficiently different that the representative cannot give the applicant's interests proper attention." *Hoots v. Pennsylvania,* 672 F.2d 1133, 1135 (3d Cir. 1982).

[1] Senate Resolution 224 of 2008 called for the Pennsylvania Legislative Budget and Finance Committee ("LB&FC") to study the economic impact on municipal wastewater dischargers to comply with the nutrient removal requirements of the then Pennsylvania Chesapeake Bay Tributary Strategy. The LB&FC contracted with Metcalf and Eddy, Inc. to conduct this study. According to Metcalf and Eddy's November 2008 report prepared for the LB&FC, the capital cost estimate for the aforementioned nutrient removal requirements for the 183 dischargers identified as significant by DEP was $1.4 billion. *See Exhibit "1" to PMAA's Motion to Intervene*.

Here, PMAA's interest in this litigation is considerably different than any other litigant's interest. Other Courts have ruled that "when an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden is comparatively light." *Kleissler v. United States Forest Service*, 157 F.3d 964, 972 (3d Cir. 1998) (citing *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) ("[W]hen the proposed intervenors' concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it.")).

The principal purposes of the CWA and Bay TMDL are not the regulation of EPA, but rather to control pollutants from sources, such as farms owned by Plaintiffs' members, and WWTPs operated by PMAA's members. The further restrictions on PMAA's members that would result from this lawsuit would unquestionably impose additional economical and operational obligations on PMAA's members. This result is undeniably different than any result that EPA may potentially suffer.

II. ALTERNATIVELY, PERMISSIVE INTERVENTION SHOULD BE GRANTED.

Should this Honorable Court determine that PMAA is not permitted to intervene as a matter of right, it is respectfully suggested that PMAA ought to be permitted to intervene pursuant to Fed. Rule Civ. P. 24(b)(1).

Pursuant to Fed. R. Civ. P. 24(b)(1), permissive intervention is appropriate when a potential intervenor's claim or defense and the underlying action share a common question of law or fact. See *McKay v. Heyison*, 614 F.2d 899, 906 (3d Cir. 1980). Importantly, Rule 24(b) permissive intervention "is to be construed liberally 'with all doubts resolved in favor of permitting intervention.'" *Koprowski v. Wistar Institute of Anatomy & Biology*, No. Civ.A. 92-CV-1182, 1993 WL 332061, at *2 (E.D. Pa. Aug. 19, 1993) (attached hereto as Exhibit "A"); see also *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) ("[L]iberal 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").

Here, PMAA disputes the claim that non-point sources such as those identified in Plaintiffs' Complaint should be excluded from the TMDL. This claim is central to this litigation and raises common questions of law and fact as those raised by Plaintiffs in their Complaint. In light of these common questions of law and fact, and the fact that PMAA's intervention in this case would not unduly

delay or prejudice the adjudication of the original parties' rights, the requirements for permissive intervention are met.

Importantly, other courts have allowed various associations to intervene in litigation concerning TMDLs and the CWA. *See, 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 TMDLs for Idaho water quality limited segments); *Idaho Conservation League, Inc. v. Russell*, 946 F.2d 717 (9th Cir. 1991) (trade associations were permitted to intervene as defendants in CWA suit brought by environmental groups against EPA).

Permitting PMAA to intervene would promote judicial efficiency by reducing the prospects of future litigation by PMAA or their members, litigation which would be necessary to protect their interests. Therefore, should this Honorable Court conclude that PMAA is not entitled to intervene as a matter of right, then the Court should grant PMAA's motion to intervene permissively.

III. PMAA HAS STANDING TO INTERVENE.

Though the Court should not require PMAA to independently demonstrate standing, should the Court so require, it is respectfully submitted that PMAA has standing to intervene.

A. PMAA Should not be Required to Show Standing.

Admittedly, courts are divided over whether standing pursuant to Article III of the United States Constitution is a prerequisite for intervention as of right. Importantly, the Third Circuit has not directly addressed this issue. See *Diamond v. Charles*, 476 U.S. 54, 68-69, n.21 (1986) (noting a circuit split and declining to decide the issue); *CSX Transportation, Inc. v. City of Philadelphia*, No. Civ.A. 04-CV-5023, 2005 WL 1677975, at *2 (E.D. Pa. July 15, 2005) (attached hereto as Exhibit “B”) ("The Courts of Appeals have diverged on this issue, ... and the Third Circuit has not indicated that Article III standing is necessary.").

PMAA respectfully suggests that this Court should follow the Second, Fifth, Sixth, Tenth, and Eleventh Circuits' position; that being, if the original plaintiff has standing, then prospective intervenors need not demonstrate standing. See, e.g., *Clark v. Putnam County*, 168 F.3d 458, 463 (11th Cir. 1999); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *United States Postal Service v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978).

Should, however, this Honorable Court require PMAA to demonstrate standing, then the requisite elements are satisfied.

B. PMAA Satisfies the Elements of Representational Standing.

It is axiomatic that Article III standing requires injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An organization, such as PMAA, has representational standing to sue on its members' behalf if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

Here, PMAA's members could easily meet the standing requirement in their own right. As explained above, many of them own and/or operate WWTPs that discharge into waters that feed the Chesapeake Bay or its tributaries. Moreover, PMAA's members would suffer a concrete injury-in-fact if non-point sources such as those identified in Plaintiffs' Complaint were excluded from this TMDL. Under such a scenario, PMAA's members would be directly impacted because Pennsylvania WWTPs would be left to bear a greater burden for reducing pollutant loadings to the Chesapeake Bay. PMAA seeks to intervene in this matter in order to present arguments to limit this potential harm.

Moreover, the interests raised by PMAA are relevant and germane to the organization's purposes, specifically PMAA's aim to assist authorities in providing services that protect and enhance the environment, promote economic vitality and the general welfare of the Commonwealth and its citizens.

Finally, there is no need for any individual member of PMAA to participate in this lawsuit. Members of PMAA have an aligned interest that has been and can continue to be effectively and efficiently represented by PMAA.

CONCLUSION

PMAA has satisfied the criteria for intervention as of right under Rule 24(a)(2). Moreover, PMAA has satisfied the requirements for permissive intervention under Rule 24(b)(1). Accordingly, PMAA respectfully requests that this Court allow it to intervene as a Party Defendant as a matter of right or, in the alternative, permissively.

Respectfully submitted,

HAMBURG, RUBIN, MULLIN,
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Date: June 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2011, a true and correct copy of the foregoing document was electronically filed and served on the following in accordance with the Rules of the United States District Court for the Middle District of Pennsylvania:

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.8(b)(2) for the Middle District of Pennsylvania, I hereby certify that Pennsylvania Municipal Authorities Association's Memorandum of Law in Support of its Motion to Intervene complies with the word count limit and does not exceed 5,000 words. Certification is reliant on the word-processing system used to prepare this Memorandum.

Pennsylvania Municipal Authorities Association's Memorandum in Support of its Motion to Intervene contains 3,088 words.

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