

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

AMERICAN FARM BUREAU)
FEDERATION, *et al.*,)

Plaintiffs,)

v.)

**Case No. 11-cv-0067
(Judge Rambo)**

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Defendant.)

**MOTION TO INTERVENE BY
PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION**

Movant, Pennsylvania Municipal Authorities Association (“PMAA”), by and through its counsel, Hamburg, Rubin, Mullin, Maxwell & Lupin, P.C., hereby files this Motion to Intervene as a Party Defendant pursuant to Federal Rule of Civil Procedure 24 and in support thereof avers the following:

1. On April 4, 2011, the American Farm Bureau Federation, Pennsylvania Farm Bureau, The Fertilizer Institute, National Pork Producers Council, National Corn Growers Association, National Chicken Council, U.S. Poultry & Egg Association and National Turkey Federation (collectively

“Plaintiffs”) filed an Amended Complaint against the United States Environmental Protection Agency (“EPA”) arising out of EPA’s establishment of the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment (“Chesapeake Bay TMDL” or “TMDL”).

2. In Plaintiffs’ First Amended Complaint (“Complaint”) they allege, *inter alia*, that the TMDL violates the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, 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).

3. 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.

4. By way of background, 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.

5. PMAA's mission is to assist water and sewer authorities in providing services that protect and enhance the environment and promote economic vitality and the general welfare of the Commonwealth of Pennsylvania and its citizens.

6. The Pennsylvania Chesapeake Bay Tributary Strategy, adopted by the Pennsylvania Department of Environmental Protection ("DEP"), identified more than 180 wastewater treatment plants ("WWTPs") in the Pennsylvania portions of the Susquehanna and Potomac River basins that would have to implement certain nutrient reduction measures in order to address water quality issues in the Chesapeake Bay.

7. Nearly half of the aforementioned 180 WWTPs are either owned or operated by municipal authorities represented by the government relations efforts of PMAA.

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

9. Specifically, 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 this workgroup were from PMAA, including staff, engineers, wastewater treatment plant managers and attorneys.

10. With regard to the Workgroup, PMAA members actively participated in exchanging information, evaluating treatment methods, analyzing cost delineations and developing trading scenarios pertaining to the Chesapeake Bay.

11. As stated by the United States Court of Appeals for the Third Circuit, a movant is permitted to intervene in an action as of right if the movant can establish each element of a four-part test as follows:

(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)).

12. With regard to timeliness, the court is to 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.” *Choike*, 297 F. App’x at 140 (quoting *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 500 (3d Cir. 1982)).

13. In sum, “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).

14. In the present case, it is clear that PMAA’s intervention is timely as this action has not progressed to any proceedings of substance on the merits and, accordingly, at this stage, PMAA’s intervention will not cause any prejudice to the litigants. *See Mountain Top*, 72 F.3d at 369-70 (granting motion to intervene even though four years had elapsed since complaint was filed and noting that intervention has been permitted even after entry of judgment).

15. As it pertains to the “sufficient interest” requirement, this element of the test requires that the interest be “significantly protectable,” *Donaldson v. United States*, 400 U.S. 517, 531 (1971), and is met by establishing the following: “the lawsuit in which the party seeks to intervene must present ‘a tangible threat to a legally cognizable interest.’” *Westra Construction, Inc. v. United States Fidelity & Guaranty Co.*, 546 F. Supp. 2d 194, 201 (M.D. Pa. 2008) (quoting *Mountain Top*, 72 F.3d at 366).

16. Courts have recognized, moreover, that ownership of WWTPs, which could be subject to future permit limit determinations as a result of litigation over

preliminary regulatory decisions is a sufficient interest so as to allow the movant to intervene as of right. *See, e.g., Sierra Club v. Environmental Protection Agency*, 995 F.2d 1478, 1485-86 (9th Cir. 1993), *declined to follow on other grounds by Kleissler v. United States Forest Service*, 157 F.3d 964 (3d Cir. 1998).

17. As point source dischargers, PMAA's members have a significantly protectable interest in the amount of nutrients that they are authorized to discharge as well as the amount of nutrients and sediment other sources are permitted to discharge.

18. PMAA's members discharge into bodies of water that are upstream of waters that are listed for TMDL development and, like the facilities and lands owned by Plaintiffs' members, are now subject to the limits imposed by the Chesapeake Bay TMDL.

19. Accordingly, PMAA, on behalf of its members, has a legally cognizable interest in this lawsuit.

20. With respect to the third element of the four-part test, the interest of PMAA's members will be prejudiced by an adverse decision in this action since, if non-point sources such as those identified in Plaintiffs' Complaint are excluded from the Chesapeake Bay TMDL, this would likely (1) impose more stringent discharge limitations on Pennsylvania WWTPs, many of which are owned and/or operated by PMAA's members, and (2) significantly increase the amount of money

required to be spent by the affected Pennsylvania WWTPs and their rate payers in order to comply with such new limitations.¹

21. Lastly, the existing parties in the present case do not adequately represent PMAA's interests since PMAA members operate nearly half of the WWTPs in Pennsylvania upstream of the Chesapeake Bay and subject to the Chesapeake Bay TMDL, and neither Plaintiffs nor EPA represent, nor purport to represent, the interests of the Pennsylvania WWTPs.

22. The Third Circuit has noted that the burden of establishing this element is "minimal" but may be met by showing "that although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests." *Brody by and through Sugzdinis v. Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992) (citing *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982)).

23. Relevant to the present case, the Third Circuit has held that "when an agency's views are necessarily colored by its view of the public welfare rather than

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 by for the LB&FC, the capital cost estimate for nutrient removal requirements for the 183 dischargers identified as significant by DEP was \$1.4 billion. (Executive Summary of referenced Metcalf and Eddy report attached hereto as Exhibit "1".)

the more parochial views of a proposed intervenor whose interest is personal to it, the burden is comparatively light” since “when the proposed intervenor’s concern is not a matter of ‘sovereign interest,’ there is no reason to think the government will adequately represent it.” *Kleissler*, 157 F.3d at 972 (citing *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996)).

24. Since the principal purposes of the CWA and the Chesapeake Bay TMDL are not related to 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, it is clear that EPA does not adequately represent PMAA’s interest in this action.

25. Thus, PMAA meets all four elements of the test for intervention as of right and this Court should grant the instant Motion to Intervene.

26. Further, to the extent that PMAA may be required to establish standing under Article III of the United States Constitution to intervene as of right, PMAA clearly meets the requirements pertaining to standing.²

² The United States Supreme Court has not definitively stated whether a party must meet the requirements of standing under Article III of the United States Constitution to intervene as of right. *Diamond v. Charles*, 476 U.S. 54, 68-69 n.21 (1986) (noting split amongst United States Courts of Appeals as to necessity of establishing Article III standing but declining to decide issue). The Third Circuit has never indicated that Article III standing is necessary. *See CSX Transp., Inc. v. City of Philadelphia*, No. Civ.A. 04-CV-5023, at *2 (E.D. Pa. July 15, 2005).

27. In order to establish standing it is necessary for a party to show an injury-in-fact, causation and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

28. It is well-established that an organization 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).

29. Here, PMAA's members meet the standing requirement in their own right as many of the members own and/or operate WWTPs that discharge into bodies of water that ultimately flow into the Chesapeake Bay or its tributaries and would suffer an injury-in-fact if Plaintiffs' assigned pollutant loads are reduced or eliminated.

30. 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 and promote economic vitality and the general welfare of the Commonwealth of Pennsylvania and its citizens.

31. Lastly, all members of PMAA subject to the Chesapeake Bay TMDL have an aligned interest that has been and continues to be effectively and efficiently represented by PMAA and, as such, their individual participation is not required in this lawsuit.

32. Accordingly, should it be necessary for PMAA to establish standing to intervene as of right, it is obvious that PMAA has standing in this action.

33. Alternatively, if this Court were to deny PMAA's intervention as of right under Federal Rule of Civil Procedure 24(a)(2), PMAA should be permitted to intervene pursuant to Federal Rule of Civil Procedure 24(b)(1), which allows for permissive intervention when a movant'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).

34. Importantly, permissive intervention under Rule 24(b) "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).

35. It is also significant to note that other federal courts have allowed 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) (permitting intervention of industrial association in citizen suit requiring EPA to

develop TMDLs for Idaho water quality limited segments); *Idaho Conservation League, Inc. v. Russell*, 946 F.2d 717 (9th Cir. 1991) (permitting trade associations to intervene as defendants in CWA suit brought by environmental groups against EPA).

36. 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 Plaintiff in the Amended Complaint.

37. In light of the common questions of law and fact and given the liberal construction pertaining to permissive intervention, even if this Court were to hold the requirements of intervention as of right not met, PMAA should be permitted to intervene under Federal Rule of Civil Procedure 24(b)(1).

WHEREFORE, Pennsylvania Municipal Authorities Association, respectfully requests that this Honorable Court grant its Motion to Intervene as a Party Defendant pursuant to Fed. R. Civ. P. 24(a)(2), or alternatively pursuant to Fed. R. Civ. P. 24(b)(1).

Respectfully submitted,

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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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