IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANACOSTIA RIVERKEEPER, INC. and FRIENDS OF THE EARTH, Plaintiffs, v. LISA JACKSON,[1] Administrator, United States Environmental Protection Agency, Defendant.	)	Case No. 1:09-cv-00097-RWR

RESPONSE TO MOTION TO INTERVENE OF THE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

Pursuant to this Court's Order dated April 17, 2009, the Plaintiffs Anacostia Riverkeeper, Inc. and Friends of the Earth hereby respond to the motion to intervene of the District of Columbia Water and Sewer Authority ("WASA"). For the reasons stated below, the Plaintiffs do not concur that WASA is entitled to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2). However, the Plaintiffs acknowledge WASA's interest in the subject matter of this case with respect to WASA's CWA permit governing WASA's discharge of pollutants into the water quality limited segments at issue in this case. Accordingly the Plaintiffs do not oppose WASA's intervention by permission, subject to appropriate limitations.

This case concerns the adequacy of pollution caps (formally known as Total Maximum Daily Loads or "TMDLs") for sediment and total suspended solids ("TSS") adopted by the District of Columbia and Maryland, and approved by Defendant U.S. EPA pursuant to the Clean Water Act ("CWA"), 33 U.S.C. § 1313(d). The issues raised in the Plaintiffs' Complaint include the question whether the TMDLs are adequate to implement applicable water quality standards

[1] Under Rule 25(d)(1), current Administrator Lisa P. Jackson is automatically substituted for former Administrator Stephen L. Johnson.

("WQS"). Complaint ¶1. The TMDLs at issue contain "wasteload allocations," which are simply allocations of the total allowable pollutant load to individual pollution sources. 40 C.F.R. § 130.2(i). Any permits issued pursuant to the CWA for the discharge of sediment and TSS must include limits that are "consistent with the assumptions and requirements of any available wasteload allocation for the discharge." of 40 C.F.R. § 122.44.

To intervene as a matter of right, a party must demonstrate that the existing parties do not adequately represent the movant's interest. Fed. R. Civ. P. 24(a)(2). WASA has not demonstrated that EPA cannot adequately represent WASA's interest in the material issues in this case. EPA is charged under the CWA with ensuring that the District and Maryland's TMDLs are adequate to ensure compliance with applicable water quality standards. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1). The bare fact that EPA is a regulatory entity while WASA is a regulated entity does not support a conclusion that EPA cannot adequately protect WASA's interest in seeing the TSS TMDLs upheld. Furthermore, WASA's economic interest in controlling costs is simply irrelevant to the material issue here, *i.e.* whether the EPA acted arbitrarily in approving the TMDLs at issue with respect to their compliance with WQS.

Finally, WASA's assertion that Plaintiffs' TMDL challenge attempts to undermine the basis of its Long Term Control Plan ("LTCP") is incorrect and does not support intervention as a matter of right. The LTCP was developed pursuant to a consent decree entered in *Anacostia Watershed Society et al. v. District of Columbia Water and Sewer Authority*, Civil Action No. 1:cv-00183-TFH,[2] for controlling combined sewer overflows. That decree does not support WASA's allegation, in part because it expressly stated that the LTCP control measures were not intended to settle the question whether the LTCP would conform to water quality standards:

[2] Copies of the consent decree and the LTCP are on file with counsel for Petitioners.

> [T]he Parties and the Citizen Plaintiffs have stipulated and agreed, and on September 22, 2004, the Court ordered that issues pertaining to the scope of Section 402(q) of the Clean Water Act, including whether the measures proposed in WASA's August, 2002 LTCP conform to the water quality standards of the District of Columbia, would not be addressed in this consolidated action, but rather EPA agreed to address such issues outside the context of this lawsuit, in, *inter alia*, the modification of WASA's NPDES permit that was pending at that time;

Consent Decree at 3. Regarding water quality standards, the Consent Decree states only that "the CSO control program *will not preclude* the attainment of water quality standards," *id*. at 4 (emphasis added).

The Plaintiffs acknowledge that WASA is subject to a CWA permit that must include limits that are "consistent with the assumptions and requirements of any available wasteload allocation for the discharge," 40 C.F.R. § 122.44, including wasteload allocations that could be affected by the outcome of this case. Should the Court grant the Petitioners' requested relief WASA would have the opportunity to protect its interests following remand in the TMDL development process, and would have an additional opportunity to protect its interests in any subsequent permit modification or renewal process. In recognition of the relationship between the challenged TMDLs and the requirements in WASA's CWA permit, the Plaintiffs do not object to WASA's participation in this case by permission.

This Court has discretion to impose reasonable restrictions on intervening parties in order to ensure fair, prompt, and efficient litigation. Such conditions can be imposed on parties intervening as of right under Fed. R. Civ. P. 24(a),[3] as well as parties intervening by permission

[3] *See, e.g. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (1987) Brennan, J., concurring) (approving restrictions on parties granted intervention under Rule 24(a) for the purpose of preventing delay or disruption of procedure); *United States v. South Florida Water Mgmt. Dist.*, 922 F.2d 704, 710 n.9 (11th Cir. 1991) (same); *Beauregard, Inc. v. Sword Services, L.L.C.*, 107 F.3d 351, 352-353 (5th Cir. 1997) (same); *U.S. v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 565 (M.D. N.C. 2001) (same).

under Rule 24(b).[4] Therefore, the Plaintiffs respectfully request that the Court prohibit the intervening defendants from raising arguments that are irrelevant to the material issues, and from initiating duplicative discovery, evidence, argument, pleadings, filings, and memoranda where their legal positions or factual presentation is in accord with those of EPA.

Respectfully submitted this 22nd day of April, 2009.

/s/ Jennifer C. Chavez
Jennifer C. Chavez
Earthjustice
1625 Massachusetts Av. NW
Suite 702
Washington, D.C. 20036
(202) 667-4500

Counsel for Plaintiffs

[4] *See, e.g. Stringfellow*, 480 U.S. at 373 (stating that such restrictions are reviewed under an "abuse of discretion" standard). *Columbus-American Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 469 (4th Cir. 1992) (endorsing "almost any condition" on parties granted intervention under Rule 24(b)).