

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ANACOSTIA RIVERKEEPER, INC.
and FRIENDS OF THE EARTH,

Plaintiffs,

v.

LISA JACKSON, Administrator,
United States Environmental Protection Agency,
Defendant,
DISTRICT OF COLUMBIA WATER AND
SEWER AUTHORITY,
Intervenor.

Case No. 1:09-cv-00097-RWR

**RESPONSE TO MOTION TO INTERVENE OF THE
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, ET AL.**

Plaintiffs Anacostia Riverkeeper, Inc. and Friends of the Earth hereby respond to the motion to intervene of the National Association of Clean Water Agencies, et al.

I. Introduction

Plaintiffs' central claims involve matters of local water quality conditions and standards. In particular, Plaintiffs challenge EPA Region III's approval of pollution caps (total maximum daily loads or "TMDLs") approved by EPA and required under the Clean Water Act ("CWA") in order for state-adopted water quality standards pertaining to total suspended solids ("TSS") to be met in the Anacostia River in Maryland and the District of Columbia.

The challenged TMDL contains pollution caps applicable to discharges from the waste water treatment system owned and operated by the District of Columbia Water and Sewer Authority ("D.C. WASA"), which is an existing Intervenor in this case. Order dated April 28, 2009. D.C. WASA is a member of two of the putative intervenor associations, the National

Association of Clean Water Agencies (“NACWA”) and the Wet Weather Partnership, formerly the Combined Sewer Overflow Partnership (“WWP”).

The movant associations satisfy the minimal interest and timeliness requirements for permissive intervention under Fed. R. Civ. P. 24(b)(1)(B), with appropriate limitations on their participation. However, the associations do not possess an interest that would entitle them to intervene as a matter of right and, to the extent they possess any interests in the TMDL at issue those interests are adequately represented by the existing parties. Therefore, Plaintiffs object to the request in the alternative by NACWA *et al.* to intervene under Fed. R. Civ. P. 24(a)(2).

II. Limits on the Water Associations’ Permissive Intervention are Appropriate.

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),¹ as well as parties intervening by permission under Rule 24(b).² The Plaintiffs respectfully request that (1) all association intervenors be required to file one common brief due the same day as briefs filed by EPA and D.C. WASA, and (2) all water association intervenors be barred from raising issues that were adjudicated in the D.C. Circuit’s 2006 ruling in *Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140 (D.C. Cir. 2006). Statements in the motion filed by the associations suggest that they will raise such issues. (*See* Motion of NACWA *et al.* at 3: “...any ruling by this Court regarding Region III’s legal obligation to establish daily loads will also affect how Region III develops TMDLs in other

¹ *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).

² *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)).

Region III states,” and at 5: “Pollutants associated with stormwater discharges are typically regulated on a non-daily basis...”). Those issues have been resolved, and any attempt to rehash them wastes the limited resources of the Court and the parties. Plaintiffs further respectfully request an additional 7 days, from September 4 to September 11, to reply to any response or cross-motion for summary judgment filed by EPA and any intervenors.

III. NACWA *et al.* Are Not Entitled to Intervene as a Matter of Right.

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). The movant associations cannot claim that such is the case here. Of the utilities that NACWA and WWP claim to represent, only WASA has a direct interest in the challenged TMDL, making NACWA and WWP’s participation unnecessary and duplicative. Since WASA has already been granted leave to intervene, its interests are already adequately protected in this litigation.

None of the other movant associations (Maryland Assoc. of Muni. Wastewater Agencies or “MAMWA,” Virginia Assoc. of Muni. Wastewater Agencies or “VAMWA,” Virginia Muni. Stormwater Assoc. or “VAMSA,” Stormwater Assoc. of Maryland or “SWAM,” and West Virginia Muni. Water Quality Assoc. or “WVMWQA”) claim to represent utilities that are governed by pollution caps in the Anacostia TSS TMDL. Lacking any direct interest in the challenged TMDL, these associations allege that they have an interest in this litigation because U.S. EPA Region III also regulates the States of Virginia, Maryland, and West Virginia. The associations cite no particular issues raised by the Plaintiffs concerning the Anacostia TSS TMDLs that they claim might be involved in other TMDLs in the region.³ At best, their interest in future TMDL approvals by Region III is speculative and contingent on the unique factual

³ Moreover, as public state incorporation records show, each of the state-level movant associations seeking leave to intervene in this case are incorporated and administered by their counsel at AquaLaw, so any general interests they share in the regulation of stormwater and wastewater are adequately represented as a practical matter.

circumstances relevant to TMDLs that might be developed for other waterbodies in the future. This is not sufficient to establish grounds to intervene as a matter of right.

Finally, the movant associations offer no basis for their claim that the existing parties cannot adequately represent their general interests in the regulation of stormwater and wastewater. The associations allege in particular that the existing parties cannot adequately represent the associations' particular interests in the regulation of urban stormwater, as compared to D.C. WASA's discharges of combined sewer overflow. Motion at 2. However, only VAMSA and SWAM claim to represent stormwater utilities, and neither claim to represent any of the stormwater utilities that are subject to pollution caps in this TMDL.

CONCLUSION

For the foregoing reasons, Plaintiffs object to intervention as a matter of right, and request entry of an order (1) requiring all association intervenors to file one common brief due the same day as briefs filed by EPA and D.C. WASA, and (2) barring all water association intervenors from raising issues that were adjudicated in the D.C. Circuit's 2006 ruling in *Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140 (D.C. Cir. 2006).

Respectfully submitted this 19th day of June, 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