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

AMERICAN FARM BUREAU FEDERATION, PENNSYLVANIA FARM BUREAU, THE FERTILIZER INSTITUTE, NATIONAL CHICKEN COUNCIL, U.S. POULTRY & EGG ASSOCIATION, NATIONAL TURKEY FEDERATION, and NATIONAL ASSOCIATION OF HOME BUILDERS **Plaintiffs**	)	
v.	)	**Case No. 11-CV-00067-SHR (Judge Rambo)**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, **Defendant,**	)	
and	)	
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, and VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, **Proposed Intervenors.**	)	

MUNICIPAL CLEAN WATER ASSOCIATIONS' REPLY TO PLAINTIFFS' CONSOLIDATED OPPOSITION TO MOTIONS FOR LEAVE TO INTERVENE

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I. INTRODUCTION

On March 25, 2011, the National Association of Clean Water Agencies ("NACWA"), Maryland Association of Municipal Wastewater Agencies, Inc. ("MAMWA"), and Virginia Association of Municipal Wastewater Agencies, Inc. ("VAMWA"), (collectively, "Municipal Associations"), jointly filed a motion and memorandum in support seeking to intervene in this action. Also on March 25, 2011, the Chesapeake Bay Foundation, Inc., Citizens for Pennsylvania's Future, Defenders of Wildlife, Jefferson County (West Virginia) Public Service District, Midshore Riverkeeper Conservancy, and the National Wildlife Federation, (collectively "CBF Group"), filed a motion to intervene. Plaintiffs 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 a Consolidated Opposition to Motions for Leave to Intervene on June 20, 2011 in response to both the Municipal Associations' and CBF Group's motions. The Municipal Associations file this reply to Plaintiffs' Consolidated Opposition.

Plaintiffs' Consolidated Opposition blends arguments against intervention by the two significantly different classes of proposed intervenors—the CBF Group, comprised predominately of citizen environmental advocacy organizations, and

the Municipal Associations, consisting of the owners and operators of facilities regulated by the Chesapeake Bay Total Maximum Daily Load ("TMDL"). The majority of Plaintiffs' arguments are directed at the CBF Group rather than the Municipal Associations.

For the reasons stated in the Municipal Associations' Memorandum in Support of their Motion to Intervene, and for the reasons stated below, the Municipal Associations respectfully request that the Court grant their Motion to Intervene.

II. ARGUMENT

The Municipal Associations meet the requirements for intervention as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, alternatively, should be permitted to intervene under Rule 24(b)(1).

A. Municipal Associations Meet Requirements for Intervention as of Right

1. Municipal Associations' Interests Are Not Adequately Represented by EPA

Municipal Associations satisfy the "*minimal* burden of showing that their interests '*may*' not be adequately represented in this litigation." Order Granting Motion to Intervene, *Fowler v. EPA*, No. 09-005-CKK, at 7 (D.D.C. Sept. 29, 2009) (Attachment 1) (emphasis added); *see Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Plaintiffs rely on a "'presumption' of adequate

representation" by governmental entities to support their argument that EPA adequately represents Municipal Associations' interests. Plaintiffs' Oppn., at 8-9 (Dkt. No. 57). However, Plaintiffs ignore the Third Circuit precedent that, "the presumption notwithstanding, 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. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (*citing Conservation Law Found. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir.1992); *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."); *see also Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) ("[T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation."). Here, EPA's view of the public welfare is generally ensuring compliance with water quality standards, regardless of which individual parties ultimately bear that burden. EPA is not primarily concerned with which particular parties it requires to reduce pollutant loadings, or what level of effort and expense are required of them, so long as the Chesapeake Bay is brought into compliance with water quality standards. The Municipal

Associations, on the other hand, have more focused views centered on the equitable distribution of wasteload allocations and load allocations among all sources, the assignment of a reasonable share to their facilities through the holistic watershed approach, as well as protection of their individual allocations.

Interests of a trade organization, like the Municipal Associations, are not adequately represented by a governmental agency, despite initially sharing common ground, where "[t]he government must represent the broad public interest, not just the economic concerns of [one] industry." *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (*quoting Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994)). That is precisely the situation in this case. Municipal Associations have economic interests in their members' specific wasteload allocations set forth in Appendix Q of the TMDL (Attachment 2), which Plaintiffs suggest "are not legally enforceable," Complaint ¶ 4. The TMDL provides specific wasteload allocations for 36 facilities owned by NACWA members, 40 facilities owned by MAMWA members, and 66 facilities owned by VAMWA members. *See* Chesapeake Bay TMDL, Appendix Q (Attachment 2). Municipal Associations' members have recently completed or are in the process of completing over 100 costly wastewater treatment plant ("WWTP") upgrades in the Bay region, at a cost of several billions of dollars, based on their specific allocations established in the TMDL that Plaintiffs seek to overturn. By

challenging EPA's authority to issue the TMDL through a watershed-wide approach, *see* Complaint ¶¶ 51-53, 76-83, this lawsuit threatens Municipal Associations' economic and operational interests, casting uncertainty on capital investments already undertaken and risking further compliance obligations and costs. Should Plaintiffs succeed, Municipal Associations' members, not EPA, would face the risk of changed allocations and potentially additional discharge restrictions, requiring additional capital upgrade costs, corresponding rate increases, and limitations on economic growth and development in the municipal sewer service areas.

As the agency charged with enforcing the Clean Water Act ("CWA"), EPA's interests are substantially different from those of entities such as Municipal Associations' members that are regulated under the CWA. In fact, a governmental entity, such as EPA, "charged by law with representing the public interest of its citizens might shirk its duty were it to advance the narrower interest of a private entity." *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (*citing Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986)). Accordingly, numerous courts have found that EPA does not adequately represent the interests of the entities which EPA regulates, including the Municipal Associations. *See, e.g.*, Memorandum and Order, *Sierra Club v. EPA*, No. H-97-3838, at 9 (D. Md. Jan. 20, 1998) (Attachment 3) ("MAMWA

interests will not be adequately represented by the EPA in this case."); Order Granting Motion to Intervene, *Fowler v. EPA*, No. 09-005-CKK, at 7 (D.D.C. Sept. 29, 2009) (Attachment 1) ("The Movants [MAMWA and VAMWA] have met the minimal burden of showing that their interests 'may' not be adequately represented in this litigation [by EPA] . . . because discharge restrictions resulting from this litigation would affect the compliance obligations on Movants' members—not necessarily the EPA—and Movants therefore appear to have 'economic and operational concerns' that are not obviously shared by the EPA.").

In determining whether EPA's representation of Municipal Associations' interests may be inadequate, "[t]he essential question is whether the goals of the [agency] differ from the goals of the Intervenors." *Animal Protection Inst. v. Martin*, 241 F.R.D. 66, 70 (D. Me. 2007). EPA's ultimate goal is to achieve compliance with water quality standards. To date, EPA has pursued that goal through the TMDL that balances interests of upstream and downstream areas and, through the states' Watershed Implementation Plans, interests of various point and nonpoint source sectors. However, as evidenced by the "reasonable assurance" and "consequences" provisions of the TMDL, EPA has asserted alternative methods of achieving water quality standards by resorting to the National Pollutant Discharge Elimination System ("NPDES") point source permitting program to make *inequitable* cuts to point sources' wasteload allocations (such as the

allocation assigned to the Municipal Associations' members facilities) to make up for nonpoint sources that do not meet their load allocations set out in the TMDL. *See* Chesapeake Bay TMDL, Section 7; Complaint ¶¶ 46, 82. For example, the TMDL's reasonable assurance provision states, "without a demonstration of reasonable assurance that relied-upon nonpoint source reduction will occur, the Bay TMDL would have to assign commensurate reductions to the point sources." Chesapeake Bay TMDL, at 7-2. Similarly, among EPA's threatened "consequences" for a state's failure to develop and implement appropriate watershed implementation plans, achieve 2-year milestones, or provide insufficient pollutant monitoring information, is: "reallocate additional load reductions from nonpoint to point sources of nitrogen, phosphorus, and sediment pollution, such as wastewater treatment plants." *Id*. at 7-12. While the Municipal Associations share EPA's goal of achieving water quality standards, the Municipal Associations are uniquely concerned with the particular allocation of the Bay's assimilative capacity to their facilities, and cost and feasibility of compliance with these individual allocations. The Municipal Associations, therefore, have a stronger interest than EPA in protecting the TMDL's holistic watershed approach and, more specifically, the resulting wasteload allocations that have been assigned to their facilities.

Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489 (9th Cir. 1995), one of the cases Plaintiffs cite for the proposition "that government entities

will adequately defend their own actions, at least where their interests appear to be aligned with those of proposed intervenors" (Plaintiffs' Oppn., at 8), has been abrogated. *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1178-80 (9th Cir. 2011). The *Wilderness Society* court abandoned the previous Ninth Circuit rule that prohibited private parties and state and local governments from intervening as of right as defendants in lawsuits against EPA brought under the National Environmental Policy Act, instead following a "liberal policy in favor of intervention." *Id*. at 1179. This Court should likewise follow a liberal intervention policy and recognize that Municipal Associations easily meet their minimal burden of showing that EPA may not adequately represent their interests.

The Municipal Associations have different interests than EPA. They also have more at risk in this lawsuit, given the substantial impact it could have on their facilities, investments, and ratepayers. While EPA's objective is that water quality standards be met as a general matter, Municipal Associations have more immediate and direct interests in the nature and extent of their members' specific regulatory compliance as established in the TMDL. Therefore, the Municipal Associations' interests in this case are not adequately represented by EPA.

2. Municipal Associations Have a "Significantly Protectable" Interest that Would Be Impaired by an Adverse Decision

Plaintiffs maintain that the Municipal Associations lack an interest related to what they characterize as the "narrow" issue of the scope of EPA's authority under the CWA, and that this lawsuit is not designed to harm the Municipal Associations' members. *See* Plaintiffs' Oppn., at 5. The regulatory reality, however, is that TMDLs are a "zero sum game," such that elimination of load allocation requirements on nonpoint sources and upstream areas, *see* Complaint ¶¶ 51-52, will have the practical effect of increasing the burden on point sources and downstream areas. *See* Chesapeake Bay TMDL, at 1-2 ("A mathematical definition of a TMDL is written as the sum of the individual wasteload allocations (WLAs) for point sources, the load allocations (LAs) for nonpoint sources and natural background, and a margin of safety (MOS)."); CWA § 303(d)(1)(c). Municipal Associations support a comprehensive approach including all sources, point sources and nonpoint sources alike, throughout the entire watershed, upstream and downstream areas alike. Plaintiffs clearly have filed this lawsuit to limit the scope of the TMDL and gain relief for their industries, but the Municipal Associations are dependent on content Plaintiffs intend to strip out of the TMDL—a reasonable allocation of responsibility across all source sectors throughout the entire watershed.

MAMWA and VAMWA have intervened in a number of lawsuits over the years related to the development of water quality policies affecting municipal wastewater infrastructure in the Chesapeake Bay watershed. *See American Canoe Ass'n, Inc. v. EPA*, 54 F. Supp. 2d 621, 623-24 (E.D. Va. 1999); Memorandum and Order, *Sierra Club v. EPA*, No. H-97-3838 (D. Md. Jan. 20, 1998) (Attachment 3); Order Granting Motion to Intervene, *Fowler v. EPA*, No. 09-005-CKK (D.D.C. Sept. 29, 2009) (Attachment 1). Plaintiffs' allegation that the Municipal Associations have "flipped to the other side of the interest equation" from those prior lawsuits, is unfounded. *See* Plaintiffs' Oppn., at 19. In each of the three prior cases, MAMWA and VAMWA intervened on the side of EPA, just as the Municipal Associations are seeking to do in this case. The Municipal Associations have consistently advocated for a reasonable, balanced program. Although the Municipal Associations have had to adjust their positions based on the changing regulatory environment, their central interests have always been protecting regulatory stability and ensuring that wastewater treatment facilities are treated equitably along with other source sectors. At the time the prior lawsuits were filed, all sources were subject to voluntary water quality based goals under the voluntary "Tributary Strategies" that were precursors to the Bay TMDL, and the Municipal Associations sought to maintain the regulatory status quo for all dischargers by opposing the imposition of mandatory regulatory restrictions. At the present time,

however, point and nonpoint source sectors are required to reduce nutrient and sediment loadings pursuant to the Bay TMDL. Plaintiffs are essentially attempting to obtain exemptions for nonpoint source sectors from these watershed-wide requirements, which would unavoidably shift a greater burden onto the shoulders of point sources, such as Municipal Associations' members. Though the period of voluntary approaches has essentially passed, the Municipal Associations still seek a balanced, inclusive watershed program. The Municipal Associations have a clear interest in defending the comprehensive watershed approach to allocating responsibility among the various sectors and avoiding the imposition of additional costly requirements on their members.

The Third Circuit has recognized that "[t]he central purpose of the 1966 amendment [to Rule 24 of the Federal Rules of Civil Procedure] was to allow intervention by those who might be practically disadvantaged by the disposition of the action." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 970 (3d Cir. 1998) (*quoting* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1908, at 301 (1986)). Generally, a putative intervenor will "demonstrate a sufficient interest for intervention of right . . . if 'it will suffer a practical impairment of its interests as a result of the pending litigation.'" *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1180 (9th Cir. 2011) (*quoting California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th

Cir. 2006)). Regardless of Plaintiffs' intention in filing this lawsuit, a practical result of disposition of the action in their favor would be to disadvantage the Municipal Associations. Vacating the TMDL would cast uncertainty upon projects such as completed or ongoing WWTP upgrade projects or planned WWTP upgrades now being designed by engineers, and would place capital investments of Municipal Associations' members at risk. There is a significant likelihood that Municipal Associations' members' allocations under the TMDL would be further restricted should the Court find the inclusion of load allocations for nonpoint sources and upstream areas to be unauthorized.

While the Municipal Associations acknowledge Plaintiffs' contention that this lawsuit does not "seek to shift regulatory burdens from agriculture to other industries," *see* Plaintiffs' Oppn., at 2, this statement is difficult to reconcile with the realities of the TMDL equation. It is clear that Plaintiffs' ultimate objective in this lawsuit is to reduce—not maintain or increase—requirements on the agriculture sector. Plaintiffs' description of the various parties in their First Amended Complaint makes it clear that the alleged injury to Plaintiffs from the TMDL, which Plaintiffs seek to redress through this lawsuit, arises from the load allocations assigned to the agricultural sector. For example, the Plaintiffs complain that farms operated by the American Farm Bureau Federation "will be directly and adversely affected by the Final TMDL, which assigns pollutant loadings both for

regulated 'point sources' and for unregulated 'nonpoint source' operations." Complaint ¶ 9. Plaintiffs' aim to alter their allocations is evidenced by their objections to "distributing pollutant loading among numerous source categories and even among individual sources throughout the watershed," Complaint ¶ 51; "allocations established by EPA affecting farms and businesses hundreds of miles upstream" but contributing pollutant loads to the Bay, *id.* at ¶ 52; and of EPA's "authority to impose pollutant load allocations" watershed-wide through a TMDL rather than only using two, more limited CWA approaches, *id.* at ¶ 53. Despite their contentions to the contrary, Plaintiffs' true concern in this litigation is the stringency of the requirements (load allocations) assigned to their members, not whether their regulator is EPA or a state government.

If Plaintiffs prevail in this suit, there is a significant likelihood that a shift in the burden of pollution reductions to point sources, such as Municipal Associations' members, will occur. The Municipal Associations' members' NPDES permits are required to comply with all water quality standards. 40 C.F.R. § 122.44. The Municipal Associations are dependent on a fair and reasonable allocation of responsibility across all sectors throughout the Bay watershed, set forth in the TMDL, to make compliance with water quality standards feasible. The Municipal Associations, which represent the most stringently regulated sector, and whose members have already made significant strides in recent years to improve

water quality, are counting on nonpoint sources to fulfill the share of pollutant reductions assigned to them under the TMDL. If Plaintiffs are successful in challenging the TMDL's watershed-wide approach with equitable allocations across source sectors, point source facilities, such as those owned by Municipal Associations' members, face threatened "consequences" from EPA. *See* Chesapeake Bay TMDL, at 7-12 (listing potential actions threatened by EPA, including "reallocate additional load reductions from nonpoint to point sources of nitrogen, phosphorus, and sediment pollution, such as wastewater treatment plants").

The Municipal Associations' interests fall squarely within the scope of the core issues of this lawsuit. Plaintiffs' seek to vacate the TMDL, which defines the total "size of the pie" of permissible nutrient and sediment discharges to the Chesapeake Bay watershed, and divides up "slices" of specified sizes in the form of wasteload allocations and load allocations for the various point and nonpoint source sectors. The allocations are all interdependent—the size of the point source "slices" are inversely related to the size of the nonpoint source "slices." If the TMDL is struck down and the Plaintiffs' industry sectors are exempted from the TMDL or otherwise have their allocations relaxed, the allocations of point sources, such as Municipal Associations' members, will be directly impacted, jeopardizing major capital projects constructed or under construction to implement the TMDL.

Like the proposed intervenors in *Conservation Law Foundation*, the Municipal Associations have an interest that would be impaired by an adverse decision because they "are the subjects of the regulatory plan," and their "economic interests will be substantially affected." *Conservation Law Found., Inc. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992); *see also Animal Protection Inst. v. Martin*, 241 F.R.D. 66, 70 (D. Maine 2007).

Plaintiffs claim that intervention as of right should be denied because the impact of the litigation on Municipal Associations' members' wasteload allocations is not definite. However, proposed intervenors as of right must only "demonstrate that their interest *might* become affected or impaired, as a practical matter, by the disposition of the action in their absence." *Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 368 (3d Cir. 1995) (*citing United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1185 n.15 (3d Cir. 1994)). In *EEOC v. AT & T*, 506 F.2d 735, 741-42 (3d Cir. 1974), the Third Circuit granted intervention for a union to challenge a proposed consent decree between an employer and the government, that *could have* impacted the terms of a collective bargaining agreement. Similarly, in *Sierra Club v. Glickman,* 82 F.3d 106 (5th Cir. 1996), the court granted intervention as of right to the American Farm Bureau Federation in a case seeking to eliminate subsidies to those who pumped water from an aquifer; the Fifth Circuit found it sufficient that the

suit could "potentially" interfere with the proposed intervenors' contractual rights by disrupting access to irrigation water. *Id.* at 109.

Here, the Municipal Associations have a "significantly protectable" interest in the allocations set forth in the TMDL for its members. These wasteload allocations are translated into NPDES permits for the Municipal Associations' members' facilities, setting forth the standards to which facilities such as WWTPs must be constructed and operated. The NPDES permits are further translated into major capital investments in treatment upgrades, which many of Municipal Associations' members have recently completed, are in the process of completing, or are planning to complete.

B. Alternatively, Permissive Intervention Should Be Granted

The Municipal Associations also satisfy the requirements for permissive intervention. Rule 24(b)(1) allows for permissive intervention if Municipal Associations' defense shares a common question of law or fact with the main action. *See McKay v. Heyison*, 614 F.2d 899, 906 (3d Cir. 1980). The Municipal Associations contest Plaintiffs' claims that the Bay TMDL violates the CWA and EPA regulations and is *ultra vires*, especially insofar as Plaintiffs challenge the watershed-wide approach to TMDL regulation and create uncertainties and risks of further reductions to allocations granted facilities owned by Municipal Associations' members. These defenses share common questions of law and fact

with the main action, and are in no way collateral issues. As explained in Section III.A.2 *supra*, the Municipal Associations' interests fall squarely within the scope of the core issues of this lawsuit.

For the reasons set forth in Section III.A.1 *supra*, the interests of the Municipal Associations are not adequately represented by EPA. Thus, the Municipal Associations' participation in this litigation will not be duplicative of EPA's efforts.

Permitting the Municipal Associations to intervene would serve the further purpose of promoting judicial efficiency by resolving common claims of law and fact in a single proceeding and reducing the prospects of future litigation by the Municipal Associations or their members. Therefore, in accordance with to the liberal construction given to Rule 24(b), the Court should grant Municipal Associations' Motion to Intervene permissively, as an alternative to intervention as of right.

IV. CONCLUSION

For the foregoing reasons, the Municipal Associations satisfy the requirements for intervention by right and permissively. Therefore, Municipal Associations respectfully request that this Court grant their Motion to Intervene.

Respectfully Submitted,

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC.
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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 Municipal Clean Water Associations' Reply to Plaintiffs' Consolidated Opposition to Motions for Leave to Intervene complies with the word-count limit and does not exceed the allotted 6,500 words. *See* Order (Dkt. No. 56). Certification is reliant on the word count feature of the word-processing system used to prepare this brief.

Municipal Clean Water Associations' Reply to Plaintiffs' Consolidated Opposition to Motions for Leave to Intervene contains 4,307 words.

/s/ Lisa M. Ochsenhirt
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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 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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