

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

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

Plaintiffs,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

Defendant.

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

**JOINT MOTION FOR LEAVE TO INTERVENE BY CHESAPEAKE BAY
FOUNDATION, CITIZENS FOR PENNSYLVANIA’S FUTURE,
DEFENDERS OF WILDLIFE, JEFFERSON COUNTY PUBLIC SERVICE
DISTRICT, MIDSHORE RIVERKEEPER CONSERVANCY, AND
NATIONAL WILDLIFE FEDERATION**

Pursuant to Federal Rules of Civil Procedure 24(a)(2) and (b)(1)(B), 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 “Proposed Intervenor” or “movants”), hereby move for leave to intervene in the above-captioned matter filed by the American Farm Bureau Federation, Pennsylvania Farm Bureau, The Fertilizer Institute, National Pork Producers Council, National Corn Growers Assoc., National Chicken Council, U.S. Poultry

& Egg Assoc., and National Turkey Federation (collectively “Plaintiffs”) against the United States Environmental Protection Agency (EPA).

PROCEDURAL BACKGROUND

Plaintiffs filed a Complaint on January 10, 2011 and the United States filed an Answer on March 14, 2011. On April 4, 2011, Plaintiffs filed an Amended Complaint to which the United States filed an Answer on April 21, 2011. The Amended Complaint alleges that EPA violated the Clean Water Act (CWA) and the Administrative Procedure Act by issuing a Total Maximum Daily Load (TMDL) for the Chesapeake Bay and its tributaries (hereinafter “the Bay TMDL”). Specifically, Plaintiffs assert that: EPA lacked authority under the CWA to issue a TMDL; the TMDL was arbitrary and capricious; EPA failed to provide adequate public notice and comment on the TMDL; and the TMDL is *ultra vires*. The United States has denied these allegations.

The United States does not oppose or support this motion. Plaintiffs are not able to offer concurrence at this time. Plaintiffs reserve the right to oppose the motion following review of movants’ basis for intervention.

THE PROPOSED INTERVENORS

A. Chesapeake Bay Foundation, Inc.

Chesapeake Bay Foundation, Inc. (CBF) is a nonprofit corporation based in Annapolis, Maryland. CBF is the only independent 501(c)(3) organization

dedicated solely to restoring and protecting the Chesapeake Bay and its tributary rivers and streams by improving water quality and reducing pollution. CBF has over 235,800 members, volunteers, and electronic subscribers nationwide. To achieve its goals, CBF has, among other things, undertaken an extensive agricultural restoration program in Pennsylvania using federal grants in excess of \$12 million to help farmers install best management practices like fencing cattle out of streams. CBF's education program operates in the District of Columbia, Maryland, Pennsylvania and Virginia. The program focuses on teaching Bay ecology to students and teachers by taking them on canoe, kayak, boating and hiking trips on and along the Bay and its tributaries. For example, in 2006, CBF sponsored a month long canoe trip for students and teachers in which they paddled the Susquehanna River from its origins near Cooperstown, NY, to the Chesapeake Bay.

CBF's members participate in resource restoration activities throughout the Bay watershed including shoreline protection projects, tree planting, and oyster cultivation and dispersal. In addition, CBF members use the waters of the Bay watershed for bird watching, boating, kayaking, sailing, fishing, swimming, and other aesthetic and recreational pursuits. The interests of CBF and its members have been harmed by poor water quality throughout the Bay region. The Bay TMDL and the state watershed implementation plans designed to meet the

pollution allocations set in the TMDL present the best method for restoring Bay water quality and its natural resources. Should the Plaintiffs prevail in this action, the interests of CBF and its members will continue to be harmed by the continued discharges of too much nitrogen, phosphorous and sediment into the air, soil and water of the Bay and its tributaries.

CBF has been involved in countless meetings with stakeholders and EPA in the development of the Bay TMDL over the last six years. Beginning in 2005, CBF was an active participant on the technical committee that oversaw the development of the TMDL. CBF staff attended numerous face to face meetings and conference calls during this period, all of which were open to any interested stakeholder including the Plaintiffs. CBF also was a member of the “Reasonable Assurance” workgroup (a particular feature of the Bay TMDL to which Plaintiffs object) and participated on occasion, in various other TMDL related workgroups and action teams. CBF submitted comments on the draft Bay TMDL.

In 2009, CBF and several other individual and organizational co-plaintiffs sued the United States EPA for failing to comply with the CWA and the Chesapeake Bay Agreements. Complaint, *Fowler v. U.S. EPA*, No. 1:09-CV-00005-CKK (D.D.C. Jan. 5, 2009). That matter was resolved by settlement agreement May 10, 2010. Settlement Agreement, *Fowler, supra*, D.D.C. May 10, 2010. The settlement agreement required EPA to, among other things, develop a

Bay wide TMDL by December 31, 2010 and take subsequent actions insuring its implementation. CBF is especially interested in preserving the terms of the settlement agreement between itself, the other co-plaintiffs, and EPA which would be adversely affected if the Plaintiffs were successful in this litigation.

B. Citizens for Pennsylvania's Future

Citizens for Pennsylvania's Future (PennFuture) is a statewide public interest membership organization that works to create a just future where nature, communities and the economy thrive. PennFuture enforces environmental laws and advocates for the transformation of public policy, public opinion and the marketplace to restore and protect the environment and safeguard public health. Protecting and restoring the Chesapeake Bay has been a significant focus of PennFuture's work. PennFuture has litigated to improve regulatory compliance in Pennsylvania's portion of the Chesapeake Bay watershed and has advocated for federal and state laws, regulations and policies seeking to protect and restore the Bay. As a member of the Choose Clean Water Coalition, PennFuture commented on the Draft Chesapeake Bay TMDL.

PennFuture members and their children use the Susquehanna River and its tributaries, including the Juniata River, for recreation, including canoeing, kayaking, fishing, swimming and snorkeling. Pollution of these surface waters from sources that include agricultural operations has impaired their enjoyment of

these activities. PennFuture members who fish these waters have witnessed a significant decline in fish populations due to poor water quality, and their fishing experiences have been diminished by restrictions placed on their activities by the Pennsylvania Fish & Boat Commission as a result of those water quality issues. PennFuture members who swim and snorkel in the Susquehanna and its tributaries also enjoy those activities less because of pollution to those surface waters.

The Final Chesapeake Bay TMDL requires the implementation of various measures designed to substantially reduce pollutant loads that are causing pollution to the surface waters that PennFuture members and their children use and enjoy. A decision vacating the Final TMDL would impede or delay the implementation of those measures, thereby preventing or deferring full use and enjoyment of these surface waters by PennFuture members and their children.

C. Defenders of Wildlife

Defenders of Wildlife (Defenders) is a non-profit public interest conservation organization with more than one million members and supporters nationally, including 46,000 in Pennsylvania, 21,000 in Maryland, and 24,000 in Virginia. Defenders is dedicated to protecting all wild animals and plants in their natural communities. As part of its efforts, Defenders assists land trusts in the Chesapeake Bay watershed with strategic planning focused on biodiversity and cultural conservation.

Additionally, Defenders' members regularly use, enjoy, and benefit from the Chesapeake Bay, its vast network of tributary rivers and creeks, and the region's diverse wildlife, including imperiled species such as the shortnose sturgeon, the Maryland darter, the James spiny mussel, and the dwarf wedge mussel. Defenders' members derive recreational, aesthetic, economic, and scientific benefits from the natural environments of the Bay and its 64,000 square mile watershed that are directly related to the health of the Bay and its tributaries. Defenders' members have and will continue to regularly observe, photograph, study, recreate in, and otherwise enjoy the Bay's natural environments, the rivers and creeks of the Bay watershed, and the region's diverse wildlife. Defenders members live and work throughout the Bay watershed and include members who live adjacent to the Bay or its tributaries and those who regularly visit the Bay: (i) for recreation, including boating, canoeing, and kayaking on the Bay and its tributaries, (ii) to enjoy the Bay's natural environment and native wildlife, or (iii) for scientific research. Additionally, many of Defenders' members living in the Bay region rely on municipal water systems that draw from rivers, creeks, lakes, and impoundments in the watershed.

The interests of Defenders and its members in protecting, observing and studying the diverse Chesapeake Bay ecosystem and its wildlife species are directly harmed by the pollutants entering the Bay and its tributary rivers and

creeks, including nitrogen, phosphorous, and sediment entering waterways from agricultural lands. The influx of these pollutants into the Bay causes eutrophication, a process in which algae blooms consume oxygen and create “dead zones” where fish and shellfish are suffocated and other underwater plant and animal species cannot survive. The continued influx of pollutants, including pollutants from agricultural lands, has and will continue to damage or destroy the water quality of the Chesapeake Bay, and to kill, injure, or disturb the region’s aquatic wildlife species, including imperiled species. Bay pollutants harm Defenders’ members’ short-term and long-term interests by impairing Defenders’ members’ ability to observe, study, and enjoy the Chesapeake Bay, its rivers and creeks, and its wildlife.

Defenders provided public comment during the development of the Bay TMDL and advocated on behalf of its members for a TMDL that would restore and preserve the Chesapeake Bay and its tributaries. Defenders and its members believe that the Bay TMDL is the most comprehensive effort to date to restore water quality in the Chesapeake Bay and believe that it represents the best opportunity to achieve meaningful restoration objectives for the watershed. For this reason, Defenders and its members will benefit from the implementation of, and have an interest in upholding, the Chesapeake Bay TMDL.

D. Jefferson County West Virginia Public Service District

The Jefferson County Public Service District (JCPSD) is a duly created public service district under W.Va. Code § 16-13A-1, *et. seq.*, holding a certificate of convenience and necessity from the Public Service Commission of West Virginia to provide sanitary sewer collection services in Jefferson County, West Virginia. JCPSD currently serves approximately 1900 customers – individuals and commercial entities. If the Plaintiffs are successful in their litigation, it will have the effect of shifting greater responsibility, and hence costs, to the JCPSD and other sanitary and stormwater sewer providers and their customers for nutrient removal. Thus, JCPSD has a strong interest in preserving the Bay TMDL.

E. Midshore Riverkeeper Conservancy

Midshore Riverkeeper Conservancy (Midshore) is a non-profit organization dedicated to the restoration and preservation of the rivers of Maryland's Eastern Shore, particularly the Choptank River, the Miles River, the Wye and Wye East Rivers, and Eastern Bay. Located in Easton, Maryland, Midshore Riverkeeper Conservancy employs two full-time Riverkeepers and an Executive Director, and represents a supporting membership of over 700 individuals and families. Utilizing advocacy, litigation, education, and outreach Midshore Riverkeepers work at every level to protect these vital resources.

The rivers under the jurisdiction of Midshore Riverkeepers, such as the Choptank, are major waterways that flow into the Chesapeake Bay. The Choptank River, for example, is 68 miles long, begins in Delaware, flows through four counties in Maryland, and comprises a watershed area of 508,000 acres. Its major tributaries include Harris Creek, Broad Creek, the Tred Avon River, Island Creek, and La Trappe Creek, as well as the Tuckahoe River which winds north through Caroline County, and Cabin and Hunting Creeks running south into Dorchester County. Agriculture and poultry production comprise roughly 60% of the land use in the watershed. Water quality monitoring over the past several decades has demonstrated steadily increased pollution from nitrogen and phosphorus to the point where the river and its tributaries are all impaired and worsening. The Miles and Wye Rivers and Eastern Bay share similar demographics and face the same pollution pressures. Importantly the water quality in all of these tributaries uniformly worsens the farther upstream one travels, pointing to the fact that most of the pollution is land based and coming from agricultural fertilizer.

The majority of the supporting members of Midshore Riverkeeper Conservancy live on or near these waterways, use them for recreational activities such as boating, swimming, crabbing, fishing, bird watching, and hunting, and derive aesthetic pleasure and nourishment from their beauty. All of the members of Midshore Riverkeeper Conservancy would suffer injury if the plaintiffs' action

were to succeed as it would derail the most promising and important environmental restoration effort of the Chesapeake Bay and its tributaries of our generation.

F. National Wildlife Federation

National Wildlife Federation (NWF) is the nation's largest conservation education and advocacy organization. The group's mission is to inspire Americans to protect wildlife. Founded in 1936, NWF has emerged as the nation's premier grassroots conservation organization with more than four million members and supporters and over 45 state and territory-level affiliate organizations, including affiliates in Delaware, the District of Columbia, New York, Pennsylvania, Virginia, and West Virginia. NWF has three strategic drivers: confronting global warming, protecting and restoring wildlife, and connecting people with nature. It is unique among conservation groups for its ability to combine strong science, federal and state policy development, education, litigation, and grassroots organizing. NWF has approximately 250,000 members in Chesapeake Bay basin states and the District of Columbia. Its Mid-Atlantic Regional Center is located in Annapolis and focuses on restoring the Chesapeake Bay, safeguarding wildlife from the impacts of global warming, improving water quality in the Bay region, and engaging citizens to take action on behalf of the environment. NWF submitted comments during the TMDL process and has a keen interest in ensuring the TMDL

is an effective tool for cleaning up the Bay and restoring its historically robust wildlife populations.

BASIS FOR THE MOTION

As explained in greater detail in their memorandum of support, Proposed Intervenor meet the legal requirements for either intervention as of right under Fed. R. Civ. P. 24(a)(2) or for permissive intervention under Rule 24(b)(1)(B).

Proposed Intervenor satisfy the intervention as of right provisions of Rule 24(a)(2) because: (1) they have made the motion in a timely manner; (2) they have an interest relating to the property and issues that are the subject of the action; (3) that interest may be impaired or impeded as a result of this action; and (4) this interest is not adequately represented by existing parties.

There should be no dispute that this motion is timely. It is being filed just over one month from the date the United States filed its Amended Complaint. Although the Court has requested a scheduling conference on June 28, no scheduling order has been entered and the administrative record has not been produced.

The Proposed Intervenor have a strong interest in the issues that are the subject of the action. The Bay TMDL is designed to reduce nutrient (nitrogen and phosphorus) and sediment pollution in the Chesapeake Bay and its tributaries in order to improve water quality. The intent of Plaintiffs' action is to vacate the Bay

TMDL. The Proposed Intervenors and the individuals whom they represent have a strong interest in this dispute because they work to protect and improve, live near, recreate in, and otherwise use and enjoy the waters of the Chesapeake Bay region subject to the Bay TMDL including those in Pennsylvania. If the action is successful, water quality in the Bay and its tributaries will not improve and may worsen, to the detriment of the interests of Proposed Intervenors.

The interests of Proposed Intervenors cannot be adequately represented by the federal government. The United States serves multiple interests and, while it may be assumed to adequately represent the public at large, the government cannot be assumed to represent the specific, parochial interests of the Proposed Intervenors.

Moreover, CBF has entered into a settlement agreement with the United States resolving claims CBF and others brought against the United States for failing to comply with the Clean Water Act and the Chesapeake Bay Agreements. *Fowler, supra*. The action brought by the Plaintiffs, if successful, would undermine the terms of that agreement. The government, as defendant in the *Fowler* action and the entity charged to comply with the terms of the settlement agreement cannot be expected to adequately represent the interests of CBF and its members.

In the alternative, Proposed Intervenor seek leave to intervene in this proceeding pursuant to Rule 24(b)(1)(B) because they have “a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). As stated above and in our supporting memorandum, Proposed Intervenor have defenses that they share with the main action.

It is within the Court’s discretion to grant permissive intervention, but the decision is tempered by “whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *Id.* Here, Proposed Intervenor will file joint briefs, will not raise collateral issues, and agree to be bound by the Court’s final scheduling order.

Proposed Intervenor would be intervening as defendants in this action and, while this is a matter to be determined on the administrative record, they can provide specific insights into issues raised by the Plaintiffs based upon the movants’ direct experiences – information that EPA cannot provide.

Thus, should the Court determine that intervention as of right is not proper the Court should grant permissive intervention.

CONCLUSION

Proposed Intervenor meet the tests for intervention as of right under Rule 24(a) and for permissive intervention under Rule 24(b)(1)(B). Thus, they request

that the Court grant them intervention at this early stage in the litigation so that the interests of Proposed Intervenors may be adequately protected.

Respectfully submitted,

/s/ Amy E. McDonnell

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CERTIFICATE OF SERVICE

I certify that on May 25, 2011, a copy of the foregoing Motion for Leave to Intervene was served by electronic service via the Court's ECF system pursuant to Standing Order 03-1, ¶ 12 upon:

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