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

AMERICAN FARM BUREAU FEDERATION, *et al.*,	)	
Plaintiffs	)	
v.	)	**Case No. 11-CV-00067-SHR**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	**(Judge Rambo)**
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'
MOTION TO INTERVENE AS DEFENDANTS

The National Association of Clean Water Agencies ("NACWA"), the Maryland Association of Municipal Wastewater Agencies, Inc. ("MAMWA"), and

the Virginia Association of Municipal Wastewater Agencies, Inc. ("VAMWA"), together, by counsel, move to intervene in this action as party defendants as a matter of right or, in the alternative, for permissive intervention, pursuant to Fed. R. Civ. P. Rule 24(a)(2) and (b)(1), respectively, for the reasons set forth in the accompanying memorandum.

Counsel certifies that counsel for each party was contacted, seeking concurrence in this motion pursuant to LR 7.1 of the Local Rules of Court of the United States District Court for the Middle District of Pennsylvania. The Plaintiffs' position is that Plaintiffs are not able to offer concurrence at this time, and that Plaintiffs reserve the right to oppose the motion following review of movants' basis for intervention in this case. The defendant United States Environmental Protection Agency takes no position on the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 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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MUNICIPAL CLEAN WATER ASSOCIATIONS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO INTERVENE

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I. INTRODUCTION

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" or "Movants"), respectfully submit this memorandum in support of their Motion to Intervene as defendants.

In their First Amended Complaint ("Complaint") challenging the United States Environmental Protection Agency's ("EPA") Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment (the "Bay TMDL" or "Final TMDL"), Plaintiffs claim, *inter alia*, that (1) "EPA's Final TMDL exceeds EPA's statutory authority under the Clean Water Act and otherwise violated the Act and its own regulations in multiple aspects," Complaint ¶ 77 (First Claim for Relief); and (2) "the Final TMDL is in excess of delegated statutory authority under the Clean Water Act and therefore is *ultra vires*," Complaint ¶ 93 (Fourth Claim For Relief). Movants seek to intervene to present their views in defense of the Bay TMDL with respect to these two claims only.

Plaintiffs base the above two claims on several allegations which, together, threaten the holistic "watershed approach" under which all pollutant source sectors contribute equitably to improve the quality of water bodies that do not meet water quality standards. Significantly, TMDLs are a "zero sum game," and relaxing any

source sector's assigned allocations will necessarily leave less pollutant loading that may be discharged by the remaining source sectors, unless the *total* maximum daily load is also increased. Thus, if Plaintiffs succeed in limiting EPA's legal authority through this litigation, a serious impact would be to shift a greater burden of water quality protection to point sources, such as the municipal wastewater treatment plants ("WWTPs") and municipal separate storm sewer systems ("MS4s") owned and operated by Movants' members. This legal risk is a critical concern for Movants' members, many of which have recently completed, are in the process of completing, or are planning to complete major capital investments in treatment upgrades to comply with the allocations assigned to their WWTPs under the Bay TMDL. These significant public investments would be at risk to the extent the authorized allocations were lost. Therefore, while Movants appreciate that the Complaint does not directly challenge Movants' members' individual allocations under the Bay TMDL, Movants cannot risk an adverse outcome that could undermine their authorized allocations in any respect, such as if the authorized WWTP allocations were found "not legally enforceable." Complaint ¶ 4.

As further explained below, the Movants meet the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure for intervention as of right or, in the alternative, should be permitted to intervene pursuant to Rule 24(b)(1).

II. STATEMENT OF FACTS

NACWA is a voluntary, non-profit national trade association representing the interests of the nation's publicly owned wastewater and stormwater utilities. NACWA's members include nearly 300 of the nation's municipal clean water agencies, which collectively serve the majority of the sewered population of the United States. Nearly 20 of NACWA's clean water agency members are within the Chesapeake Bay ("Bay") watershed and own and operate WWTPs to which allocations have been granted in the Bay TMDL. For over 40 years, NACWA has maintained a leadership role in legal and policy issues affecting the public authorities responsible for cleaning the nation's wastewater and stormwater. NACWA is at the forefront of the development and implementation of scientifically-based, technically-sound, and cost-effective environmental programs for protecting public and ecosystem health.

MAMWA is a non-profit, non-stock corporation incorporated under the laws of Maryland that represents the owners and operators of WWTPs (also referred to as "publicly owned treatment works" or "POTWs") throughout Maryland. All of MAMWA's members discharge highly treated wastewater to the Bay or its tributaries pursuant to state-issued National Pollutant Discharge Elimination System ("NPDES") permits and received allocations for their WWTPs under the

Bay TMDL. Since 1996, MAMWA has worked for the reduction and elimination of water pollution through the application of sound science and good policy.

VAMWA is a non-profit, non-stock corporation incorporated under the laws of Virginia, that represents 57 local governments, wastewater authorities, and districts that own and operate WWTPs throughout Virginia. VAMWA's membership serves approximately 95 percent of Virginia's sewered population, as well as business and industry throughout the Commonwealth. Most of VAMWA's members' facilities discharge highly-treated wastewater within the Bay watershed pursuant to state-issued NPDES permits known as Virginia Pollutant Discharge Elimination System ("VPDES") permits. These WWTPs all received allocations under the Bay TMDL. For over 20 years, VAMWA has assisted its members in protecting public health and the environment through sound science and public policy.

The Movants have been long-term, active participants in the development of the Bay-related water quality policies affecting municipal wastewater infrastructure. In 1998, VAMWA intervened in *American Canoe Association, Inc. v. EPA*, which was resolved by entry of a consent decree setting an 11-year TMDL development schedule for impaired waters on Virginia's 1998 Clean Water Act ("CWA") § 303(d) list, including the Chesapeake Bay and certain of its tidal tributaries. *See American Canoe Ass'n, Inc. v. EPA*, 54 F. Supp. 2d 621, 623-24

(E.D. Va. 1999). Also in 1998, MAMWA intervened in a nearly identical lawsuit in Maryland, which was dismissed on summary judgment. Memorandum and Order, *Sierra Club v. EPA*, No. H-97-3838 (D. Md. Jan. 20, 1998) (Attachment 1). In 2009, VAMWA and MAMWA jointly intervened as of right in *Fowler v. EPA*, which was resolved by a settlement agreement under which EPA volunteered to establish the Bay TMDL by December 31, 2010, and which addressed a number of significant Bay regulatory policy issues. Order Granting Motion to Intervene, *Fowler v. EPA*, No. 09-005-CKK (D.D.C. Sept. 29, 2009) (Attachment 2). Thus, the current case challenging the Bay TMDL is only the latest in a long line of litigation affecting the Bay and Movants' members.

Beyond litigation, the Movants have participated in numerous regulatory and non-regulatory processes and committees at both the federal and state levels related to Bay restoration. These include, among others, the Chesapeake Bay Program's Water Quality Goal Implementation Team (water quality criteria development, maximum loading determination, and state-basin allocations) and the Virginia and Maryland Chesapeake Bay TMDL Stakeholder Advisory Committees (Phase 1 and Phase 2 Watershed Implementation Plans). In addition, NACWA, MAMAWA and VAMWA each submitted comments on EPA's Draft Chesapeake Bay TMDL issued on September 24, 2010.

III. ARGUMENT

A. Movants Meet Requirements for Intervention as of Right

Movants are entitled to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2) because they meet the following four criteria: "(1) the application for intervention is timely; (2) the applicant[s] [have] 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 Fed. Appx. 138, 140 (3d Cir. 2008) (*quoting Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987)). Under this test, MAMWA and/or VAMWA have twice been granted intervention as of right in cases concerning precursor issues to the Bay TMDL. Movants should again have the right to intervene, especially now that their members' facilities are regulated by and have been granted allocations under the Bay TMDL. *See* Bay TMDL, Appendix Q.

1. Movants' Motion is Timely

In determining whether an intervenor's motion is timely, the Court must 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 v. Slippery Rock Univ. of Pa.*, 297 Fed Appx. 138, 140 (3d Cir. 2008) (*quoting Harris v.*

Pernsley, 820 F.2d 592, 596 (3d Cir. 1987)). As the Third Circuit has noted, "the critical inquiry is: what proceedings of substance on the merits have occurred?" *Mountain Top Condominium Association v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995).

This lawsuit has not progressed to any proceedings of substance on the merits, so Movants' intervention at this stage will not result in any prejudice to the other parties. Plaintiffs filed their First Amended Complaint on April 4, 2011, and EPA just filed its Answer on April 21, 2011. Presumably, it will be weeks or months before EPA will produce the extensive administrative record for this complex agency action, and substantive briefing would not begin until sometime after the record becomes available. Therefore, there will be no conceivable prejudice or delay to the original parties from Movants' intervention, and this motion is timely.

2. Movants Have a "Significantly Protectable" Interest

Movants clearly have a "significantly protectable" interest to support mandatory intervention. Under this element of Rule 24(a)(2), "the lawsuit in which the party seeks to intervene must present 'a tangible treat to a legally cognizable interest.'" *Westra Construction, Inc. v. U.S. Fidelity & Guaranty Co.*, 546 F. Supp. 2d 194, 201 (M.D. Pa. 2008) (*quoting Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995)). This interest

requirement "is a practical guide designed to dispose of lawsuits 'by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *U.S. v. Eilberg*, 89 F.R.D. 473, 474 (E.D. Pa. 1980).

District courts in Maryland and the District of Columbia have previously recognized the interests of the Movants and allowed MAMWA and VAMWA to intervene as of right in circumstances very similar to those here. In 2009 Bay-related litigation, the U.S. District Court for the District of Columbia granted MAMWA, VAMWA, and other municipal trade associations' motion to intervene as defendants as a matter of right. Order Granting Motion to Intervene, *Fowler v. EPA*, No. 09-005-CKK (D.D.C. Sept. 29, 2009) (Attachment 2). As point source dischargers to the Bay watershed, VAMWA and MAMWA had an interest in the amount of nutrients and sediment their members were authorized to discharge. *See id*. at 2. The plaintiffs were seeking an order requiring EPA to develop and implement programs to significantly decrease nutrient and sediment point-source discharges to the Bay Watershed and preclude backsliding on point source reductions. *Id*. at 6. As is the case here, the *Fowler* court explained, "If Plaintiffs are ultimately successful and the Court orders such relief, the interests of point source dischargers such as Movants' members would clearly be affected because they would be required to comply with any new restrictions that would arise following the Court's order." *Id*. at 6. Thus, the court found that VAMWA and

MAMWA "satisfied all of the elements necessary to intervene in this case as Defendants as a matter of right." *Id*. at 7.

In an earlier TMDL-related case in Maryland, the court allowed MAMWA to intervene as of right. The plaintiffs in that case were seeking to establish the nondiscretionary duties of EPA to identify impaired waters in Maryland and establish TMDLs for pollutants to those waters, including the Bay and its tributaries. Memorandum and Order at 6, *Sierra Club v. EPA*, No. H-97-3838 (D. Md. Jan. 20, 1998) (Attachment 1). The Court recognized that MAMWA had a significantly protectable interest that would be impaired if the litigation were allowed to proceed without its presence because MAMWA members' ability to continue their previously authorized discharges—such as those now set forth in the Bay TMDL—would be affected by the subsequent development of TMDLs for impaired waters. *Id.* at 8.

More generally, ownership of WWTPs that could be subject to future permit limit determinations as a result of litigation over certain preliminary regulatory decisions has been determined to be a "significantly protectable interest" meriting intervention as of right. *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993). In *Sierra Club v. EPA*, the Ninth Circuit ruled that the City of Phoenix, which held permits issued under the CWA for WWTP discharges, had a protectable interest with respect to the compilation of lists of impaired waters and the identification of

point sources discharging to those waters. 995 F.2d at 1478. As the Ninth Circuit summarized:

> The legitimate interests of persons discharging permissible quantities of pollutants pursuant to NPDES permits are explicitly protected by the [Clean Water] Act. 33 U.S.C. § 1342. ***Because the Act protects the interest of a person who discharges pollutants pursuant to a permit, and the City of Phoenix owns such permits, the City has a 'protectable' interest.*** These permits may be modified by control strategies issued as a result of this litigation, so the City's protectable interest relates to this litigation.

Id. at 1485-86 (emphasis added).

Movants' interests are even more direct than those at issue in *Sierra Club*. The City of Phoenix's interest was contingent on EPA first deciding whether to list Phoenix's receiving waters for regulation before a control strategy would be required. Arguably the potential impact on the city was speculative, and it was uncertain whether changes to the city's permits would be required until specific waters were listed by EPA and a control strategy comparable to a TMDL subsequently developed. Nevertheless, the Ninth Circuit granted intervention as of right. *Id.* at 1486. Here, Movants' members discharge directly to or immediately upstream of waters that are already listed for TMDL development and, like the facilities and lands owned by Plaintiffs' members, are now subject to the control strategy established by the Bay TMDL. Thus, Movants' members have a legally cognizable interest in their NPDES permit limits based on nutrient and sediment

allocations in the Bay TMDL, *see* 40 C.F.R. § 122.44(d)(1)(vii)(B), that is more concrete than the interest recognized as protectable in *Sierra Club*.

3. Movants' Interests Will Be Prejudiced by an Adverse Decision

Movants' significantly protectable interests in continuing to discharge wastewater and stormwater may be impaired by an adverse disposition in this action. Proposed intervenors as of right must "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 (3d Cir. 1995) (*citing United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1185 n.15 (3d Cir.1994)).

As a practical matter, if Plaintiffs successfully challenge EPA's watershed-wide TMDL program and exclude the primarily nonpoint agricultural sources, whether in Maryland, Virginia, or upstream headwater states, the remaining point sources such as WWTPs and MS4s owned by Movants' members, would likely suffer reductions to their allocations to make up the loss of these nonpoint source pollutant reductions. Movants' members would be at risk of reductions to their allocations under the TMDL if the "assigned pollutant loads are not legally enforceable," *id.* at ¶ 4; if all parties do not bear a fair share of the "more stringent permit limitations" under a watershed-wide approach, *id.* at ¶ 8; or if EPA were to impose "additional point source reductions" on WWTPs and MS4s to offset the

outcome of a successful challenge to EPA's legal authority here, *id.* at ¶ 48. This would mean greater reliance on municipal point source WWTP reductions and costly new upgrades or restrictions on municipal operations to meet water quality standards. CWA § 303(d)(1)(C); 40 C.F.R. § 130.7(c)(1); Final TMDL, at 1-2. This prejudices Movants' members as the owners of these facilities.

4. Existing Parties Cannot Adequately Represent Movants' Interests

To meet the fourth Rule 24(a)(2) requirement, the proposed intervenor need only show that "the representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). A proposed intervenor may meet this minimal burden by showing that "its interests, though similar to those of an existing party, are nevertheless sufficiently different that the representative cannot give the applicant's interests proper attention." *Hoots v. Commonwealth of Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982).

Movants' interest in this litigation is considerably different than EPA's interest. The Third Circuit has explained, "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 Service*, 157 F.3d 964, 972 (3d Cir. 1998) (*citing 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.")).

The principal purposes of the CWA and Bay TMDL are not the regulation of EPA, but rather the control pollutants from sources, such as farms owned by Plaintiffs' members, and WWTPs and MS4s owned by Movants' members. The further restrictions on Movants' members that could result from this lawsuit would impose compliance obligations on Movants' members (not EPA) and would present significant problems for Movants' members, including economic (capital upgrade costs, corresponding rate increases, and limitations on economic growth and development in the municipal sewer service areas) and operational (additional discharge restrictions). *See* Memorandum and Order at 8, *Sierra Club v. EPA*, No. H-97-3838 (D. Md. Jan. 20, 1998) (Attachment 1)("[I]t is one thing to hold that only the government can be a defendant in a suit . . . where the statute regulated only government action, "but quite another to exclude permit-holding property owners from a CWA suit where the statute directly regulates their conduct.").

Furthermore, while Movants seek to intervene generally to defend the holistic watershed approach embodied in the Bay TMDL, as the point source "targets" of EPA's "backstops," threatened "consequences," and similar leveraging under the TMDL, *see* Bay TMDL Sections 7-8, Movants' positions as to the scope of EPA's authority to leverage the Bay States and their point source dischargers in

the nonpoint source-dominated Bay system will certainly differ from EPA's broad interpretation as evidenced by the Bay TMDL's Accountability Framework, *see* Bay TMDL, at 7-4 to 7-12.

B. Alternatively, Permissive Intervention Should Be Granted

Movants also satisfy the requirements for permissive intervention. Under Rule 24(b)(1), permissive intervention is appropriate if Movants' claim or defense and the main action share a common question of law or fact. *See McKay v. Heyison*, 614 F.2d 899, 906 (3d Cir. 1980). Movants contest Plaintiffs' allegations that the Bay TMDL violates the CWA and EPA regulations and is *ultra vires*, particularly to the extent that Plaintiffs challenge the watershed-wide approach to TMDL regulation and otherwise create uncertainties and risks of further reductions to allocations granted to WWTPs and MS4s owned by Movants' members. These matters are central to the Bay TMDL and, thus, raise common questions of law and fact, requiring judicial interpretation of the CWA and its implementing regulations. In light of these common questions of law and fact, and the fact that Movants' intervention in this case would not unduly delay or prejudice the adjudication of the original parties' rights, the requirements for permissive intervention are met.

Other courts have allowed trade associations to intervene in TMDL and other CWA litigation. *See, e.g., Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962 (W.D. Wash. 1996) (intervention of industrial association permissible in

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

Finally, Rule 24(b) permissive intervention "is to be construed liberally 'with all doubts resolved in favor of permitting intervention.'" *Koprowski v. Wistar Institute of Anatomy and Biology*, No. 92-CV-1182, 1993 WL 332061, at *2 (E.D. Pa. Aug. 19, 1993) (Attachment 3); *see also Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) ("[L]iberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process"). Allowing Movants to intervene would promote judicial efficiency by reducing the prospects of future litigation by the Movants or their members to protect their interests. Thus, as an alternative to intervention as of right, the Court should grant this motion to intervene permissively to facilitate resolution of common claims of law and fact in one proceeding consistent with principles of judicial economy.

C. Movants Have Standing To Intervene

Though the Court should not require Movants to independently demonstrate standing, if the Court does so require, Movants clearly have standing to intervene.

1. Intervenors Should Not Be Required To Show Standing

The courts are divided over whether Article III standing is a prerequisite for intervention as of right, and the Third Circuit has not directly addressed this issue. *See Diamond v. Charles*, 476 U.S. 54, 68-69, n.21 (1986) (noting a circuit split and declining to decide the issue); *CSX Transportation, Inc. v. City of Philadelphia*, No. 04-CV-5023, 2005 WL 1677975, at *2 (E.D. Pa. July 15, 2005) (Attachment 4) ("The Courts of Appeals have diverged on this issue, . . . and the Third Circuit has not indicated that Article III standing is necessary.").[1] This Court should follow the Second, Fifth, Sixth, Tenth, and Eleventh Circuits' position that, if the original plaintiff has standing, prospective intervenors need not demonstrate standing. *See, e.g.*, *Clark v. Putnam County*, 168 F.3d 458, 463 (11th Cir. 1999); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978).

2. Movants Satisfy Elements of Representational Standing

Article III standing requires injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An organization, such as any of the Municipal Associations, has representational standing to sue on its

[1] In an unreported decision, the Middle District of Pennsylvania required Article III standing for permissive intervention, *Corby v. Scranton Housing Authority*, No. 3:04-CV-2523, 2006 WL 3199145 (M.D. Pa. Nov. 3, 2006) (Attachment 5), but that holding is not mandated by Third Circuit law.

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. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

To demonstrate injury-in-fact, "Movants need not show that they have *already* suffered an injury . . . , but rather, that the outcome of the litigation *would* cause a concrete and imminent injury if Plaintiffs prevail and receive their requested relief." Order Granting Motion to Intervene at 5, *Fowler v. EPA*, No. 09-005-CKK (D.D.C. Sept. 29, 2009) (Attachment 2). Some courts view the Article III injury-in-fact requirement and the Rule 24(a) "interest" requirement as "collaps[ing] into a single inquiry." *Id.* at 4. Thus, the *Fowler* court found that VAMWA and MAMWA had standing in the 2009 Bay TMDL litigation, explaining that if the court ordered the relief sought by plaintiffs, "the interests of point source dischargers such as Movants' members would clearly be affected because they would be required to comply with any new restrictions that would arise following the Court's Order." *Id*. at 6.

Similarly, here the Movants' members could easily meet the standing requirement in their own right. As explained above, many of them own and operate WWTPs and MS4s that discharge into the Bay or its tributaries. They

would suffer a concrete injury-in-fact if the Court awarded Plaintiffs their desired relief. As noted above, Plaintiffs challenge the comprehensive, watershed-wide approach to water quality regulation inclusive of nonpoint sources, such as agriculture, and challenge EPA's allocations, which represent the very authorizations and requirements upon which approximately $3 billion of completed or pending WWTP upgrades throughout Maryland and Virginia are designed. For example, Plaintiffs complain of EPA's "distributing pollutant loading among numerous source categories and even among individual sources throughout the watershed," Complaint ¶ 51; of "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. By arguing that EPA violated the CWA and EPA regulations by, *inter alia*, its watershed-wide approach and granting pollutant load allocations to individual sources and source categories and to upstream water segments, Plaintiffs jeopardize Municipal Associations' interests. *See* Complaint ¶¶ 76-83. If Plaintiffs' challenge were successful, Movants would be directly impacted because municipal point sources discharging into the Bay would be left to bear a greater burden for reducing pollutant loadings to achieve water quality

standards. If Movants are granted the right to intervene in this lawsuit, they will be able to present arguments to redress this potential harm.

The interests Movants seek to protect are germane to their organizations' purposes, specifically in protecting water quality, reflecting sound science and good policy in EPA requirements applicable to their members' facilities. Among others, these EPA requirements include the Bay TMDL and the many precursor and ongoing legal and regulatory activities such as those described at pages 4-5 above. Finally, there is no need for any individual member to participate in this lawsuit. Members of these organizations have an aligned interest that has been and can continue here to be effectively and efficiently represented by the Movants.

IV. CONCLUSION

Movants have satisfied the four criteria for intervention as of right under Rule 24(a)(2). Movants have also satisfied the requirements for permissive intervention under Rule 24(b)(1). Accordingly, Movants respectfully request that this Court allow each to intervene as a party defendant as a matter of right or, in the alternative, permissively.

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC.
VIRGINIA 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' Memorandum in Support of Their Motion to Intervene complies with the word-count limit and does not exceed 5,000 words. Certification is reliant on the word count feature of the word-processing system used to prepare this brief.

Municipal Clean Water Associations' Memorandum in Support of Their Motion to Intervene contains 4982 words.

/s/ Lisa M. Ochsenhirt
Lisa M. Ochsenhirt

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 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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Attachment 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SIERRA CLUB, et al.	*	
Plaintiffs	*	
vs.	*	CIVIL NO. H-97-3838
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.	*	
Defendants	*	

* * * o0o * * *

MEMORANDUM AND ORDER

This is a citizens suit brought by plaintiffs under § 505(a)(2) of the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1365(a)(2). Plaintiffs are Sierra Club, Chesapeake Bay Foundation and American Littoral Society. They have named as defendants the United States Environmental Protection Agency (the "EPA"), Carol Browner, Administrator of the EPA, and Michael McCabe, Regional Administrator of EPA Region III.[1]

Plaintiffs assert that they are by this action seeking to improve the quality of the waters in the State of Maryland by compelling the EPA to perform its nondiscretionary duties under § 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d). The suit also

[1]Region III is responsible for administering EPA programs in Maryland.

seeks to address alleged acts and omissions of the EPA which are actionable under the Administrative Procedure Act. Broad ranging declaratory and injunctive relief is sought by the plaintiffs.

The complaint was filed on November 13, 1997, and defendants have not as yet responded. Pending in the case is a motion to intervene as a defendant filed by the Maryland Association of Municipal Wastewater Agencies, Inc. ("MAMWA"). A memorandum of law in support of that motion has been filed by MAMWA which has also submitted a proposed answer to the complaint. Plaintiffs have filed an opposition to MAMWA's pending motion to intervene and MAMWA has recently replied to plaintiff's opposition.

The Court has now had an opportunity to review the pleadings and memoranda. No hearing is necessary for a ruling on the pending motion. See Local Rule 105.6. For the reasons stated herein, MAMWA's motion to intervene will be granted.

MAMWA is an incorporated association under the laws of the State of Maryland. Its members include owners and operators of publicly owned wastewater treatment works in Maryland, including counties, cities, and other local governmental entities.[2]

The Clean Water Act required that by 1979 all waters in each state that did not meet water quality standards had to be identified. By this action, plaintiffs ask the Court to adjudicate the adequacy of the lists of water quality limited streams

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[2]MAMWA's members include the counties of Anne Arundel, Frederick, Howard, Queen Anne's and Washington, the cities of Hagerstown and Salisbury, the town of Ocean City, the St. Mary's Metropolitan Commission, the Somerset County Sanitary District, and the Washington Suburban Sanitary Commission.

("WQLSs")[3] submitted by Maryland pursuant to § 303(d) of the Clean Water Act. According to plaintiffs, Maryland has failed to identify all of its waters which do not meet applicable water quality standards, and the EPA has failed to perform its nondiscretionary duty to do so.

The Clean Water Act also required that by 1979 pollutant load limits for each WQLS had to be established to insure that polluted waters achieved water quality standards. These pollutant load limitations are known as total maximum daily loads ("TMDLs") and total maximum daily thermal loads ("TMDTLs"). Plaintiffs also assert in the complaint that Maryland has failed to establish TMDLs and estimate TMDTLs for its impaired waters and that the EPA has failed to perform its nondiscretionary duty to do so.

MAMWA asserts that most if not all of its members discharge municipal wastewater into WQLSs in Maryland pursuant to permits issued by the State. According to MAMWA, all of the receiving waters into which MAMWA's members discharge are proposed for TMDL development in plaintiff's complaint or are identified for investigation as potential WQLSs. MAMWA asserts that it wishes to intervene in this case as a defendant in order to facilitate its members' compliance with water quality related requirements in the most cost effective and efficient manner possible.

Intervention is sought both under both Rule 24(a)(2) and under

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[3]In their complaint, plaintiffs refer to all such waters, which include rivers, streams, lakes, ponds, estuaries, bays, ocean coastal waters and wetlands, as water quality limited segments ("WQLSs").

Rule 24(b)(2) of the Federal Rules of Civil Procedure. Under Rule 24(a)(2), anyone shall be permitted to intervene in an action upon timely application

> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by existing parties.

Permissive intervention under Rule 24(b)(2) is allowed on timely application

> (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

It is discretionary with the court whether permissive intervention should be allowed under Rule 24(b)(2). However, in exercising its discretion, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original party."

The Fourth Circuit has interpreted Rule 24(a)(2) as entitling an applicant to intervention of right if the applicant can demonstrate: (1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation. Tague v. Bakker, 931 F.2d 259, 261 (4th Cir. 1991). In opposing MAMWA's right to intervene in this case under Rule 24(a)(2),

plaintiffs contend (1) that MAMWA lacks a legally protectable interest in this litigation; (2) that MAMWA's ability to protect its interest will not be impaired by the disposition of this litigation; and (3) that MAMWA's interests in the litigation are adequately represented by the EPA.[4] Following its review of the memoranda filed by the parties and the applicable authorities, this Court has concluded that there is no merit to any of the arguments advanced by plaintiffs in opposing MAMWA's motion to intervene. The Court is satisfied that MAMWA under the circumstances here should be allowed to intervene in this case as a matter of right.

In considering the parties' positions, this Court must be guided by the approach which the Fourth Circuit has directed a trial court to take when confronted with the issue of intervention as a matter of right under Rule 24(a)(2). As the Court stated in Feller v. Brock, 802 F.2d 722, 729 (4th Cir. 1986), liberal intervention is desirable to dispose of as much of a controversy "involving as many apparently concerned persons as is compatible with efficiency and due process." (Citing Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)). In this particular case, efficiency and due process will be furthered if MAMWA is permitted to intervene in this case.

It should first be noted that MAMWA's members are local governmental entities. Their interest and stake in this litigation

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[4]Plaintiffs do not contend that MAMWA's motion to intervene was not timely filed. Certainly, this requirement has been met. MAMWA's motion has been filed at an early stage of this case and even before the date for defendants to respond to the complaint.

differs considerably from that of both plaintiffs and defendants. It is apparent that the interests of MAMWA and its members are economic, a factor which a court may consider in deciding a motion to intervene. See United States v. City of Niagra Falls, 103 F.R.D. 164, 166 (W.D. N.Y. 1984). Indeed, if plaintiffs prevail in this suit, the action which the Court would require the EPA to take would undoubtedly add to the economic burden to be thereafter assumed by MAMWA's members and eventually by citizens of the various localities represented by these members. Neither plaintiffs nor defendants in this case have such economic concerns.

Pursuant to permits, MAMWA's members currently discharge to Maryland waters which have been listed by the Maryland Department of the Environment ("MDE"). In their complaint, plaintiffs have identified additional waters which they believe should have been listed or should be considered for listing. Such additional listings would reasonably be expected to affect plans of MAMWA members to develop new facilities and expand existing facilities which would be discharging to newly identified WQLSs. The success by plaintiffs in this suit would therefore adversely impact the interests of MAMWA members in planned future development of wastewater facilities and in planned expansion of present such facilities.

In a case involving somewhat similar facts, the Ninth Circuit stated that owners of wastewater treatment plants had a "significantly protectable interest" meriting intervention as of right. Sierra Club v. U.S. Environmental Protection Agency, 995 F.2d 1478, 1481 (9th Cir. 1983). The complaint in Sierra Club

alleged that lists of impaired waters, point sources discharging pollutants and control strategies were insufficient under § 1314(l)[5] and that the EPA had a duty to make a final decision on the list and to implement control strategies. The City of Phoenix was permitted to intervene in the case as a matter of right because of the effect that a court ruling in plaintiff's favor would have on discharges of the City's two wastewater treatment plants. The Ninth Circuit determined that plaintiff's suit would affect the City's real property by requiring the EPA to "change the terms of permits it issues to the would-be intervenor, which permits regulate the use of that real property." Id. at 1483. Similarly, this suit would affect the real property interests of MAMWA's members.

Plaintiffs' reliance on ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318 (11th Cir. 1990) is misplaced. In that case, the Eleventh Circuit upheld the district court's denial of intervention because none of the utilities seeking to intervene discharged to impaired waters, inasmuch as no impaired waters had been designated in Florida at that time. Id. at 1322. The facts here are quite different, inasmuch as Maryland has submitted a lengthy list of WQLSs to which MAMWA's members currently discharge.

Most of MAMWA's members discharge municipal wastewater into WQLSs in Maryland pursuant to permits issued by the State of Maryland. This suit seeks relief which would require changes to

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[5]Even though Sierra Club involved Section 304(l) of the Clean Water Act rather than, as here, Section 303(d), the principles enunciated by the Court are fully applicable in this case.

permits held by MAMWA members, making them more restrictive. Since their ability to continue with previously approved discharges will be affected by this litigation, this Court concludes that MAMWA has a significantly protectable interest which would be impaired if this litigation were to proceed without its presence. As the Ninth Circuit observed in Sierra Club, it is one thing to hold that only the government can be a defendant in a suit such as this one where the statute regulated only government action, "but quite another to exclude permit-holding property owners from a CWA suit where the statute directly regulates their conduct." 995 F.2d at 1485.

Relying on ManaSota-88, plaintiffs argue that resolution of this litigation will not have any immediate effect on MAMWA since it will later have the ability to be heard if specific rules are developed by the EPA which would adversely affect MAMWA's interests. See 896 F.2d at 1323. According to plaintiffs, MAMWA could participate in and judicially challenge the results of any EPA rule-making resulting from this litigation. However, requiring that MAMWA, before it may be heard in a judicial proceeding, must await not only the outcome of this suit but also later administrative action taken by the EPA is hardly a cost efficient manner whereby MAMWA may timely seek to protect the interests of its members. MAMWA contends that the EPA has no mandatory duty to act in the manner alleged by plaintiffs. If MAMWA is successful in defending this action, there will be no future EPA rule-making which would adversely affect the interests of MAMWA's members. There would be no need for MAMWA to participate in the EPA's rule-

making process and challenge the results in court if, as MAMWA now claims, the complaint should be dismissed. If MAMWA is a party here and if plaintiffs prevail, rulings by this Court could be expected to have a preclusive effect on all or parts of a future suit brought by MAMWA against the EPA. If MAMWA is permitted to intervene in this case, piecemeal litigation would be avoided whether plaintiffs or MAMWA were to be ultimately successful.

This Court further concludes that MAMWA interests will not be adequately represented by the EPA in this case. As the Fourth Circuit has noted, a movant's burden of showing an inadequacy of representation in a case of this sort is minimal. Virginia v Westinghouse Electric Corp., 542 F.2d 214, 216 (4th Cir. 1976). On the record here, the Court is satisfied that MAMWA has met this burden.

MAMWA, if permitted to intervene as a defendant, proposes to argue (1) that provisions of the Clean Water Act which establish EPA's Chesapeake Bay program supersede the § 303(d) requirement to develop TMDLs for a significant portion of Maryland waters and (2) that Maryland's tributary strategy program is a constructive TMDL program. Even if defenses asserted by the EPA are successful here, MAMWA's concerns may not necessarily be addressed. Since the particular grounds for any such dismissal would be important to MAMWA, the ultimate objective sought by MAMWA in the case is not one necessarily shared by the EPA.

In similar TMDL litigation brought against the EPA in other states, settlement has been reached by way of consent decrees. Because of its protectable interest here, MAMWA should have the

right to determine whether this case should be fully litigated or should be settled by way of a consent decree similar to the ones entered in related litigation. Plaintiffs' reliance on Westinghouse Electric Corp., 542 F.2d at 216, is misplaced. Unlike the circumstances in that case, MAMWA does not have the same ultimate objective as does the EPA in this action.

In any event, even if MAMWA were not entitled to intervene in this case as a matter of right, this Court is satisfied that permissive intervention is warranted here under Rule 24(b). Clearly, the main action here and MAMWA's asserted defenses have a question of law or fact in common.

Plaintiffs argue that if MAMWA is permitted to intervene in this case, hundreds of other permitted dischargers throughout the State of Maryland would also be entitled to intervene. This Court must disagree. Absent court approval, no such intervention would be permitted. Other dischargers would have to convince the Court that their intervention would not unduly delay or prejudice the rights of the other parties. With MAMWA in the case, a party seeking to intervene would be faced with the considerable burden of convincing this Court that its interest in the litigation would not be adequately represented not only by the EPA but also by MAMWA and that additional delay would not result. Since MAMWA is now a party in this case, this Court would not be inclined to approve interventions sought by parties similarly situated because of the additional delay and cost to all the parties which would undoubtedly result.

For all these reasons, it is this 20th day of January, 1998

by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion of Maryland Association of Municipal Wastewater Agencies, Inc. to intervene as a defendant in this case is hereby granted; and

2. That the Clerk is directed to accept and file the answer to the complaint submitted by defendant Maryland Association of Municipal Wastewater Agencies, Inc.

Alexander Harvey II

Senior United States District Judge

Attachment 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. BERNARD FOWLER, *et al.*, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	Civil Action No. 09-005 (CKK)

ORDER GRANTING MOTION TO INTERVENE
(September 29, 2009)

This case concerns the quality of the water in the Chesapeake Bay, the largest estuary in the United States. Compl. ¶ 2. Plaintiffs have filed suit against the Environmental Protection Agency ("EPA"), Administrator Stephen L. Johnson, and the United States (collectively, "Defendants") alleging, among other things, that Defendants have violated their obligations under Section 117 of the Clean Water Act ("CWA"), 33 U.S.C. § 1267(g)(1)(A)-(E), and various Chesapeake Bay Agreements to the detriment of the water quality in the Chesapeake Bay.[1] *Id.* ¶¶ 3-4. In addition to seeking an Order from this Court requiring Defendants to comply with their obligations pursuant to Section 117 of the CWA and the Chesapeake Bay Agreements, Plaintiffs' Complaint seeks an Order requiring the United States to develop and implement various environmental programs, including those "designed to significantly reduce nitrogen, phosphorous, and sediment discharges from all point sources within the Bay Watershed" and

[1] The "Chesapeake Bay Agreements" are a series of agreements signed by the states of Maryland and Pennsylvania, the Commonwealth of Virginia, the District of Columbia, and the United States, relating to the restoration and protection of the Chesapeake Bay. Compl. ¶¶ 69-105.

"prevent backsliding on point source reductions via strong point source permits and enforcement." *Id.* at 40-41.

Currently pending before the Court is a [18] Motion to Intervene as Defendants as a matter of right filed by the Maryland Association of Municipal Wastewater Agencies, Inc., the Virginia Association of Municipal Wastewater Agencies, Inc., the Virginia Municipal Stormwater Association, Inc., and the Storm Water Association of Maryland (collectively, "Movants").[2] Movants are membership organizations that represent point source dischargers to the Chesapeake Bay and its tributaries. Movants' Mot. at 6-8. They argue, among other things, that the relief requested by Plaintiffs in this case could directly impact the level of nutrients and sediment their members may discharge now and/or in the future, thereby impairing or impeding the interests of their members. *Id.* at 4-6. Plaintiffs filed an Opposition to Movants' Motion to Intervene and Movants filed a Reply.[3] After a thorough review of the parties' pleadings, relevant case law and statutory authority, and the entire record of the case as a whole, the Court shall GRANT Movants' [18] Motion to Intervene as Defendants as a matter of right, for the reasons that follow.

LEGAL STANDARD AND DISCUSSION

Federal Rule of Civil Procedure 24(a)(2) authorizes individuals or organizations to intervene in a case as a matter of right, stating in relevant part:

[u]pon timely application anyone shall be permitted to intervene in an action . . .

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[2] Movants also request permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(1)(B) as an alternative form of relief. Because the Court shall grant Movants the right to intervene as a matter of right, the Court does not reach the alternative request for relief.

[3] Defendants did not file a Response to the Motion to Intervene.

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). The Court of Appeals for the District of Columbia Circuit has read this rule to require consideration of four elements:

> (1) the timeliness of the motion [to intervene];
>
> (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action;
>
> (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest;
>
> (4) whether the applicant's interest is adequately represented by existing parties.

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (internal punctuation omitted)). In addition, the D.C. Circuit has enumerated a fifth element, requiring that "a party seeking to intervene as a matter of right must demonstrate that it has standing under Article III of the Constitution." *Id.*

Plaintiffs oppose Movants' intervention on the grounds that they (1) do not have a protectable interest relating to the subject of this case, (2) the EPA can adequately represent Movants' interests in this case, and (3) the Movants lack standing.[4] Pl.'s Opp'n at 2-8. Because

[4] Plaintiffs do not dispute that the Motion to Intervene was timely filed, as it was submitted prior to Defendants' submission of an Answer to Plaintiffs' Complaint and the Court had not yet issued a Scheduling Order in this case. *Cf. Fund for Animals*, 322 F.3d at 730 (finding the intervenors' motions were timely when they were filed before the defendants filed an answer). Similarly, Plaintiffs do not dispute that this case could impair or impede Movants' interests depending on whether Plaintiffs obtained the relief sought in their Complaint.

the D.C. Circuit has held that intervenors have "an interest relating to the property or transaction which is the subject of the action" when they have constitutional standing, *Fund for Animals*, 322 F.3d at 731, the first and third of Plaintiffs' arguments collapse into a single inquiry. As set forth below, the Court finds that Plaintiffs' arguments lack merit and that Movants are entitled to intervene as Defendants as a matter of right.

A. Movants Possess Article III Standing and Have a Protectable Interest Relating to the Subject of this Case

To establish Article III standing, a party must show: (1) that it has suffered an injury in fact, which is the invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there is a causal connection between the injury and the conduct at issue, such that the injury is fairly traceable to the challenged act; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Organizations like Movants may assert standing on behalf of their members when their members would otherwise have standing to sue in their own right, the interests they seek to protect are germane to the organizations' purposes, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Plaintiffs argue that Movants cannot satisfy these requirements because their members have not yet suffered an injury in fact. Pl.'s Opp'n at 6. In particular, Plaintiffs emphasize that any injury to Movants' members would only occur, if at all, when Plaintiffs were awarded the relief requested in their Complaint. *Id.* According to Plaintiffs, because "there is no way of

knowing what the effects of any relief granted would have on Movants or even what, if any, relief will be granted," Movants cannot establish standing at this stage of the litigation. *Id.* Moreover, even if Plaintiffs were awarded the relief sought and the interests of Movants' members were threatened, Plaintiffs argue that the EPA would have to promulgate new regulations and that Movants "would be given a chance to comment on those proposed regulations." *Id.* at 7. These arguments are not persuasive.

To establish injury, the Movants need not show that they have *already* suffered an injury as Plaintiffs' arguments suggest, but rather, that the outcome of the litigation *would* cause a concrete and imminent injury if Plaintiffs prevail and receive their requested relief. The D.C. Circuit's analysis in *Fund for Animals v. Norton*, 322 F.3d 728 (D.C. Cir. 2003) is illustrative. In that case, the plaintiffs filed suit against the Secretary of the Interior and the Director of the Fish and Wildlife Service, alleging that they violated the Endangered Species Act and the Administrative Procedure Act by failing to list the argali sheep as an endangered species in several countries including Mongolia, and by issuing permits to hunt and import argali "trophies" into the United States. *Id.* at 730-31. The country of Mongolia, through its Natural Resources Department of the Ministry of Nature and Environment ("NRD") sought to intervene, arguing that it had standing because

> fees paid by sport hunters are the primary source of funding for its argali conservation program. If the [plaintiffs] succeed[] in barring American hunters from bringing their trophies home, some hunters will not travel to Mongolia to hunt the argali, and the revenues that support the conservation program will decline.

Id. at 733. The D.C. Circuit explained that the NRD's argument was "persuasive" because these threatened losses would constitute a "concrete and imminent injury" and "a decision favorable to

the NRD would prevent that loss from occurring." *Id.* *See also Military Toxics Project v. EPA*, 146 F.3d 948, 952-54 (D.C. Cir. 1998) (holding that the intervenors "*would* suffer concrete injury *if* the court granted the relief the petitioners [sought]" in a suit to overturn an EPA rule) (emphasis added).

The same analysis applies in this case. Movants are membership organizations representing point source dischargers to the Chesapeake Bay. Movants' Mot. at 6-8. Plaintiffs' Complaint specifically seeks an Order requiring the United States to develop and implement various environmental programs, including those "designed to significantly reduce nitrogen, phosphorous, and sediment discharges from all point sources within the Bay Watershed" and "prevent backsliding on point source reductions via strong point source permits and enforcement." *Id.* at 40-41. If Plaintiffs are ultimately successful and the Court orders such relief, the interests of point source dischargers such as Movants' members would clearly be affected because they would be required to comply with any new restrictions that would arise following the Court's Order.

Plaintiffs' argument that Movants could challenge later regulatory proceedings that may occur is irrelevant. The D.C. Circuit has explained that "[i]t is not enough to deny intervention . . . because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977). *See also Fund for Animals*, 322 F.3d at 736 ("[r]egardless of whether the NRD could reverse an unfavorable ruling by bringing a separate lawsuit, there is no question that the task of reestablishing the status quo if the [plaintiffs] succeed[] in this case will be difficult and burdensome"). The present litigation is an appropriate forum for Movants to seek to protect their

interests, and the fact that they could participate in later regulatory proceedings is an insufficient reason to deny their intervention.

B. The EPA May Not Adequately Represent Movants' Interests in this Case

The Movants have met the minimal burden of showing that their interests "may" not be adequately represented in this litigation. The United States Supreme Court has explained that the showing required for this element is "minimal," *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972), and the D.C. Circuit has described it as "not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Here, the Movants have satisfied this minimal showing 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. Movants' Mot. at 18. *Cf. Fund for Animals*, 322 F.3d at 736 (finding this element satisfied where one could "imagine how the interests [of the defendants and intervenors] might diverge during the course of litigation").

Based on the foregoing, the Court finds that Movants have satisfied all of the elements necessary to intervene in this case as Defendants as a matter of right. The Court nevertheless remains cognizant of Plaintiffs' concerns that this lawsuit is primarily focused on the EPA's obligations under Section 117 of the CWA and the Chesapeake Bay agreements and not specifically issues related to point source dischargers. To ensure that this lawsuit does not become unnecessarily sidetracked, the Court shall grant Movants' Motion to Intervene but shall also prohibit the Movants from raising claims outside the scope of those raised by the original parties or from raising collateral issues. *Cf. Fund for Animals*, 322 F.3d at 738 n. 11.

Accordingly, it is, this 29th day of September, 2009, hereby

ORDERED that the [18] Motion to Intervene as Defendants as of right filed by the Maryland Association of Municipal Wastewater Agencies, Inc., the Virginia Association of Municipal Wastewater Agencies, Inc., the Virginia Municipal Stormwater Association, Inc., and the Storm Water Association of Maryland (collectively, "Movants") is GRANTED; it is further

ORDERED that the Movants are prohibited from raising claims outside the scope of those raised by the original parties or from raising collateral issues; and it is further

ORDERED that the original parties shall confer with Movants concerning Movants' [24] Motion for Order to Participate in Settlement Discussions. If the original parties and Movants cannot reach an agreement as to this Motion, the original parties shall respond to the Motion no later than October 9, 2009.

SO ORDERED.

Date: September 29, 2009

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

Attachment 3

Not Reported in F.Supp., 1993 WL 332061 (E.D.Pa.)
(Cite as: 1993 WL 332061 (E.D.Pa.))

United States District Court, E.D. Pennsylvania.
Hilary KOPROWSKI, M.D.
v.
The WISTAR INSTITUTE OF ANATOMY AND BIOLOGY, et al.

No. CIV. A. 92-CV-1182.
Aug. 19, 1993.

Richard A. Sprague, Christine M. Gallagher, H. Coleman Switkay, Sprague & Sprague, Philadelphia, PA, for Hilary Koprowski, M.D.

William H. Oldach, Lynne Delanty Spencer, Pepper, Hamilton & Scheetz, Lloyd R. Ziff, Melinda P. Rudolph, John G. Harkins, Jr., Harkins Cunningham, Philadelphia, PA, for Wistar Institute of Anatomy & Biology.

Lynne Delanty Spencer, Pepper, Hamilton & Scheetz, Lloyd R. Ziff, Melinda P. Rudolph, John G. Harkins, Jr., Harkins Cunningham, Philadelphia, PA, for Robert A. Fox, Giovanni Rovera, M.D.

Robert D. Balin, Lankenau, Kovner & Kurtz, New York City, for Tom Curtis, Straight Arrow Publishers, Inc., Jann S. Wenner.

NEWCOMER

MEMORANDUM

NEWCOMER, District Judge.

***1** Presently before the Court is a Motion to Intervene by Straight Arrow Publishers, Inc., Jann S. Wenner and Tom Curtis ("intervenors"), for the limited purpose of modifying the confidentiality agreement contained in the settlement agreement of this case. Plaintiff, Hilary Koprowski, M.D., opposes this motion. For the following reasons, the motion will be granted.

I. *Background:*

On February 11, 1992, Hilary Koprowski, M.D. filed this action against the Wistar Institute, alleging that his removal as Director of Wistar violated the Age Discrimination in Employment Act, the Pennsylvania Human Relations Act, and his employment contract with Wistar. Extensive discovery took place. During that time, no protective orders or confidentiality agreements were in place. In April 1993, Dr. Koprowski and Wistar entered into a settlement agreement. In their settlement agreement, the parties agreed to maintain as confidential any and all discovery information generated in the action between them. This settlement agreement was approved and entered of record by an Order of this court, dated June 9, 1993.

This motion to intervene arises out of a subsequent libel action filed by Dr. Koprowski against the intervenors, which is pending in this Court, No. 92-CV-7431 ("the libel action"). The intervenors seek access to Dr. Koprowski's deposition transcript generated in this recently-settled case ("the Wistar action"). To the extent that this specified transcript is the subject of a confidentiality agreement, intervenors seek to modify the agreement to provide that, subject to the continuing terms of the agreement, intervenors shall be granted access to Dr. Koprowski's deposition transcript, as generated in the Wistar action.

II. *Discussion:*

Numerous courts have recognized permissive intervention under Federal Rule of Civil Procedure 24(b) to be a proper method for a non-party to challenge a confidentiality agreement or protective order by limited intervention for discovery purposes. *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 472 (9th Cir.1992), *cert. denied sub nom. International Ins. Co. v. Bridgestone/Firestone, Inc.*, 113 S.Ct. 197 (1992); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir.1988) (Rule 24 is correct course for third parties to challenge protective orders), *cert. denied*, 488 U.S. 1030 (1989); *United Nuclear*, 905 F.2d 1424, 1427 (10th Cir.1990), *cert. denied sub nom. American Special Risk Ins. Co. v. Rohm & Haas Co.*, 498 U.S. 1073 (1991); *Meyer Goldberg, Inc., of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir.1987) (recognizing 24(b) intervention as proper method for nonparty to seek protected discovery materials); *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624, 627 (S.D.Iowa 1993) (Rule 24 is widely recognized method to seek modification of a protective order). When

a non-party seeks permissive intervention for this limited purpose, no independent jurisdictional basis is required as that party does not intend to litigate on the merits or seek to become a party to the action. *Beckman*, 966 F.2d at 473; *Jochims*, 148 F.R.D. at 627. Rather, jurisdiction is derived from the fact that this court approved the confidentiality agreement, and, therefore, this court retains the power to modify it. *United Nuclear*, 905 F.2d at 1427 (court retains the power to modify protective order even if underlying suit is dismissed).

***2** The permissive intervention rule is to be construed liberally "with all doubts resolved in favor of permitting intervention." Fed.R.Civ.P. 24. The appropriate standard to be applied when modification of a protective order or confidentiality agreement is sought by an intervening party is set forth in *Jochims*, 148 F.R.D. at 630 (quoting *Wilk v. Amer. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir.1980)):

[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order. (citations omitted).

This standard is consistent with the purpose of the federal rules to "secure the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1. Courts have favored promotion of full disclosure through discovery to meet the needs of parties in pending litigation. *See, e.g.*, *Beckman*, 966 F.2d at 475.

Accordingly, in applying the *Wilk* standard, a court must weigh potential prejudice, if any, against the benefits of modification of the confidentiality agreement. *Jochims*, 148 F.R.D. at 630-31; *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 139 F.R.D. 102, 106 (E.D.Mich.1991); *Meyer Goldberg*, 823 F.2d at 163. Here, plaintiff argues that he has a right to expect privacy in discovery, and that he relied on this anticipated confidentiality as a condition to settlement of the Wistar action. Intervenors counter that no confidentiality agreement was in force during pre-trial discovery and litigation, but rather, a blanket agreement came into being at settlement.

The extent to which a party can rely on a protective order or confidentiality agreement should depend on the extent to which the order induced the party to allow discovery or to settle the case. *Beckman*, 966 F.2d at 475. In this case, intervenors maintain that plaintiff submitted to his Wistar deposition without any provision for a protective order, and therefore, the confidentiality agreement was not an inducement to the offering of the testimony at issue here. Additionally, intervenors argue that the inducement to settle was the anticipated protection from public dissemination. Here, intervenors have already agreed to use the information in accordance with the protective order in the Wistar action, and, therefore, the threat of dissemination is not present. Plaintiff's reliance in this regard would not be undermined.

Furthermore, plaintiff has not alleged specific prejudice or harm, and has not contested intervenors' proposed conformity with the confidentiality agreement restrictions as insufficient. Under the circumstances, access to the transcript could be granted without causing harm to the privacy interests of plaintiff. Moreover, any potential prejudice to plaintiff is diminished, if not eliminated, by the fact that the information will be subject to the same restrictions as those contained in the original confidentiality agreement.

***3** The potential benefits to intervenors from modification of the confidentiality agreement-against which must be weighed plaintiff's potential prejudice-is the saving of time and expense which may be achieved by avoiding duplicative discovery. *See Jochims*, 148 F.R.D. at 630-31; *United Nuclear*, 905 F.2d at 1428. Plaintiff denies that legitimate interests of the intervenors would be advanced for discovery purposes, arguing that there are no common issues between the two actions. Nevertheless, "[w]hile it is true that the information sought must have some legitimate and relevant use in the collateral litigation, the facts do not need to be identical for this Court to allow access to the protected material." *Kerasotes*, 139 F.R.D. at 106; *see also United Nuclear*, 905 F.2d at 1427 ("no particularly strong nexus of fact or law need exist between the two suits"); *Beckman*, 966 F.2d at 474.

The intervenors seek information to aid in their discovery process, and to avoid undue delay and expense through engaging in duplicative discovery. Under the federal discovery rules, any information that is relevant or is calculated to lead to admissible evidence is discoverable. Fed.R.Civ.P. 26(b)(1). Some of the issues and facts about which plaintiff was deposed in the Wistar action will probably be the subject of inquiry in the libel action. [FN1] In the court's opinion, this information could lead to admissible or relevant evidence in the intervenors' case. Therefore, the intervenors' need for the protected information is justified, and outweighs potential prejudice to the secrecy interests of plaintiff.

Given the reasonableness of the intervenors' request for disclosure, and the absence of a showing that plaintiff's secrecy interests would be harmed, this court concludes that the deposition testimony of plaintiff taken in the Wistar action is discoverable for purposes of the libel action, subject to the restrictions of the original confidentiality agreement.

III. *Conclusion:*

Accordingly, the intervenors' Motion to Intervene will be granted, and the confidentiality agreement previously approved in this litigation shall be modified to allow the intervenors access to Dr. Koprowski's deposition transcript, subject to the restrictions of the original agreement.

> FN1. Intervenors assert, under plaintiff protest, that the following issues of the Wistar action are “highly relevant” to the libel action: Dr. Koprowski's competence and performance; Dr. Koprowski's status as a public figure; and Dr. Koprowski's work method with regard to the polio vaccine trials. This court does not believe that in-camera review of the transcript, as proposed by plaintiff and assented by intervenors, is necessary to determine that the protected information could lead to relevant or admissible evidence in the libel action.

E.D.Pa.,1993.
Koprowski v. Wistar Institute of Anatomy and Biology
Not Reported in F.Supp., 1993 WL 332061 (E.D.Pa.)

END OF DOCUMENT

Attachment 4

Not Reported in F.Supp.2d, 2005 WL 1677975 (E.D.Pa.)
(Cite as: 2005 WL 1677975 (E.D.Pa.))

United States District Court,
E.D. Pennsylvania.
CSX TRANSPORTATION, INC.
v.
CITY OF PHILADELPHIA

No. Civ.A. 04-CV-5023.
July 15, 2005.

Benjamin C. Dunlap, Jr., Nauman Smith Shissler & Hall, LLP, Harrisburg, PA, for CSX Transportation Inc.

Christopher I. McCabe, City Solicitor's Office, Philadelphia, PA, for City of Philadelphia.

MEMORANDUM AND ORDER

KAUFFMAN, J.

***1** On October 26, 2004, CSX Transportation, Inc. ("CSX"), a Virginia corporation with its principal place of business in Florida, brought suit against the City of Philadelphia ("the City") seeking to enforce a contract related to a parcel of land directly east and adjacent to the Schuylkill River, which is known as the Schuylkill River Park ("Park"). This tract of land is bordered on the west by the River and on the east by active railroad tracks owned and operated by CSX. Complaint at 2. In brief, CSX claims that the City has a contractual obligation to erect a permanent barricade across two city streets that run across its tracks to the River (Race and Locust Streets), in order to prevent members of the public from using these roads to enter the Park. *Id.* at 3-4. On November 19, 2004, CSX moved for a preliminary injunction to force the City to construct such a barricade.[FN1] Currently before the Court is a Motion to Intervene in this suit brought by various individuals in the Philadelphia area who claim an interest in use of the Park (collectively "Movants"). For the reasons set forth below, this Motion will be denied.

FN1. Following a hearing on January 5, 2005, the parties requested that this Court hold the Motion for Preliminary Injunction to give them the opportunity for additional briefing and to conduct settlement negotiations.

I. Background

CSX claims breach of contract and promissory estoppel based on Construction and Acquisition Agreements entered into between CSX's predecessors in interest and the City in 1979, when the City first acquired certain parcels of land from the company for conversion into a park. *See* Complaint; Exhibit A; Exhibit B. The City defends this action by arguing: (1) to the extent that the relevant contracts so compel, it has already constructed an effective barricade across these streets, meaning that there is no breach of contract; and (2) to the extent that any agreement mandates that the streets be closed entirely, it is *ultra vires* and unenforceable, given that Race and Locust Streets are public streets over which the City has not surrendered its rights. Defendant's Opposition To Motion for Preliminary Injunction ("Opposition") at 9.

The Movants seeking to intervene in this suit include: (1) Free Schuylkill River Park, an unincorporated association of over one hundred City residents; (2) Logan Square Neighborhood Association, a Pennsylvania non-profit corporation with 300 members; (3) Bicycle Coalition of Greater Philadelphia, a Pennsylvania non-profit corporation with 1,500 dues-paying members; (4) Philadelphia Parks Alliance, a Pennsylvania non-profit corporation with over 700 members; (5) Darrell L. Clarke, City Council representative for the 5th District of the City of Philadelphia; (6) Jack Kelly, City Council at-large member; (7) Anna C. Verna, City Council representative for the 2nd District and City Council President; (8) Babette Josephs, elected member of the state House of Representatives, representing the 182nd District of the Commonwealth; and (9) Vincent J. Fumo, elected member of the state Senate, representing the 1st Senatorial District. Movants seek intervention and press counterclaims against CSX based on their use, or their members' use, of the Park, and the Race and Locust Street entrances.

II. Intervention as of Right

***2** Movants claim intervention as of right or, in the alternative, request permissive intervention. In-

tervention as of right is governed by Federal Rule of Civil Procedure 24(a)(2), which entitles a party to intervene if: (1) the application is timely; (2) the applicant has a sufficient interest in the litigation; (3) that interest may be impaired by the disposition of the action; and (4) that interest is not adequately represented by an existing party in the litigation. *See, e.g., Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir.1987). If a party fails on one prong of this test, there is no entitlement to intervention. *Id.; Sch. Dist. of Philadelphia v. Pennsylvania Milk Mktg. Bd.*, 160 F.R.D. 66, 68 (E.D.Pa.1995). Here, there is no dispute that Movants have made a timely application, so this Court's analysis will focus on the issues of interest, impairment, and adequacy of representation.

A. *Interest in the Litigation*

As an initial matter, CSX argues that Movants do not have Article III standing and therefore should not be permitted to participate in this case. The Supreme Court has not definitely stated whether a party must meet the requirements of Article III standing for intervention by right at the district court level. *See Diamond v. Charles*, 476 U.S. 54, 68-69, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) (specifically reserving the question of "whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III"); *accord McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 233, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (recognizing question still open). The Courts of Appeals have diverged on this issue, *see Diamond*, 476 U.S. at 68 n. 21, and the Third Circuit has not indicated that Article III standing is necessary. *See In re Grand Jury*, 111 F.3d 1066, 1071 n. 8 (3d Cir.1997) (recognizing that parties have been deemed to meet the standard for intervention under Rule 24(a)(2) though they do not necessarily possess the requisite Article III standing, and declining to clarify the relationship between the two inquiries). There is no dispute that there is a justiciable controversy currently before the Court. As a result, this Court need not determine whether Movants meet the requirements of Article III; instead, the Court will focus on whether Movants have demonstrated the requisite interest under Rule 24.

Intervention by right under Rule 24(a)(2) requires a "significantly protectable" legal interest, which is direct, as compared to contingent or remote. *Diamond*, 476 U.S. at 68; *see also Harris*, 820 F.2d at 601 (stating party must cite a legal interest, as opposed to one of a general or indefinite nature); *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc. ("Mountain Top")*, 72 F.3d 361, 366 (3d Cir.1995). The Third Circuit has emphasized that this is a pragmatic analysis and that there is no set list of interests that qualify as sufficient for intervention. *See Kleissler v. U.S. Forest Service*, 157 F.3d 964, 969-70 (3d Cir.1998). Interference with contract rights, direct economic interests, and the potential interference with free speech rights have all been deemed sufficient interests for intervention. *Id.* at 972. "[I]ntervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought." *Id.* A group has the requisite interest to bring suit provided that its members do. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc. ("Laidlaw")*, 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997).

***3** The interest claimed by Movants in this case is the legal right to use and enjoy the Park and River, and the right to maintain unimpeded access to these public trust assets over at-grade public streets. In response, CSX argues that there is no threat to the Movants' enjoyment of the River or Park merely by closing certain Park entrances (since others will remain open), and that the alleged injury is merely less convenient access to the Park.

Movants' asserted interest in the use of Race and Locust Streets, and the right to use these streets to access a public park, would seem to represent a sufficient legally cognizable interest. It is well established that the "highways belong to the commonwealth in trust for the great body of the people." *Hindin v. Samuel*, 158 Pa.Super. 539, 45 A.2d 370, 372 (Pa.Super.1946); *see also Chestnut Hill & Mt. Airy Bus. Men's Ass'n v. City of Philadelphia*, 87 Pa. D. & C. 209, 221 (Pa.Com.Pl.1954). Although one of the ultimate issues of this case is whether these public streets have been vacated or whether the City has otherwise pledged to barricade them, there is no serious dispute that members of the public ordinarily have a right to the use and enjoyment of these streets. Furthermore, analogizing to situations where courts have found sufficient standing to sue (which similarly requires a direct and concrete interest), Movants' asserted interest in access to and use of the Park would

seem to be sufficient for purposes of intervention. Several of Movants have averred that they use the Race and Locust Street entrances to the Park, and that their access to the Park would be impeded by CSX's proposed barricade. *Cf.* *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (recognizing legally cognizable interest in the aesthetic or recreational potential of parks and other public spaces); *Laidlaw*, 528 U.S. at 181-82 (finding averments of use of river sufficient to demonstrate injury flowing from potential pollution of river). Thus, the reduction of access to and enjoyment of the Park and River stemming from the closing of certain streets, coupled with the legal interest members of the public have in access to public streets, is a direct, concrete interest, which will permit intervention in this suit. *Cf.* *Kleissler*, 157 F.3d at 970.

However, recognition of such an interest does not enable intervention by each of the Movants. Only to the extent that these organizations have averred that their members actually use the Race and Locust Street entrances to the Park is there evidence that their legal rights would be directly affected. *Cf.* *Sierra Club*, 405 U.S. at 735 (finding no injury in fact where party did not allege that member individuals were specifically among the injured, and further noting that injury must be one discernable from that suffered by the public at large); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Streater v. U.S. Dep't of Transp.*, 1996 WL 134807, at *5-6 (E.D.Pa. March 25, 1996) (ruling that increased bike or foot traffic in an area is not an injury specific to party and that party cannot merely assert the rights of others). Moreover, there is no basis for permitting intervention by right by public officials merely as a result of their official status. With the exception of Representative Babette Josephs, who asserts that she accesses the Park over the at-grade crossings, *see* Intervenors' Counterclaim at 2, none have averred that they even use the Park or that their direct, personal enjoyment of it will be somehow impeded by the outcome of this suit.[FN2] This Court has not been directed to a single case where a representative was permitted to intervene in a suit based exclusively on the interests of his or her constituents; to the contrary, cases have held that where a public official demonstrates only a general interest in the litigation, intervention is properly denied. *See, e.g.*, *Harris*, 820 F.2d at 602 (stating that where a public official demonstrates only a general interest in litigation, his motion to intervene should be denied); *cf.* *Arizonans for Official English*, 520 U.S. at 65.

FN2. Councilman Darrell L. Clarke represents that he uses the Park, but does not claim to access it through the Race or Locust Street entrances, or otherwise indicate how closing these entrances would directly affect him. Intervenors' Counterclaim at 2.

***4** In sum, the Court determines that the following groups and individuals have demonstrated a sufficient interest for intervention by right: Free Schuylkill River Park; Logan Square Neighborhood Association; Bicycle Coalition of Greater Philadelphia; Philadelphia Parks Alliance; and Representative Babette Josephs. *See* Affidavit of Richard D. Atkins, attached to Surreply on Behalf of Applicant Intervenors ("Surreply"); Affidavit of Edwin Bronstein, attached to Surreply; Affidavit of Russell Meddin, attached to Surreply; Intervenors' Counterclaim at 2. The Court will now proceed to examine the potential impairment of that interest and the adequacy of representation.

B. *Impairment of Interest*

To the extent that the Movants have an interest as described above, there is a real and substantial risk of impairment. The specific aim of CSX's suit is to force the City to barricade the portions of Race and Locust Streets that lead to the River. If CSX prevails, these roads will be shut down and Movants will be unable to use them to access the Park. Accordingly, there is a sufficient risk of impairment of interest to satisfy this prong.

C. *Adequacy of Representation*

Ultimately, however, Movants claim for intervention must fail because the City is adequately representing their interests in this suit. Representation can be considered inadequate on any of the following grounds: (1) although an intervenor's interests are similar to those of an existing party, they diverge sufficiently that the existing party cannot devote proper attention to the interests; (2) there is evidence of collusion between the representative party and the opposing party; or (3) the representative party is not diligently prosecuting the suit. *See* *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania ("Delaware Valley")*, 674 F.2d 970, 973 (3d Cir.1982); *Brody By & Through Sugzdinis v. Spang*, 957 F.2d 1108, 1123 (3d Cir.1992); *Rallis v.*

Trans World Music Corp., 1994 WL 52753, at *2 (E.D.Pa. Feb.22, 1994). The would-be intervenor bears the burden of showing that his interest is not adequately represented. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972).

Although the burden of demonstrating inadequacy is generally described as minimal, there is a presumption of adequacy when a governmental entity charged with representing the public or a policy is the existing party to a suit. *See* *Kleissler*, 157 F.3d at 970; *Delaware Valley*, 674 F.2d at 973-74; *United States v. City of Philadelphia*, 798 F.2d 81, 90-91 (3d Cir.1986). This presumption generally applies when a governmental agency brings suit, and is applicable when a government is acting in its capacity of sovereign, or representative of the people. *See, e.g.*, *Kleissler*, 157 F.3d at 970. However, an analogy to the present case is clear-if the government is charged with holding the streets in trust for the public, and preserving public access to the streets and parks, then there is no reason the government would not adequately represent the Movants' interests in this case. Indeed, although the City first answers the suit by claiming that it has no contractual obligation to barricade the streets, it further argues that the streets are held in trust for the public and, therefore, could not be barricaded by the relevant Construction and Acquisition Agreements. Opposition at 9. Furthermore, the closing of a public street is a matter of sovereign interest under Pennsylvania law and while the City is acting as a private party to a contract in this suit, it is also functioning as the sovereign, charged with holding and preserving the streets in trust for the public. *Cf.* *Delaware Valley*, 674 F.2d at 973 (holding that party charged by law with representing another party's interests will be deemed adequate).

***5** Finally, there is no indication that the interests of the City and Movants diverge in this case: both parties are seeking to maintain Race and Locust Streets as open, at-grade crossings into the Park. The City first defends against the suit on narrower grounds (initially arguing that it has no contractual obligation, and then, alternatively resting on the fact that the City could not contract to close public streets), and the Movants seek slightly different relief, but these superficial differences do not reflect any true divergence of interests. *Cf.* *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 987-88 (2d Cir.1984) (stating government representation will not be inadequate merely because citizens would seek more drastic or different relief); *Bumgarner v. Ute Indian Tribe of Uintah & Ouray Reservation*, 417 F.2d 1305, 1308 (10th Cir.1969) (declining to find inadequate representation where parties would have employed different tactics or handled a case differently). As a result, in the absence of any claims of collusion or a lack of a diligent defense, the convergence of the parties' interests leads this Court to conclude that the City is adequately representing the Movants in this litigation. Consequently, intervention as of right must be denied. *See Mountain Top*, 72 F.3d at 368-89 (describing comparison of interests as most important factor in gauging adequacy).

III. Permissive Intervention

Under Rule 24(b), a court may, in its discretion, permit a party to intervene if the applicant's "claim or defense and the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b); *F.T.C. v. Mercury Mktg. of Delaware, Inc.*, 2004 WL 2110686, at *2 (E.D.Pa. Aug.25, 2004); *Pennsylvania Milk Mktg. Bd.*, 160 F.R.D. at 67. Unlike in cases of intervention by right, when intervention is merely permissive, an intervenor must establish an independent jurisdictional basis for its claims. *Beach v. KDI Corp.*, 490 F.2d 1312, 1319-20 (3d Cir.1974); *Rallis*, 1994 WL 52753 at *3; 1 Federal Procedure, Lawyer's Edition § 1:37.

While there are common questions of law and fact in the present suit and claims brought by Movants, permissive intervention is not appropriate. First, it is not immediately clear what the basis for federal jurisdiction over Movants' claims would be, given that there is no federal cause of action and no amount in controversy has been specified. More importantly, however, given the number of Movants and the drastic nature of the relief sought, Movants' presence would inject undue complexity into the case and would hinder the speedy resolution of these issues between CSX and the City. *See* *Kleissler*, 157 F.3d at 970 (cautioning against intervention that would disrupt the focus of the litigation or render case management unduly complex); *Rollins Cablevue v. Saienni Enterprises*, 115 F.R.D. 484, 488 (D.Del.1986) (noting court must consider if intervention will unduly delay or prejudice the adjudication of the rights of the original parties); *see also* *Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir.1982) (ruling district court

within its right to deny permissive intervention where interests of applicant adequately represented by existing party). As a result, this Court will deny permissive intervention.

IV. Conclusion

***6** Based on the above analysis, this Court will deny both intervention as of right and permissive intervention. However, this Court will consider all filings up to this point by Movants as submissions of amicus curiae. *See* *Harris*, 820 F.2d at 603 (stating that even if third parties do not meet the requirements of intervention, their participation may be desirable to the extent it contributes to a better understanding of the case); *cf.* *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 131 (3d Cir.2002) (permitting amici submissions when applicants have a sufficient interest in the case, the brief is desirable, and the brief discusses matters relevant to the disposition of the case).

ORDER

AND NOW, this 15th day of July, 2005, upon consideration of the Motion for Intervention (docket no. 12), the Second Motion to Intervene (docket no. 22), the responses thereto, and following a hearing on January 5, 2005, it is ORDERED that the Motions are DENIED.

E.D.Pa.,2005.
CSX Transp., Inc. v. City of Philadelphia
Not Reported in F.Supp.2d, 2005 WL 1677975 (E.D.Pa.)

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Not Reported in F.Supp.2d, 2006 WL 3199145 (M.D.Pa.)
(Cite as: 2006 WL 3199145 (M.D.Pa.))

United States District Court,
M.D. Pennsylvania.
Karen CORBY, et al., Plaintiffs,
v.
SCRANTON HOUSING AUTHORITY and its Executive Director, David E. Baker, in his official capacity, Defendants.

Civil Action No. 3:04-CV-2523.
Nov. 3, 2006.

Andrew Hailstone, Kreder, Brooks, Hailstone & Ludwig, Scranton, PA, Kevin L. Quisenberry, Community Justice Project, Pittsburgh, PA, Laurence E. Norton, II, Community Justice Project, Harrisburg, PA, for Plaintiffs.

Paul K. Paterson, Mascelli & Paterson, Scranton, PA, for Defendants.

MEMORANDUM

A. RICHARD CAPUTO, District Judge.

***1** Presently before the Court is Joseph Pilchesky's Motion for Intervention in the above-captioned action (Doc. 82-1) and Complaint for Declaratory Judgment and Petition for Injunctive Relief (Doc. 83-1). For the reasons set forth below, Mr. Pilchesky's motion will be denied, and his complaint and petition will be dismissed without prejudice.

BACKGROUND

The facts of the underlying case are undisputed. The Scranton Housing Authority ("Housing Authority") owns and operates low income housing for residents of Scranton, Pennsylvania, including the Washington Plaza Apartments ("Washington Plaza"). The Housing Authority receives funds from the United States Department of Housing and Urban Development ("HUD"). For several years, the Housing Authority has planned to renovate and modernize Washington Plaza. The Housing Authority sought out and received funds from HUD to perform the modernization, and included such modernization in its five year plan. This plan called for all residents of Washington Plaza to vacate their apartments, thus permitting all buildings to be renovated and modernized simultaneously. Residents could choose to move to other Housing Authority developments, Section Eight housing, or private residences. The Housing Authority offered to compensate residents for the relocation. The plan further called for new residents to move into the units after they were reopened. On or about October 6, 2004, the Housing Authority sent residents a letter informing them that they had ninety (90) days to begin relocation. The letter also explained that information on relocation options and available housing could be obtained from a person on-site at Washington Plaza. Residents had already begun moving out by the time the underlying action was filed. (Doc. 47.)

On November 19, 2004, residents of Washington Plaza filed an Emergency Complaint and Motion for a Temporary Restraining Order and Preliminary Injunction against the Housing Authority and its Executive Director, David Baker. (Doc. 1.) The complaint alleged that the renovation plan violated the Uniform Relocation Assistance Act, 42 U.S.C. § 4601, *et seq.*, as well as the federal regulations governing HUD funded projects, 24 C.F.R. § 968.105, *et seq.*, and the Due Process Clause of the Fourteenth Amendment. On this same date, this Court held a hearing on the Motion for Temporary Restraining Order and Preliminary Injunction. After hearing testimony from both sides, the Court conditionally certified the plaintiffs as a class and issued a temporary restraining order enjoining the Housing Authority from displacing residents of Washington Plaza. (Doc. 6.) A hearing on the motion for a preliminary injunction was initially scheduled, but was continued to a later date with the hope that the parties would reach a settlement. (Docs. 10 and 11.) After several months of negotiations, the parties informed the Court that settlement was not possible. (Doc. 22.)

A hearing on the preliminary injunction was then held on April 18, 2005. On June 7, 2005, the Court certified the class of residents of Washington Plaza who resided there since the Housing Authority's initiation of negotiations with HUD for modernization funds ("Class Plaintiffs"). (Doc. 47.) The Court also granted plaintiff-residents' motion for a preliminary

injunction, enjoining the Housing Authority from relocating or displacing any residents of Washington Plaza until such time as the Housing Authority complies with the Uniform Relocation Assistance Act and the federal regulations governing HUD-funded projects. *Id.*

***2** On September 2, 2005, Class Plaintiffs filed a Motion for Temporary Restraining Order and Supplemental Preliminary Injunction, seeking to enjoin the Housing Authority from filling vacant apartments at Washington Plaza. (Doc. 49-1.) On September 7, 2005, a hearing was held on the motion, at which both parties presented testimony. (Doc. 52.) The next day, the Court granted Class Plaintiffs' motion, enjoining the Housing Authority from filling vacant apartments at Washington Plaza. (Doc. 55.) Upon motion by Class Plaintiffs, on May 25, 2006, the Court entered a permanent injunction to the same effect as its prior temporary restraining order and preliminary injunctions. (Doc. 70.)

On August 30, 2006, Class Plaintiffs and the Housing Authority jointly moved the Court to amend its May 25, 2006 Order. (Doc. 78-1 .) In their joint motion, the parties explained that, in May of 2006, Mr. Paul S. Smola, Director of Architecture for KBA Engineering, P.C., the architectural and engineering firm hired by the Housing Authority to perform Phase I of the Housing Authority's renovation project for Washington Plaza, notified the Housing Authority by letter that potential building code violations existed at Washington Plaza related to the lack of fire protection systems. (Doc. 78-1 ¶ 1.) Mr. Smola also stated in his letter that he had contacted Mr. William Fiorini, Director of the City of Scranton Department of Permits, Licensing and Inspection, to perform a physical inspection of Washington Plaza. *Id.* Mr. Fiorini conducted a physical inspection of the premises in July of 2006, concluding that Washington Plaza lacked appropriately-rated fire separation walls. (Doc. 78-1 ¶¶ 2-3.) By letter dated July 13, 2006, Mr. Fiorini informed the Housing Authority that, as a temporary remedy, it must install hard-wired interconnected fire and smoke detectors in all crawl spaces, in the vicinity of all bedrooms, within all bedrooms, on all first floor levels and in the attics of the buildings, within thirty (30) days or else he would have no choice but to condemn the property. (Doc. 78-1 ¶ 3.) Mr. Fiorini further stated that, as long-term renovations moved forward, the Housing Authority would need to obtain a permit within six (6) months to permanently correct the noted violations and bring Washington Plaza into compliance with the current building codes. *Id.* On August 23, 2006, Mr. Fiorini sent a second letter to the Housing Authority advising that, because repairs had not been commenced within the prescribed thirty (30) day time period, the Housing Authority had until September 1, 2006, to make the necessary repairs or the City of Scranton would condemn Washington Plaza. (Doc. 78-1 ¶ 5.) The Housing Authority requested and received a brief extension to the September 1, 2006, condemnation deadline until Friday, November 10, 2006. (Doc. 78-1 ¶ 7.)

On September 1, 2006, the Court granted the parties' joint motion (Doc. 80). In its Amended Order, the Court directed the Housing Authority to: (1) provide a temporary remedy for the exigent health and safety issues related to the lack of fire protection systems at Washington Plaza; (2) see to the expedient relocation of all residents into suitable, affordable, decent, safe and sanitary replacement housing; and (3) set the framework for negotiation of long-term redevelopment goals for the property as public housing or similarly affordable housing. (Docs. 78 and 80.)

***3** On September 26, 2006, Joseph Pilchesky filed a Motion for Intervention (Doc. 82-1) and Complaint for Declaratory Judgment and Petition for Injunctive Relief (Doc. 83-1). Therein, Mr. Pilchesky complains that it is "an irresponsible waste of taxpayer funds to needlessly relocate residents" of Washington Plaza (Doc. 83-1 p. 11), and that, as a taxpayer, he has an economic interest in ensuring that the Housing Authority performs the repairs necessary to avoid the condemnation of Washington Plaza by the City of Scranton (Doc. 82-1 ¶ 44). Mr. Pilchesky cites the Donated or Dedicated Property Act, 53 PA. STAT. ANN.. §§ 3381-3386,[FN1] and the Public Trust Doctrine, as set forth in *Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania*, 96 A. 123 (Pa.1915),[FN2] in support of his motion to intervene in this matter.

> FN1. The Donated or Dedicated Property Act provides that lands and buildings donated or dedicated to a political subdivision shall be deemed to be held by the political subdivision, as trustee, for the benefit of the public. 53 PA. STAT. ANN.. § 3382. Jurisdiction is vested in the Orphans' Court to resolve dis-

putes involving the use of dedicated property. *See* 53 PA. STAT. ANN.. §§ 3384-3385. Donated or dedicated property does not include lands or buildings acquired by a political subdivision by purchase. 53 PA. STAT. ANN.. § 3386.

FN2. I n *Philadelphia Museums*, the Supreme Court of Pennsylvania held, first, that the City of Philadelphia was without the power to convey property which it had previously dedicated to the public, as it held the property in trust for the public's benefit, and, second, that a taxpayer had standing to sue to set aside the City's unlawful conveyance of the dedicated property. 96 A. at 126.

DISCUSSION

Rule 24 of the Federal Rules of Civil Procedure provides for a person's intervention into an existing action. There are two distinct types of intervention-intervention as of right, *see* FED.R.CIV.P. 24(a), and permissive intervention, *see* FED.R.CIV.P. 24(b).[FN3]

FN3. The Court notes that Rule 24(c) imposes several procedural requirements with which an applicant must comply before being permitted to intervene as of right or permissively. *See* FED.R.CIV.P. 24(c). First, an applicant must identify the type of intervention sought-intervention as of right, under Rule 24(a), or permissive intervention, under Rule 24(b). *See Gaskin v. Pennsylvania*, 231 F.R.D. 195, 196 (E.D.Pa.2005). Next, an applicant must file a motion stating the grounds for his proposed intervention. FED.R.CIV.P. 24(c). Lastly, the motion "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." *Id.* Mr. Pilchesky has complied with these procedural requirements.

A. Intervention as of Right

Rule 24(a) governs an applicant's intervention as of right, providing that:

> Upon timely application anyone shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED.R.CIV.P. 24(a)(2). Courts within the Third Circuit apply a four-part test to determine whether an applicant may intervene in an action as of right. An applicant is entitled to intervene as of right when: "(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." *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir.1987), *cert. denied*, 484 U.S. 947 (1987) (citation omitted). The applicant bears the burden of demonstrating that he has met all four prongs of this test. *See United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 n. 9 (3d Cir.1994). If a party fails on any one prong of this test, he is not entitled to intervene as of right. *Sch. Dist. of. Phila. v. Pa. Milk Mktg. Bd.*, 160 F.R.D. 66, 68 (E.D.Pa.1995). The Court's analysis will focus on whether Mr. Pilchesky has a sufficient interest in the litigation.

Intervention as of right under Rule 24(a)(2) requires an interest "relating to the property or transaction which is the subject of the action" that is "significantly protectable." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). This legal interest must be direct, as compared to contingent or remote. *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *see also Harris*, 820 F.2d at 601 (stating that an intervenor must cite a legal interest, as opposed to one of a general or indefinite nature). "[I]ntervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir.1998).

***4** Here, Mr. Pilchesky cites the Donated or Dedicated Property Act, 53 PA. STAT. ANN.. §§ 3381-3386, and the Public Trust Doctrine, as set forth in *Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania*, 96 A. 123 (Pa.1915), in support of his right to intervene. Mr. Pilchesky argues that, as a taxpayer, he has an economic interest in ensuring that the Housing Authority

performs the repairs necessary to avoid condemnation. Mr. Pilchesky also complains that it is "an irresponsible waste of taxpayer funds to needlessly relocate residents" of Washington Plaza.

The Court is of the opinion that Mr. Pilchesky's interest as a taxpayer does not entitle him to intervene as of right under Rule 24(a). The interest of a taxpayer in government funds is too "indeterminable, remote, uncertain and indirect" to entitle him to challenge "their manner of expenditure." *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 433 (1952). Indeed, Mr. Pilchesky's grievance as a taxpayer is merely one that he "suffers in some indefinite way in common with the people generally." *Frothingham v. Mellon*, decided with *Mass. v. Mellon*, 262 U.S. 447, 488 (1923).

Mr. Pilchesky's reliance upon the Donated or Dedicated Property Act ("Act"), 53 PA. STAT. ANN.. §§ 3381-3386, and the Public Trust Doctrine, as set forth in *Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania*, 96 A. 123 (Pa.1915), does not alter the Court's conclusion. Indeed, by its very terms, the Act only applies to lands or buildings donated or dedicated to a political subdivision for the benefit of the public; the Act does not apply to lands or buildings acquired by a political subdivision by purchase. 53 PA. STAT. ANN.. §§ 3382 and 3386. Here, Mr. Pilchesky does not allege that Washington Plaza was donated or dedicated to the City of Scranton to be held in trust for the benefit of the public. Rather, Mr. Pilchesky states that Washington Plaza was purchased by the Housing Authority. The fact that federal funds were used to purchase Washington Plaza does not transform it into donated or dedicated property held in trust for the benefit of the public under the Act. As such, the Act and the Public Trust Doctrine do not apply.

Consequently, Mr. Pilchesky does not have a sufficient interest in this matter to entitle him to intervene as of right. Accordingly, the Court will deny Mr. Pilchesky's motion to intervene as of right pursuant to Rule 24(a).

B. Permissive Intervention

Rule 24(b) governs permissive intervention, providing that:

> Upon timely application anyone may be permitted to intervene in an action ... when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED.R.CIV.P. 24(b). The Court has discretion under Rule 24(b) to grant or deny an application for permissive intervention. *Id.; see also Hoots v. Pennsylvania*, 672 F.2d 1133, 1135-36 (3d Cir.1982).

***5** The requirements that an applicant must meet in seeking permissive intervention are: (1) an independent basis of subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action. *In re Linerboard Antitrust Litig.*, 333 F.Supp.2d 333, 338-39 (E.D.Pa.2004); *see also EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C.Cir.1998); *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir.1992). As Mr. Pilchesky fails to satisfy the first requirement, the Court will address it alone.

The first requirement for permissive intervention is that the applicant has an independent basis for subject matter jurisdiction. *Linerboard*, 333 F.Supp.2d at 338; *EEOC*, 146 F.3d at 1046; *Beckman*, 966 F.2d at 473; *see also Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1319 (7th Cir.1997); *Int'l Paper Co. v. Inhabitants of Town of Jay, Me.*, 887 F.2d 338, 346 (1st Cir.1989); Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice & Procedure* § 1917 (1986 & Supp.2005). That is, the applicant must have Article III standing. *See* FED.R.CIV.P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts").

Here, Mr. Pilchesky, as a taxpayer, clearly lacks Article III standing. *See Mass. v. Mellon*, 262 U.S. 447 (1923) (taxpayer challenging propriety of certain federal expenditures lacked Article III standing); *Doremus*, 342 U.S. 429 (same); *U.S. v. Richardson*, 418 U.S. 166 (dismissing for lack of standing a taxpayer suit challenging the federal government's failure to disclose the expenditures of the Central Intelligence Agency, as the suit rested upon an impermissible generalized grievance); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (dismissing for

lack of standing a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, § 6, cl. 2, for Members of Congress to hold commissions in the military reserves, as the suit involved only a generalized grievance).

As previously stated, the Donated or Dedicated Property Act and Public Trust Doctrine do not apply because Washington Plaza was acquired by the Housing Authority by purchase. To be sure, even if the Act did apply, Mr. Pilchesky's proper relief is in the Pennsylvania Orphans' Court. *See* 53 PA. STAT. ANN.. §§ 3384 and 3385.

Consequently, the Court will deny Mr. Pilchesky's motion for permissive intervention pursuant to Rule 24(b).

CONCLUSION

In light of the foregoing, the Court finds that Mr. Pilchesky does not satisfy the requirements imposed by Rule 24 of the Federal Rules of Civil Procedure. Accordingly, his motion to intervene will be denied, and his complaint and petition will be dismissed without prejudice.

An appropriate Order will follow.

ORDER

NOW, this *3rd* day of November, 2006, **IT IS HEREBY ORDERED** that Joseph Pilchesky's Motion for Intervention (Doc. 82-1) is **DENIED** and his Complaint for Declaratory Judgment and Petition for Injunctive Relief (Doc. 83-1) is **DISMISSED** without prejudice.

M.D.Pa.,2006.
Corby v. Scranton Housing Authority
Not Reported in F.Supp.2d, 2006 WL 3199145 (M.D.Pa.)

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