IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD AND WATER WATCH **1616 P Street, NW, Suite 300** **Washington, DC 20036, and** **FRIENDS OF THE EARTH** **1100 15th Street, NW, 11th Floor** **Washington, DC 20005** **Plaintiffs** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY** **1200 Pennsylvania Ave., NW** **Washington, DC 20460, and** **LISA JACKSON, Administrator,** **U.S. Environmental Protection Agency** **1200 Pennsylvania Ave., NW** **Washington, DC 20460** **Defendants** **and** **NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES** **1816 Jefferson Place N.W.** **Washington DC 20036, and** **VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC.** **6 South 5th Street** **Richmond, VA 23219, and** **VIRGINIA NUTRIENT CREDIT EXCHANGE ASSOCIATION, INC.** **6 South 5th Street** **Richmond, VA 23219, and** **MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC.**	)	**Case No. 1:12-cv-01639-RC** **(Judge Contreras)**

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PARTNERSHIP)
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Richmond, VA 23219, and)
Proposed Intervenors)
_____)

MUNICIPAL CLEAN WATER ASSOCIATIONS'
MOTION TO INTERVENE AS DEFENDANTS

The National Association of Clean Water Agencies, the Virginia Association of Municipal Wastewater Agencies, Inc., the Virginia Nutrient Credit Exchange Association, Inc., the Maryland Association of Municipal Wastewater Agencies, Inc., the North Carolina Water Quality Association, Inc., the West Virginia Municipal Water Quality Association, Inc., and the CSO Partnership, Inc. d/b/a the Wet Weather Partnership (collectively, "Municipal Clean Water Associations,") 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.

Undersigned counsel certifies that counsel for each other party was contacted, seeking concurrence in this motion pursuant to LCvR 7(m) of the Local Rules of Court of the United States District Court for the District of Columbia. Plaintiffs do not oppose this motion. Defendant takes no position on the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2012, a true and correct copy of the foregoing document was delivered to the Clerk of court via electronic mail at dcd_cmecf@dcd.uscourts.gov.

I further certify that on December 4, 2012, a true and correct copy of the foregoing document was mailed by First-Class Mail, postage prepaid, and sent by electronic mail to the following participants, addressed as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD AND WATER WATCH and FRIENDS OF THE EARTH **Plaintiffs** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA JACKSON, Administrator,** **Defendants** **and** **NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC., VIRGINIA NUTRIENT CREDIT EXCHANGE ASSOCIATION, INC., MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC., NORTH CAROLINA WATER QUALITY ASSOCIATION, INC., WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION, INC., AND CSO PARTNERSHIP, INC. d/b/a WET WEATHER PARTNERSHIP** **Proposed Intervenors**	**Case No. 1:12-cv-01639-RC** **(Judge Contreras)**

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"), the Virginia Association of Municipal Wastewater Agencies, Inc. ("VAMWA"), the Virginia Nutrient Credit Exchange Association, Inc. (the "Virginia Exchange"), the Maryland Association of Municipal Wastewater Agencies, Inc. ("MAMWA"), the North Carolina Water Quality Association, Inc. ("NCWQA"), the West Virginia Municipal Water Quality Association, Inc. ("WVMWQA"), and the CSO Partnership, Inc. d/b/a the Wet Weather Partnership (the "Partnership") (collectively, "Municipal Clean Water Associations," "Municipal Associations" or "Movants") respectfully submit this Memorandum in Support of their Motion to Intervene as defendants.

In their Complaint challenging the pollutant trading provisions of the United States Environmental Protection Agency's ("EPA's") Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment (the "Chesapeake Bay TMDL"), Plaintiffs specifically challenge EPA's authorization of pollutant credit trading, including EPA's requirement for and authorization of the use of offsets for new or expanded sources of the pollutants nitrogen and phosphorus (each a "nutrient" and collectively, "nutrients") under the Chesapeake Bay TMDL.

Movants seek to intervene to protect and defend the rights of their members to engage in, or to continue engaging in, pollutant credit trading pursuant to the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.,* for purposes of compliance with their federal or state-issued National Pollutant Discharge Elimination System ("NPDES") permits to operate their wastewater treatment plants ("WWTPs") and regulated municipal separate storm sewer systems ("MS4s").

Many of Municipal Associations' members are parties to nutrient trading contracts or are otherwise engaged in nutrient trading in the Chesapeake Bay watershed, while other members

participate in trading programs for other watersheds throughout the nation. Some of Municipal Associations' members are engaged in trading pollutant reduction credits to comply with NPDES permit limits applicable to discharges from their ***existing*** facilities. Many such members have made long-term planning decisions regarding capital projects at these facilities, entered into trading contracts, upgraded or deferred upgrading WWTPs based in part on pollutant credit trades with third parties, and expended and continue to expend public funds related trading. They have done so based on EPA's longstanding support and approval of pollutant credit trading under the CWA, which is the target of Plaintiffs' lawsuit.

In addition, members of Municipal Associations are engaged in, or will be required to engage in, trading to offset increases in pollutant loads associated with ***new or increased*** discharges typically associated with economic development and population growth. Where the current pollutant loading to the receiving water for such a discharge already equals or exceeds the maximum loading that the waterbody can assimilate without exceeding water quality standards, the ability to offset pollutant load increases by trading with other sources of the pollutant is an important if not essential option for protecting water quality while also continuing to provide centralized sewer service.

One of Movants – the Virginia Exchange – itself is actively and directly engaged in nutrient trading as a market aggregator and facilitator of the largest nutrient credit trading program in the Chesapeake Bay watershed, and perhaps nationally. Plaintiffs' attack on the Chesapeake Bay TMDL's pollutant credit trading provisions is a direct threat to this trading program, which is a major element of the Commonwealth of Virginia's Chesapeake Bay TMDL Watershed Implementation Plan and the related compliance strategies established by many

owners of WWTPs in Virginia, most of which are actively trading through the Virginia Exchange under existing contracts.

As further explained below, 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)(B). If the Court determines otherwise, Movants request that they be granted amicus status in this litigation.

II. STATEMENT OF FACTS

A. National Association of Clean Water Agencies

NACWA is a national nonprofit trade association representing the interests of the nation's publicly-owned wastewater and stormwater utilities. NACWA's voluntary membership is made up of nearly 300 municipal clean water agencies located across the country that collectively serve the majority of the sewered population of the United States. 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, including pollutant credit trading.

NACWA's clean water agency members are NPDES permittees. Some NACWA members participate in nutrient trading programs, while others expect to be able to do so in the future. Nearly 20 of NACWA's clean water agency members are located within the Chesapeake Bay watershed, and many are actively involved in pollutant credit trading under the Chesapeake Bay TMDL's provisions authorizing trading, which are at issue in this litigation. Other NACWA members are located in States outside of the Chesapeake Bay watershed, engage in pollutant credit trading or may do so in the future, and have a significant interest in the outcome of this case, which challenges the legality of trading under the federal CWA.

B. Virginia Association of Municipal Wastewater Agencies

VAMWA is a nonprofit, nonstock corporation incorporated under the laws of the Commonwealth of Virginia. VAMWA's voluntary membership includes 62 local governments, wastewater authorities and sanitation districts that own and operate municipal WWTPs throughout Virginia. For over 20 years, VAMWA has worked for the reduction and elimination of water pollution through the application of sound science and good policy. VAMWA's membership serves approximately 95 percent of Virginia's sewered population, including business and industrial customers. Forty-nine of VAMWA's members own or operate WWTPs that discharge highly-treated wastewater within the Chesapeake Bay watershed pursuant to state-issued NPDES permits known as Virginia Pollutant Discharge Elimination System ("VPDES") permits, and these WWTPs are subject to the Chesapeake Bay TMDL, including its trading authorization provisions. Many VAMWA members are also members of the Virginia Exchange and are actively engaged in and rely upon nutrient trading through the Virginia Exchange, as discussed below.

C. Virginia Nutrient Credit Exchange Association

The Virginia Exchange is a nonprofit, nonstock corporation incorporated under the laws of the Commonwealth of Virginia. The Virginia Exchange's voluntary membership is comprised of owners of 72 regulated municipal WWTPs and industrial facilities located in Virginia and discharging within the Chesapeake Bay watershed. The Virginia Exchange coordinates and facilitates nutrient credit trading among its members with the goal of improving water quality in the Chesapeake Bay watershed efficiently and cost-effectively.

The Commonwealth of Virginia enacted enabling legislation for its Chesapeake Bay Watershed Nutrient Credit Exchange Program (the "Virginia Trading Program") in 2005. H.B.

2862, 2005 Sess., 2005 Virginia Laws Ch. 710 (codified at Va. Code § 62.1-44.19:12 *et seq.*). The Virginia General Assembly found that this market-based, predominantly point source nutrient credit trading program and associated watershed general permit (described below) would assist in (a) meeting pollution reductions and cap load allocations "cost-effectively and as soon as possible in keeping with the 2010 timeline and objectives of the Chesapeake 2000 Agreement, (b) accommodating continued growth and economic development in the Chesapeake Bay watershed, and (c) providing a foundation for establishing market-based incentives to help achieve the Chesapeake Bay Program's nonpoint source reduction goals." Va. Code § 62.1-44.19:12.

Pursuant to this statutory authority, the Virginia Exchange was organized in 2005 "to coordinate and facilitate participation in the nutrient credit exchange program" by its members. Va. Code § 62.1-44.19:17 (statutory authorization of the Virginia Exchange). Today, the Virginia Exchange is actively engaged in nutrient trading with its members having traded over four million nutrient credits in 2011 alone. In addition, contractual commitments are in place between and among the Virginia Exchange and its members for trades through the Virginia Exchange over the next five years, from 2012 through 2016.

Also pursuant to this statutory authority, the Virginia State Water Control Board and the Virginia Department of Environmental Quality issued an NPDES permit known as the General VPDES Watershed General Permit for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia (the "Watershed General Permit"). Va. Code. § 62.1-44.19:12 - :19; 9 Va. Admin. Code § 25-820-10. NPDES permits are typically reissued every five years, and the current Watershed General Permit was reissued in 2011 for a five-year term from January 1, 2012 through December 31, 2016.

The Watershed General Permit establishes annual effluent loading limits for nitrogen and phosphorus for the more than 100 regulated facilities engaged in pollutant credit trading through the Virginia Exchange. The Watershed General Permit also establishes the conditions under which pollutant credits may be traded and, consistent with the Chesapeake Bay TMDL, authorizes regulated facilities to comply with their nutrient limits by acquiring nitrogen credits or phosphorus credits from another permitted facility, among other means. 9 Va. Admin. Code § 25-820-70 Part I J.

With the enactment of additional trading legislation in 2012 (S.B. 77 and H.B. 176, 2012 Spec. Sess., 2012 Virginia Laws Ch. 808), Virginia is expanding its program for certifying credits from various sources and has authorized additional categories of CWA-regulated facilities that may opt to use credits for VPDES compliance purposes, including regulated MS4s.

D. Maryland Association of Municipal Wastewater Agencies

MAMWA is a nonprofit, nonstock corporation incorporated under the laws of the State of Maryland. MAMWA's voluntary membership includes 23 owners and operators of WWTPs throughout Maryland. MAMWA works for the reduction and elimination of water pollution through the application of sound science and good policy. Most of the MAMWA members' facilities discharge highly-treated wastewater to the Chesapeake Bay or its tributaries pursuant to state-issued NPDES permits and are subject to the Chesapeake Bay TMDL.

MAMWA members' WWTPs are dependent upon pollutant credit trading for NPDES permit compliance pursuant to the State of Maryland's Point Source Strategy, which is a two-part plan to upgrade major WWTPs to state-of-the-art, enhanced nutrient removal ("ENR") technology to meet permit loading limits, and to remain under these loading limits over time

even while treating, with new or expanded facilities, the additional pollutant loads expected from growth and development.

To this end, in 2008 the Maryland Department of the Environment ("MDE") issued a policy document entitled *Maryland Policy for Nutrient Cap Management and Trading in Maryland's Chesapeake Bay Watershed*, *available at* http://www.mde.state.md.us/assets/document/NutrientCap_Trading_Policy.pdf, which represented the initial phase of the State's policy development on nutrient trading (the "Phase I Policy"). MDE's Phase I Trading Policy is in accordance with and in furtherance of the Chesapeake Bay TMDL's trading provisions at issue in this litigation. Similarly, in April 2008 the Maryland Department of Agriculture issued the requirements and procedures for point-nonpoint agricultural trading in two draft documents: *The Maryland Policy for Nutrient Cap Management and Trading in Maryland's Chesapeake Bay Watershed Phase II A—Guidelines for the Generation of Agricultural Nonpoint Nutrient Credits*, *available at* http://www.mdnutrienttrading.com/docs/Phase%20II-A_Crdt%20Generation.pdf, and *Phase II B—Guidelines for Agricultural Nonpoint Credit Purchases*, *available at* http://www.mdnutrienttrading.com/docs/Phase%20II-B_Crdt%20Purchase.pdf (collectively, the "Phase II Trading Policy"). The Phase II Trading Policy provides a mechanism for agricultural sources to generate nutrient credits that can be acquired by NPDES-regulated point sources and other interested buyers, and describes how credits may be exchanged between buyers and sellers.

Currently, the State of Maryland is in the process of developing other state water quality-related policies that rely heavily on pollutant credit trading to offset growth-related impacts. MAMWA seeks to protect the ability of its Members to engage in trading under the Chesapeake Bay TMDL in accordance with state policy.

E. North Carolina Water Quality Association

NCWQA is a nonprofit corporation incorporated under the laws of the State of North Carolina. NCWQA's voluntary membership is comprised of 33 owners of public water, sewer, and stormwater utilities throughout North Carolina, serving a significant majority of the sewered population in the state. NCWQA's primary purpose is to ensure that state and federal water quality programs are based on sound science and policy in order to protect public health and the environment in the most affordable and cost-effective manner possible. Some NCWQA members have been engaged in pollutant credit trading activities for years through trading associations such as the Tar/Pamlico Basin Association and the Neuse River Compliance Association.[1] NCWQA members are concerned that a successful challenge to the trading component of the Chesapeake Bay TMDL by the Plaintiffs based on the federal CWA will result in a national domino effect, leading to the wholesale dismantling of long-standing nutrient credit trading programs in North Carolina.

F. West Virginia Municipal Water Quality Association

WVMWQA is a nonprofit, nonstock corporation incorporated under the laws of the State of West Virginia. WVMWQA's voluntary membership is comprised of 37 owners of publicly owned treatment works throughout West Virginia. WVMWQA's primary purpose is to ensure that West Virginia's water quality programs are based on sound science and regulatory policy so that its members can protect public health and the environment in the most cost-effective manner possible. At least one current WVMWQA member is located within the Chesapeake Bay watershed. Although no trading program yet exists in West Virginia, the State received federal

[1] Additional information about the Tar/Pamlico Basin Association is available at http://portal.ncdenr.org/web/wq/ess/eco/coalition/tpba. Additional information about the Neuse River Compliance Association is available at http://lnba.net/.

grant money to develop a nutrient trading program, and WVMWQA members are interested in having the option to engage in nutrient trading to meet NPDES compliance requirements.

G. Wet Weather Partnership

The Partnership is a national nonprofit association whose voluntary membership is comprised of localities and governmental authorities and districts with combined sewer systems. The Partnership seeks environmentally responsible solutions to urban wet weather issues in a fiscally prudent manner, and is dedicated to ensuring that federal and state water quality regulatory programs are scientifically based, affordable, and cost-effective. The Partnership's membership includes several localities located in States within the Chesapeake Bay watershed, and some of these members are actively trading nutrients. Other members are located in States outside of the Chesapeake Bay watershed, but either participate in trading or may choose to do so in the future so long as trading continues to be permissible under the federal CWA.

H. The Municipal Associations' Participation in Prior Chesapeake Bay-Related Restoration Planning Activities and Related Litigation

Some of Municipal Associations have long been and continue to be active participants at the federal and state levels in legislative, administrative and judicial activities affecting Chesapeake Bay water quality policies for municipal wastewater and stormwater infrastructure. For example, members and representatives of VAMWA and MAMWA have served on the EPA Chesapeake Bay Program's Water Quality Goal Implementation Team (water quality criteria development, maximum loading determination and state-basin allocations) and related subcommittees and on the Virginia and Maryland Chesapeake Bay TMDL Stakeholder Advisory Committees for Watershed Implementation Plans. Additionally, VAMWA and MAMWA each submitted comments on EPA's Draft Chesapeake Bay TMDL, dated September 24, 2010.

In the courts, this case is only the latest litigation in a line of cases beginning in 1998 regarding the cleanup of the Chesapeake Bay pursuant to the CWA's TMDL Program, and some of Movants have been involved in these cases. 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 as a defendant in a nearly identical lawsuit in Maryland, and successfully sought dismissal of that case. Memorandum and Order, *Sierra Club v. EPA*, No. H-97-3838 (D. Md. Jan. 20, 1998) (Attachment 1 hereto).

In 2009, this Court granted intervention as of right to VAMWA and MAMWA in *Fowler v. EPA*, which was promptly resolved by a settlement agreement between EPA and the environmentalist plaintiffs under which EPA volunteered to establish the Chesapeake Bay TMDL by December 31, 2010, and which addressed a number of significant Chesapeake Bay regulatory policy issues. *See* Order Granting Motion to Intervene, *Fowler v. EPA*, No. 09-005-CKK (D.D.C. Sept. 29, 2009) (Attachment 2 hereto).

Most recently, in October 2011, NACWA, VAMWA and MAMWA intervened as of right in *American Farm Bureau Federation v. EPA* in support of the Chesapeake Bay TMDL's holistic "watershed approach" under which both point ***and nonpoint*** sources are assigned pollutant loading caps to improve the quality of water bodies that do not meet water quality standards. Memorandum and Order, *American Farm Bureau Federation v. EPA*, No. 1:11-CV-0067 (M.D. Pa. Oct. 13, 2011) (Attachment 3 hereto).

In all of the above cases, the courts routinely allowed Movants, as representatives of the facility owners subject to the regulatory decisions at issue, to intervene to protect their significant interests. For the further reasons presented below, Movants respectfully request this Court to grant their intervention as of right and allow their continued participation.

III. ARGUMENT

A. The Municipal Associations' Meet the Requirements of Rule 24(a) for Intervention as of Right

Movants are entitled to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2), which governs intervention as of right, and states in pertinent part:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). The District of Columbia Circuit has determined that intervention as of right depends upon the applicants' ability to satisfy five prerequisites: (1) the timeliness of the motion; (2) a showing of "adequate interest"; (3) a possible impairment of that interest; (4) a lack of adequate representation by the existing parties to the action; and (5) standing to sue. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003). Municipal Associations satisfy each of these five prerequisites.

1. The Municipal Associations' Motion is Timely

Under the circumstances, Movants have moved to intervene in this case in a timely manner. "[T]imeliness is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *U.S. v. American Tel. &*

Tel. Co., 642 F.2d 1285, 1295 (D.C. Cir. 1980) (granting intervention for purpose of appealing discovery order). Movants' Motion to Intervene is filed early in this litigation. EPA has not yet filed an answer or other responsive pleading to Plaintiffs' Complaint, nor has EPA yet produced the administrative record for the agency action at issue. Movants' intervention at this early stage in this action will not delay the original parties, and there will be no prejudice to any party from granting Movants' Motion to Intervene. Under these circumstances, Movants' Motion to Intervene is timely.

2. The Municipal Associations' Interests in Existing and Future Trading under Their Members' NPDES Permits and Contracts Are Adequate Interests

"[T]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (granting Wisconsin banking commissioner leave to intervene in challenge to legality of approval of national bank branches in Wisconsin). The interest need not be a direct one in the property or transaction at issue, provided that it is an interest that would be impaired by the outcome of the litigation. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967) (granting state, natural gas producer and natural gas distributor intervention in case challenging legality of natural gas pipeline sale). Movants' members' interests in the continuing legal viability of their pollutant credit trading activities – under NPDES permits and under contracts – in the Chesapeake Bay watershed and other watersheds meets the adequate interest requirement given in the subject matter of this litigation.

As explained above in the Introduction and its description of the prospective Intervenors, Movants' members are NPDES permittees. Many of Movants' members are currently engaged in pollutant credit trading under the Chesapeake Bay TMDL pursuant to NPDES permits and

trading contracts. Other members of Movants are located in the Chesapeake Bay watershed and may desire to, or under the policies of a given state may even be required to, engage in trading in the future to maintain compliance with their NPDES permits. Significantly, one of Movants, the Virginia Exchange, is directly engaged in pollutant credit trading under the Chesapeake Bay TMDL. Still other members whose facilities discharge in other watersheds are currently engaged, or in the future may choose to engage, in pollutant credit trading, and seek to protect and maintain the legality of this compliance method. It is this existing trading activity and similar, future trading activity that the Plaintiffs seek to eliminate by their lawsuit.

This lawsuit, if successful, will likely have two types of adverse impacts on Movants' members (and the Virginia Exchange directly): (1) regulatory impacts, for example, eliminating the typically more cost-effective option of implementing TMDLs and complying with associated NPDES permit limits by pollutant credit trading, and (2) impacts on existing trading contracts, for example, by declaring the subject matter of such contracts (trading to achieve NPDES compliance) to be unlawful under the CWA and eliminating the economic value of such contracts to credit buyers and sellers. These regulatory and contractual impacts are explained further below.

Under the Chesapeake Bay TMDL, the two key provisions impacting the scope and extent of any discharger's regulatory compliance obligations are (1) the TMDL's wasteload allocations establishing the maximum discharge of nitrogen and phosphorus from the facility and forming the basis for NPDES permit limits, and (2) the compliance options available to the facility owner to comply with such allocations under its NPDES permit. Trading is an important permit compliance option due to its demonstrated ability to reduce the cost of compliance. For example, the Chesapeake Bay Commission, which is comprised of legislators from the States of

Maryland, Pennsylvania and Virginia, has documented this fact in its report entitled *Nutrient Credit Trading for the Chesapeake Bay: An Economic Study* (May 2012), *available at* *http://www.chesbay.us/Publications/nutrient-trading-2012.pdf*. The experience of the Virginia Exchange, VAMWA and their members agrees with the Commission's findings related to the significance and economic importance of trading to the public.

The effect of Plaintiffs' lawsuit, if successful, would likely be to impair the ability of Movants' members (and the Virginia Exchange itself) to engage in trading in the Chesapeake Bay watershed for purposes of NPDES permit compliance and water quality protection, and, given the broad legal basis for Plaintiffs' Complaint, to impair the ability of Movants' members in other watersheds to engage in trading for such purposes.

These types of potential adverse regulatory impacts on the regulated community, including adversely impacting the terms and conditions of existing and future NPDES permits and Movants' members options for compliance therewith, are routinely found to meet the adequate interest requirement for intervention as of right. For example, in the only other challenge to EPA's Chesapeake Bay TMDL issued in December 2010, *American Farm Bureau Federation v. EPA*, Civil No. 1:11-CV-0067, the U.S. District Court for the Middle District of Pennsylvania granted the intervention motion of NACWA, VAMWA and MAMWA where Movants' members discharge "pursuant to their NPDES permit limits which are subject to the strategy established in the Bay TMDL." *See* Mem. Op. at 13 (Attachment 3 hereto). The same court also found that economic interests of NACWA, VAMWA and MAMWA in the outcome of the case, particularly their "capital investments in treatment upgrades," to be an adequate interest. The same facilities and the same TMDL cleanup plan are at issue here. The investments of some of Movants' members in upgrades to produce nutrient credits to trade to

other facility owners, and reliance of some of Movants' other members on the availability and acquisition of such credits for NPDES permit compliance is the same type of interest that was considered adequate for intervention as of right in *American Farm Bureau.*

In 2009 Bay-related litigation, this Court granted VAMWA and MAMWA's 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 hereto). As point source dischargers to the Bay watershed, VAMWA and MAMWA had an interest in the amount of nutrients their members were authorized to discharge. *See id*. at 2; *see also Sierra Club v. EPA*, 995 F.2d 1478, 1485-86 (9th Cir. 1993) ("[T]he 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.").

As mentioned briefly *supra* at 9-10, district courts in Maryland and Virginia have also recognized Movants' interests and have allowed them to intervene as of right under circumstances very similar to those here. For example, in an earlier TMDL-related case in Maryland, the court allowed MAMWA to intervene as of right in a case where plaintiff environmental groups sought to establish the obligation of EPA to develop TMDLs for impaired waters including the Chesapeake Bay and its tributaries. Memorandum and Order at 6, *Sierra Club v. EPA*, No. H-97-3838 (D. Md. Jan. 20, 1998) (Attachment 1 hereto). 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 would be affected by the future TMDLs. *Id*. at 8.

The Court may also consider Movants' economic interests in the outcome of this case. See *Kleissler v. U.S. Forest Service*, 157 F.3d 964 (3d Cir. 1998) at 973 (granting intervention in suit seeking injunction to halt all logging activity, finding movants' economic interest in future timber contracts represented a "strong" and "direct" economic interest in the outcome of the litigation); Memorandum and Order, *Sierra Club v. EPA*, No. H-97-3838 (D. Md. Jan. 20, 1998) (Attachment 1 hereto) (Memorandum and Order granting MAMWA's motion to intervene based in part on MAMWA's economic interest in suit seeking to compel EPA to develop TMDLs) (citing *United States v. City of Niagara Falls*, 103 F.R.D. 164, 166 (W.D.N.Y. 1984)).

A clear example of economic interests of the Movants relevant to the legal issues raised by Plaintiffs is the robust point source trading market in Virginia, which is conducted pursuant to the Virginia Exchange's multi-party Nutrient Credit Services Agreement and the operation of the Virginia Exchange. In addition to the interest of the Virginia Exchange and its members in the Virginia Exchange's own ongoing operations, members of Movants VAMWA, NACWA, and the Wet Weather Partnership actively trade nutrient credits in five major river basins through the Virginia Exchange contract. For example, in 2012, the Virginia Exchange and its members traded over 3.4 million nitrogen credits and 800,000 phosphorus credits. These credit exchanges represented an economic value of approximately $2 million based on the price credits transferred under the contract and the price schedule established thereunder. On information and belief, the economic value is known to be far greater considering the value of treatment plant upgrade sequencing and timing to those members and owners that are currently relying on credit acquisition in lieu of an immediate, costly ENR-level upgrade of their treatment facility. Further

information about this comprehensive trading program , including the contractual commitments of the owners of participating facilities, is available at http://www.deq.state.va.us/Portals/0/DEQ/Water/PollutionDischargeElimination/2012_ExchangeCompliancePlan_AnnualUpdate.pdf.

Movants' economic interests in preserving their capital investments in treatment upgrades, the economic value of their sales and purchases of nutrient credits, and their ability to accommodate growth by offsetting additional pollutant loads are substantial and, as discussed in the following section, may be directly affected by the outcome of the litigation.

3. Plaintiffs' Requested Relief Would Impair the Municipal Associations' Interests

Under the third prong of Rule 24(a)'s intervention inquiry, a party must demonstrate that the possible disposition of the litigation "may as a practical matter impair or impede" its ability to protect its interests. Fed. R. Civ. P. 24(a)(2). The Advisory Committee Notes for the 1966 Amendments to Rule 24(a) explain: "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 n.3 (1967) (citing Advisory Committee notes; superseded on grounds unrelated to the rules of intervention), *superseded by statute*, Act of Dec. 21, 1974 (amendment of 15 U.S.C. § 29), *as stated in United States v. Am. Tel. & Tel. Co.*, 714 F.2d 178, 180-81 (D.C. Cir. 1983).

Plaintiffs allege broadly that "[a]ny pollution trading between and among sources is not authorized under the CWA," Complaint ¶ 69 (First Claim for Relief); and request a declaration by this Court that "the trading provisions of the TMDL are in violation of the Clean Water Act and are null and void," *id*. at ¶ 101 (Prayer for Relief). If granted, EPA would be required to remove the nutrient trading provisions from the Chesapeake Bay TMDL. Further, given the

broad legal basis of the Complaint – the federal statute – there are serious potential national ramifications of a judgment in Plaintiffs' favor. Given the existing trading activities of Movants as described *supra* at pages 3 to 9 (Statement of Facts) and the further reasons set forth in Section A. 2. of the Argument *supra* at pages 11 to 16, elimination of the Chesapeake Bay TMDL's trading authorization as requested by Plaintiffs would clearly impair the interests of Movants and their members. Existing and successful trading programs nationwide are at risk of being eliminated or severely constrained to the detriment of Movants' members, their water quality improvement efforts and, in Virginia, the Virginia Exchange itself. More specifically with respect to Movants' members, those that have invested in treatment facilities to generate credits risk a loss in value of those investments to the extent of lost credit value, while others who have acquired or plan to acquire credits will be compelled to meet the same pollutant reductions by more costly methods.

4. EPA Does Not Adequately Represent the Municipal Associations

An intervenor-applicant need only make the minimal showing that an existing representation "may be" inadequate in order to satisfy the "inadequate representation" standard for intervention as of right. *Trbovich v. United Mine Works of America*, 404 U.S. 528, 538 n.10 (1972) (Secretary of Labor could not adequately represent union members in suit challenging union election). As this Court previously held, "merely because parties share a general interest in the legality of a program or regulation does not mean their particular interests coincide so that representation by the agency alone is justified." *American Horse Protection Ass'n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001) (USDA could not adequately represent horse advocacy group in suit challenging legality of horse "soring" practice). Similarly, the Court of Appeals for the District of Columbia Circuit found that the U.S. Fish and Wildlife Service ("FWS") could not

adequately represent the "more narrow and parochial" interests of the country of Mongolia in litigation challenging the FWS' listing and importation obligations with respect to foreign species of sheep, even though both entities were involved in efforts to conserve the sheep species and were attempting to defend the legality of the same Endangered Species Act regulation. *Fund for Animals v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003). "[E]ven 'a shared general agreement . . . does not necessarily ensure agreement in all particular respects,' . . . and '[t]he tactical similarity of the present legal contentions of the [parties] does not assure adequacy of representation or necessarily preclude the [intervenor] from the opportunity to appear in [its] own behalf.'" *Id.* (*quoting Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir.1977); *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967)).

Although EPA shares Municipal Associations' interest in clean water, the two play vastly different roles. EPA is the federal regulatory agency responsible under the CWA for regulating point source discharges of pollutants such as occurs by the ordinary and proper operation of WWTPs and MS4s. The Municipal Associations' members own and operate these facilities and are subject to EPA regulation and enforcement.

With respect to trading in particular, as a federal agency with national jurisdiction, EPA has a general interest in trading based on its national clean water goals and an obligation to ensure that its regulatory programs are as efficient as possible. However, EPA, with such broad interests and its need to consider a wide range of interests held by diverse segments of the general public, cannot substitute for and represent the interests of the regulated community and its members. *See Trbovich*, 404 U.S. at 538.

In contrast to EPA, it is Municipal Associations' members who (1) "foot the bill" for meeting requirements established by EPA in the Chesapeake Bay TMDL and strive to minimize

the cost for their local ratepayers, (2) have financed capital upgrades to produce nutrient credits and stand to lose the value of those utility-specific investments, and (3) are relying on the acquisition of nutrient credits under existing contracts for the purpose of compliance at individual facilities and bearing the enforcement consequences of non-compliance in the event that such trades cannot be performed as a result of an adverse outcome in this lawsuit. Municipal Associations' interests are the type of more narrow, parochial interests that EPA cannot be assumed to represent. *See, e.g.*, *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (insurer permitted to intervene in action challenging the District of Columbia's no-fault insurance law).

Further, given the experience of their members (and the Virginia Exchange) as participants in existing trading markets, Municipal Associations certainly have the ability "to contribute to the informed resolution of . . . questions when, and if, they arise before the District Court." *See Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977) (granting rubber and chemical companies leave to intervene in case involving EPA's development of CWA regulations and noting that the intervenors were "likely to serve as a vigorous and helpful supplement to [agency's] defense.").

5. The Municipal Associations Have Standing

Article III standing requires injury-in-fact, causation and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Representational standing by associations such as Movants exists when (1) the "members would otherwise have standing to sue in their own right"; (2) the interests that the association "seek to protect are germane to the organization's purpose"; and (3) neither the claim asserted nor the relief requested requires participation in the lawsuit of the individual members. *Hunt v. Wash. State Apple Adv. Com'n*,

432 U.S. 333, 343 (1977). However, after questioning the need for defendant-intervenors (as opposed to parties bringing new claims) to show standing at all, the D. C. Circuit held that "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (United States granted leave to intervene in case brought by hostages against Iran). For the same reasons that Movants are entitled to intervene as of right under Rule 24(a), and in particular prong two (adequate interest) and prong three (relief sought would impair such interest) of the Rule 24(a) test as discussed above, Movants' member have standing in their own right. The CWA legal issues and resulting implications for the legality of trading as a TMDL implementation and NPDES compliance method are clearly germane to the water quality policy and protection purposes of each of Municipal Associations as explained *supra* at pages 11 to 13. Neither the claims asserted nor the relief requested by the Plaintiffs, which are directed at EPA and would require revision by EPA of its Chesapeake Bay TMDL, would require the direct participation of the individual members of Municipal Associations as parties. Therefore, representational standing by these leading associations is appropriate in this case.

B. Alternatively, Permissive Intervention Should Be Granted

If the Court does not find that Movants demonstrate the requirements for intervention as of right, Movants request permissive intervention under Federal Rule of Civil Procedure 24(b):

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b)(1). "Rule 24(b) . . . provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact." *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967). Although the rule speaks in terms of "claim or

defense," it is "not interpreted strictly so as to preclude permissive intervention." *Id.* Here, permissive intervention is appropriate even if the Court denies the Motion to Intervene as of right. As discussed above, Municipal Associations' Motion to Intervene is timely, and the legality of their existing and future trading activities is at issue in this litigation. Furthermore, intervention will not unfairly prejudice the parties, and the significance of this litigation on Municipal Associations' members weighs heavily in favor of allowing their participation as parties.

C. Amicus Status

If for any reason this Court denies one or more of Municipal Associations intervenor status for any portion, stage or claim of this litigation, Municipal Associations request that the Court allow them to file amicus briefs on the merits of this case, including in support of any motion to dismiss or for summary judgment.

IV. CONCLUSION

The Court should grant the Motion to Intervene as of right. If, however, this Court determines that Municipal Associations are not entitled to intervene as of right, Municipal Associations should be granted permissive intervention. As a final alternative, if Municipal Associations' Motion to Intervene is denied, this Court should allow Municipal Associations to participate as amicus curiae in this case.

DATE: December 4, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2012, a true and correct copy of the foregoing document was delivered to the Clerk of court via electronic mail at dcd_cmecf@dcd.uscourts.gov.

I further certify that on December 4, 2012, a true and correct copy of the foregoing document was mailed by First-Class Mail, postage prepaid, and sent by electronic mail to the following participants, addressed as follows:

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