IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VIRGINIA DEPARTMENT OF TRANSPORTATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:12-cv-00775-LO-TRJ
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

NAIOP Northern Virginia, the Commercial Real Estate Development Association ("NAOIP"); the National Association of Home Builders ("NAHB"); and the Northern Virginia Association of Realtors® ("NVAR")(collectively, "Movants"), by counsel, submit the following Memorandum in Support of their Motion to Intervene, and state as follows:

I. INTRODUCTION

Virginia Department of Transportation and the Board of Supervisors of Fairfax County, Virginia ("Plaintiffs") challenge the United States Environmental Protection Agency's ("EPA") approval and establishment of certain pollution caps, known as "total maximum daily loads" ("TMDLs") in the Accotink Creek Watershed (the "Accotink TMDL"). Plaintiffs allege that the EPA violated the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA") and the Administrative Procedure Act, 5 U.S.C. §551 *et seq.* ("APA") in approving TMDLs for benthic impairments that are based on the quantity or flow of water rather than baseline water quality standards.

NAIOP Northern Virginia, the Commercial Real Estate Development Association ("NAIOP"), is a consortium of over 700 Northern Virginia land owners, local developers, investors and asset managers headquartered in Alexandria, Virginia. The National Association of Home Builders ("NAHB") is a national trade association whose 140,000 members are involved in home building, remodeling, multifamily housing construction, property management, building product manufacturing, and other aspects of residential and light commercial construction. In Virginia, the affiliated associations include the Home Builders Association Virginia ("HBVA") and Northern Virginia Building Industry Association ("NVBIA"). HBVA has approximately 4,000 members operating throughout the Commonwealth of Virginia, including approximately 790 members of the NVBIA. The Northern Virginia Association of Realtors® ("NVAR") is a northern Virginia based trade association with approximately 10,000 members. NVAR's members include realtors and about 200 affiliate members which own, operate, sell, and develop property within the Accotink Creek Watershed. NVAR also owns real property within the Accotink Creek Watershed.

NAIOP, NHAB and NVAR are hereinafter referred to as the Movants.

Certain Movants' members and NVAR own or operate land within the Accotink Creek Watershed and which is covered by the Virginia Stormwater Management Program ("VSMP") General Permit for Stormwater Discharge. Such general permits incorporate and are subject to any active TMDL. Further, any member seeking to develop property that disturbs more than 2,500 square feet in the Accotink Watershed is required to obtain a VSMP general permit, which will be subject to the Accotink TMDL. NVAR owns and operates certain real property within the Accotink Watershed, and is the holder of a VSMP General Permit for Stormwater Discharge for the stormwater runoff resulting from the operation of his property.

As property owners and VSMP permit holders, which are subject to active TMDLs in Virginia, Movants will be required to abide by the unprecedented flow rate reductions mandated by the Accotink TMDL. As such, Movants have a substantial interest in the enforceability and applicability of the Accotink TMDL through which they seek to intervene in this litigation as a matter of right and file the Interveners' Complaint attached hereto as Exhibit A.

Alternatively, the Court should grant permissive intervention. There are common questions of law and fact between Movants' and Plaintiffs' claims. Intervention would promote judicial efficiency by reducing the prospects of future litigation by NAOIP to protect its interests and the interests of its members. As a representative of citizens and commercial real estate owners in Northern Virginia, Movants will provide the Court with a broader perspective on the impacts and appropriateness of the declaratory judgment and relief from the standpoint of landowners and developers in Northern Virginia. Further, as a property owner whose land will be directly affected by the Accotink TMDL, NVAR will offer a unique insight on the impact and import of the Accotink TMDL on those may be most affected by its enactment – private landowners.

II. PROCEDURAL POSTURE AND BACKGROUND.

On April 18, 2011, the EPA established and published the Accotink TMDL. Rather than focusing on the level of pollutants in the water stream, this unprecedented new EPA regulation seeks to control both the quantity and flow of the water in the Accotink Creek Watershed. On July 7, 2012, Plaintiffs filed a Complaint for Declaratory Judgment and Injunctive Relief on the grounds that the Accotink TMDL is *ultra vires*, arbitrary, capricious, and not in conformity with the CWA and APA. On September 11, 2012, Defendants filed an Answer to the initial Complaint, and on September 18, 2012, this Court issued its Initial Scheduling Order.

III. ARGUMENT

A. Movants are Entitled to Intervene in this Action as a Matter of Right.

Movants are entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Rule 24(a)(2) provides, in relevant part, that a movant is entitled to intervene in an action when it

> 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.

In the Fourth Circuit, a party seeking intervention as a right must demonstrate, that "(1) it has an interest in the subject matter of the action, (2) disposition of the action may practically impair or impede the movant's ability to protect that interest, and (3) that interest is not adequately represented by the existing parties." *Newport News Shipbuilding and Drydock Co. v. Peninsula Shipbuilders Ass'n.*, 646 F.2d 117, 120 (4th Circuit 1981).

1. Movants Have a Protectable Interest in this Litigation.

First, Movants claim an interest in the outcome of this litigation and the enforceability of the Accotink TMDL. In order to have sufficient interest to intervene as a matter of right, the inteverner must possess "a significantly protectable interest. To be protectable, the putative intervener's claim must bear a close relationship to the dispute between the existing litigants and therefore must be direct, rather than remote or contingent." *Cooper Technologies, Co. v. Dudas*, 247 FRD 510, 514 (E.D. Va. 2007) citing *Dairy Maid Dairy, Inc. v. U.S.*, 147 FRD 109 (E.D. Va. 1993) (internal citations omitted).

Here, many Movant members and NVAR own property within the Accotink Creek Watershed. The new flow-based TMDL will directly affect property owners who will be required to absorb significant expenses in implementing these unprecedented and *ultra vires* water quantity standards. Even more than Virginia government entities, it is the private citizens

and property owners in the Accotink Creed Watershed that will bear the cost and burden of implementing the EPA's new flow regulations. Any property owner who seeks to develop its site in manner that will affect more than 2,500 square feet of land in the Accotink Watershed is required to obtain a VSMP permit which must comply with all active TMDLs, including the Accotink TMDL. Therefore, Rule 24(a)(2) provides Movants the right to intervene in this important litigation to protect their private property rights and the cost of government imposed reduction of their stormwater discharge.

2. Disposition of this Litigation will Impair Movants' Ability to Protect their Rights.

Second, disposition of the current litigation will impair Movants' ability to protect their interest to be free from unlawful and *ultra vires* EPA standards and regulations. If this matter is adjudicated in a manner that is adverse to Movants, the precedential value of such a determination could be nearly impossible to overcome. Should the Defendants prevail in this matter, Movants would be foreclosed from litigating the crucial question of whether the EPA possesses the statutory authority to regulate the *quantity* of water in addition to the quality of water and amount of pollutants. Accordingly, it is crucial that Movants intervene in *this* litigation rather than through a subsequent lawsuit so that no adverse precedent can be established.

3. Movants' Interests are not Adequately Protect by State Government Plaintiffs.

Finally, the existing Plaintiffs cannot adequately represent Movants' objectives. This "requirement of Rule 24(a)(2) is satisfied if the applicant shows a representation of its interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Cooper Technologies Co.* at 515, *citing Trbovich v. United Mine Workers of America*, 404 U.S.

528, 538 n. 10 (1972). "There is good reason in most cases to suppose that the applicant is the best judge of the representation of his own interest and to be liberal in finding that one who is willing to bear the costs of separate representation may not be adequately represented by the existing parties." *Id.*, *citing* 7C Charles Alan Wright, Arthur R. Miller and Mary Kay Kane; Federal Practice and Procedure: Civil § 1909 (2nd Ed. 1986).

While both Plaintiffs and Movants seek to invalidate the same regulations, their interests do not coincide. Plaintiffs are government entities and political subdivisions of the Commonwealth. As the Fourth Circuit Court of Appeals commented, "even when a governmental agency's interests appear aligned with those of a particular private group at a particular moment in time, 'the government position is defined by the public interest, [not simply] the interests of a particular group of citizens.'" *JLS, Inc. v. Public Service Commission of West Virginia*, 321 Fed. Appx. 286, 290 (4th Cir. 2009), *citing Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986). This Court should consider that, "if Movants' intervention is denied, Plaintiffs could settle this case in a manner that could harm Movants' interests." *Id.* at 290-91.

Very simply, the existing Plaintiffs have no interest in protecting Movants from the undue cost or burden of the Accotink TMDL. Their interest is aligned with the public interest and the special interests of the Virginia Department of Transportation and Fairfax County. The existing Plaintiffs have no incentive to protect the rights and interests of private property owners.

More importantly, the existing Plaintiffs are primarily concerned with the effect of the Accotink TMDL on their Municipal Separate Storm Sewer Systems ("MS4s"). *See* ECF No 1, Compl. ¶¶ 6, 28-30, 46-42, 58-59, 88-96, 139-154, 179-187. Whereas the existing Plaintiffs' interest centers on the effect of EPA regulations on such public sewer systems, the Movants' primary concern relates to the Accotink TMDL's effect on private property owners who hold

general VSMP permits or plan to develop or redevelop land within 2,500 square feet of the Accotink Watershed. *See* Ex. A ¶¶ 45-47, 153-154. Furthermore, this Court is permitted consider whether "if Movants' intervention is denied, Plaintiffs could settle this case in a manner that could harm Movants' interests." *JLS, Inc*, 321 Fed. Appx. 290-91. In this case, the existing Plaintiffs may broker a deal that relates only to public sewer systems and MS4s while leaving private property owners subject to the onerous Accotink TMDL.

In addition, Movants have presented unique arguments and allegations regarding why the Accotink TMDL is arbitrary and capricious due to the improper soil classification used by the EPA. *Id.* ¶¶ 136-142. Lastly, Movants have asserted a new cause of action that the Accotink TMDL is void for vagueness because ordinary property owners cannot interpret either: (i) what baseline standard they must use for stormwater reduction and (ii) whether the reduction rate applies to the first 24-hours of a storm event or to the total volume of the event. *Id.* ¶¶ 143-152, 176-183. Accordingly, although their arguments often overlap, Movants and Plaintiffs will present unique claims as to how the Accotink TMDL affects their rights and interests and why the regulation is unenforceable.

In sum, Movants' have a discreet interest in this litigation that will not cannot be adequately protected by the existing Plaintiffs. Therefore, intervention as a matter of right warranted.

B. Movants Should be Permitted to Intervene.

Movants' motion satisfies this Court's requirements for intervention by right and should be granted. In the alternative, this Court should exercise its discretion and permit Movants to intervene for the discrete purpose of filing Complaint. In this Court, a party may be permitted to intervene pursuant to Rule 24(b)(2), at the discretion of the court, provided the motion is timely

and the applicant presents a question of law or fact in common with that presented by the litigation. *Hill Phoenix, Inc. v. Systematic Refrigeration, Inc.*, 117 F.Supp.2d 508, 515 (E.D.Va. 2000), *citing* Fed.R.Civ.P. 24(a)(2); *accord Newport News Shipbuilding and Drydock Co.*, 646 at 120; *Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976).

As described above, Movants contend that Accotink TMDL is unenforceable because it is *ultra vires*, arbitrary and capricious as it relates to private property owners, and void for vaguness. The existing Plaintiffs assert the regulation is invalid as it government entities and localities and their MS4s. In many ways, the parties' cases will hinge on similar questions of law and fact regarding the enforceability of the Accotink TMDL. Accordingly, this Court should promote judicial economy and allow Movants to permissively intervene so that all known issues arising out of the legality Accotink TMDL can be decided in one case.

In addition, Movants' request to intervene is timely. Whether a motion to intervene was timely must be determined based on all the circumstances. *See N.A.A.C.P. v. New York*, 413 U.S. 345, 366 (1973). The factors to consider include: (1) the point to which the suit has progressed at the time the motion to intervene is filed; (2) the length of time the applicant knew, or should have known, of the litigation before filing its motion to intervene; (3) and prejudice to existing parties that would result from allowing the intervention. See *id*. at 366- 69. The Fourth Circuit has stated that the most important factor in determining whether a motion to intervene is timely is the prejudice caused to the other parties by the delay. *See Spring Const. Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir.1980).

In this case, Defendants have only recently filed an Answer, and this Court issued its Initial Scheduling Order just one month ago on September 18, 2012. Further, according to the Initial Scheduling Order, discovery is not slated to close until January 11, 2012. *See* ECF No. 8,

Initial Sch. Ord. Thus, the case is still in infancy, and Defendants will not suffer prejudice by Movants' intervention.

IV. CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court grant their Motion to Intervene as a plaintiff in the above-listed case.

Dated: October 19, 2012

Respectfully submitted,

NAIOP Northern Virginia, the Commercial Real Estate Development Association;
National Association of Home Builders; and
Northern Virginia Association of Realtors®

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will then send a notification of such filing (NEF) to the following:

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