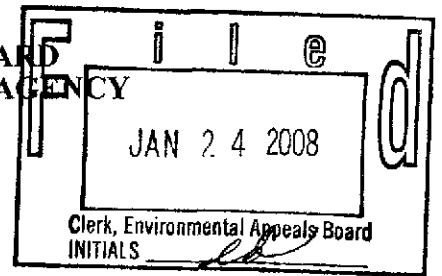


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In re:

District of Columbia Water and Sewer  
Authority

NPDES Permit No. DC0021199

NPDES Appeal Nos. 05-02, 07-10,  
07-11, 07-12

**ORDER DENYING MOTION FOR LEAVE TO INTERVENE**

By motion dated June 26, 2007, Friends of the Earth and Sierra Club (together, "FOE/SC") sought leave to intervene in Appeal No. 07-11, filed by WASA, and to respond to the issues raised therein. ("Motion to Intervene" or "Motion"). As detailed more fully below, on July 27, 2007, the Board issued an order in which it determined it was unnecessary to rule on FOE/SC's Motion to Intervene. *See* Order Granting Leave to Reply (July 27, 2007) at 4 n.5. However, in a filing dated three months later, FOE/SC renewed their request for the Board to decide their Motion to Intervene. *See* Clarification Regarding Motion of FOE/SC to Intervene in WASA Petition for Review (Oct. 30, 2007). For the reasons explained below, we hereby deny FOE/SC's Motion.

The procedural background relevant to this Motion to Intervene is as follows. Each of the above-captioned petitions seeks review of NPDES Permit No. DC0021199 (the "Permit"), which United States Environmental Protection Agency ("EPA") Region 3 (the "Region") issued to the District of Columbia Water and Sewer Authority ("WASA") to authorize the discharge of treated wastewater from WASA's Blue Plains Wastewater Treatment Plant. WASA filed Appeal No. 07-11 on May 7, 2007, seeking review of the total nitrogen effluent limit contained in the Permit, and the Region's decision not to include a compliance schedule for achievement of that limit in

the Permit. FOE/SC filed Appeal No. 07-12 on May 7, 2007, seeking review of the Permit conditions establishing water quality-based effluent limitations for combined sewer overflow discharges.<sup>1</sup>

In FOE/SC's Motion seeking leave to intervene in Appeal No. 07-11, they state that because they "did not seek review of the issues raised by WASA's petition [for review in Appeal No. 07-11], and are not named as parties in WASA's petition \* \* \* [, they] seek leave to intervene and for leave to file a response to WASA's appeal." Motion to Intervene at 2. FOE/SC also argue that they "have a substantial interest in WASA's petition for review \* \* \* and have demonstrated a longstanding and strong interest in ensuring that the permit is fully protective of water quality in the District [of Columbia]." *Id.* FOE/SC further assert that their interests are not adequately represented by the Region or WASA, and that absent their participation and opportunity to file a response to the Petition, their ability to protect their interests may be impaired. *Id.* at 3. In response, the Region states that it "takes no position with response [*sic*] to the present motion by [FOE/SC]." Response to Motion to Intervene (July 10, 2007) at 1. WASA has not submitted a response to FOE/SC's Motion.

On July 23, 2007, FOE/SC filed a motion requesting leave to reply to arguments raised by the Region and WASA with respect to its petition in Appeal No. 07-12. In a footnote to that motion, FOE/SC stated:

FOE/SC filed a motion for leave to intervene and to respond to the issues raised in WASA's petition [in Appeal No. 07-11]. That motion is awaiting decision by the Board. Based on a review of WASA's petition and [the Region's] response

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<sup>1</sup> Appeal No. 05-02 was filed by WASA and Appeal No. 07-10 was filed by the Chesapeake Bay Foundation. Neither of these petitions are relevant to our decision with respect to FOE/SC's current Motion.

thereto, FOE/SC have determined that it is not necessary to file a separate response to WASA's petition. However, FOE/SC request the Board to allow this response to serve as FOE/SC's reply to WASA's petition, to the extent the issues raised in WASA's petition overlap with the issues discussed herein.

FOE/SC's Motion for Leave to Reply (July 23, 2007) at 1. In light of this statement, the Board issued an order granting the request to file a reply and stating that "The Board interprets this statement to mean that FOE/SC's Motion for Leave to Reply supersedes its June 26, 2007 Motion for Leave to Intervene \* \* \*. Accordingly, \* \* \* it is unnecessary for the Board to rule on [FOE/SC's] Motion for Leave to Intervene." Order Granting Leave to Reply (July 27, 2007) at 4 n.5. However, in a filing dated three months later, FOE/SC state that "FOE/SC *did not* intend to withdraw their motion to intervene or suggest that their latter motion for leave to reply superseded their pending motion to intervene." Clarification Regarding Motion of FOE/SC to Intervene in WASA Petition for Review (Oct. 30, 2007) at 2.

Neither the EAB Practice Manual nor 40 C.F.R. part 124 specifically addresses the question of intervention, and the EAB Practice Manual addresses the filing of responses by non-parties only when that party is a permittee.<sup>2</sup> EAB Practice Manual § III.D.1 Accordingly, the Board exercises its discretion when deciding whether to grant intervention and non-party briefing. *See In re USGen New England, Inc.*, NPDES App. No. 03-12, at 8 n.13 (EAB Feb. 19, 2004). In previous cases, as well as the present case,<sup>3</sup> the Board has granted leave to intervene to

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<sup>2</sup> In arguing in favor of intervention, FOE/SC erroneously state that intervention in this proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. part 22. *See* Motion to Intervene at 2; 40 C.F.R. § 22.1 (setting forth the scope of part 22). In fact, permit appeals are governed under 40 C.F.R. part 124, specifically §124.19, and part III of the EAB Practice Manual.

<sup>3</sup>On June 12, 2007, WASA moved to intervene as a party respondent in Appeal 07-12. The Board granted this motion, explaining that the Board "generally allows the permit applicant to  
(continued...)

permittees, when supported by an appropriate motion. *See, e.g., In re Aurora Energy, L.L.C.*, NPDES Appeal No. 03-11, at 1 (EAB Oct. 21, 2003) (granting permittee's motion for leave to intervene); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 470 (EAB 2002) (explaining that permittee's motion to intervene and file response to petition was granted); *In re Haw. Elec. Light Co.*, PSD Appeal Nos. 01-24 through 01-29, at 1 (EAB Oct. 18, 2001) (granting permittee's motion to intervene and file a response to petitions for review). The Board is less inclined, however, to grant intervention to parties that are neither permittees nor permitting authorities. *See USGen* at 8 n.13; *see also In re Tenn. Valley Auth.*, CAA Docket No. 00-6 (EAB June 16, 2000) (denying environmental groups' motion to intervene, but granting leave to file non-party briefs).

By accepting FOE/SC's July 23, 2007 Reply in Appeal No. 07-12, which FOE/SC stated would also "serve as FOE/SC's reply to WASA's petition [in Appeal No. 07-11]" the Board has allowed FOE/SC's views on the issues raised by WASA in Appeal No. 07-11 to be heard. In addition, the Board notes that FOE/SC participated fully in a lengthy oral argument on November 15, 2007, in which all of the parties in the above-captioned petitions had the opportunity to express their views in one forum. Moreover, as the United States Court of Appeals for the First Circuit has noted in another case, involving the State of Rhode Island, in which the Board denied formal intervention but allowed the State to file a reply and participate in oral argument, denying formal intervention would not prejudice the person seeking intervention, because, as an "interested person," the person would have the opportunity to appeal from EPA's final permitting decision in federal court. The Clean Water Act's judicial review provisions ensure that the Board's denial of intervention would not curtail the interested person's right to appeal a final

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(...continued)

respond to a petition filed by a third party petitioner if the permit applicant has filed a request to respond." *See Order Granting Motion for Leave to Intervene* (June 15, 2007) at 2 (quoting EAB Practice Manual § III.D.1). WASA filed a response to FOE/SC's petition on July 6, 2007.

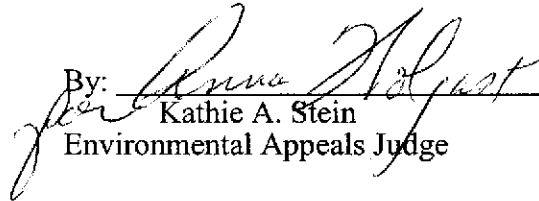
permitting decision. *See Rhode Island v. U.S. Env'tl. Protection Agency*, No. 04-1513, at 16-17 (1st Cir. Aug. 3, 2004) (order dismissing petition for judicial review).

In light of the above, the Board hereby denies FOE/SC's motion to intervene, with prejudice.

So ordered.

Dated: January 24, 2008

ENVIRONMENTAL APPEALS BOARD

By:   
Kathie A. Stein  
Environmental Appeals Judge

## CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Motion for Leave to Intervene, District of Columbia Water and Sewer Authority, NPDES Petition Nos. 05-02, 07-10, 07-11, and 07-12, were sent to the following persons in the manner indicated:

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Annette Duncan,  
Secretary