

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

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In re:	)	
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	)	
Government of the District of Columbia,	)	NPDES Permit Appeal No. 11-05
Municipal Separate Storm Sewer System,	)	
NPDES Permit No. DC 0000221	)	

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**REPLY OF FRIENDS OF THE EARTH, ET AL., IN SUPPORT OF THEIR  
MOTION FOR LEAVE TO INTERVENE AND TO FILE NONPARTY BRIEF**

Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc. (collectively, “Citizen Petitioners”) respectfully submit this reply in support of their motion to participate in the above-captioned appeal through the filing of their brief, lodged with the Board on July 6, 2012, and their participation in oral argument. For the reasons stated below, the arguments offered by District of Columbia Water and Sewer Authority (“DC Water”) and Wet Weather Partnership (“WWP”) in opposition to the motion (Dkt. 48) do not establish prejudice or serious delay, nor do they support the claim that Citizen Petitioners’ participation would be redundant.

**1. Allowing Citizen Petitioners to participate will not create prejudice or undue delay**

The Board’s Practice Manual (June 2012) specifically addresses non-party briefs, stating that in circumstances other than “where review has been granted,” “the Board exercises its discretion, where appropriate, to allow intervention and/or non-party briefing.” *Id.* at 46, *contra* DC Water/WWP at n. 2. Allowing Citizen Petitioners’ to intervene and submit a brief in this appeal is appropriate because they have a demonstrated interest in the targeted issue addressed in their proposed brief, and absent their participation Citizen Petitioners’ ability to protect that

interest may be impaired. At the same time, allowing Citizen Petitioners to file a brief and participate in oral arguments will not result in prejudice to DC Water or WWP's rights or ability to protect their own interests.

Although allegations of prejudice appear eight times in their reply in opposition (hereafter "Opp"), DC Water and WWP fail to offer an explanation of exactly *how* the filing of an additional brief in this case "prejudices resolution of this appeal." *See* Opp. at 3. They declare boldly that "[g]ranted the Citizen Groups party status in the case or accepting their brief at this time will be highly prejudicial to the Petitioners," yet in the same sentence DC Water and WWP identify a clear and simple way to address this purported problem: "a further extension of the briefing schedule for the Petitioners to have an opportunity to respond." *Id.* at 2-3.

Though admittedly Citizen Petitioners' motion to intervene and file a brief comes late in this appeal process, our request for leave to get involved at this juncture is not attributable to undue delay. Instead, it stems from the fact that DC Water and WWP for the first time in their June 14 reply attempted to make inappropriate inferences from Citizen Petitioners' settlement agreement with EPA, and to otherwise attack the settlement. Further, while the briefing process in this case has otherwise come to a close, the Board has not yet scheduled oral argument in this case and therefore the Citizen Petitioners reasonably concluded that there remains adequate time before the Board's issuance of its decision to allow for their filing of a targeted brief and for DC Water to file a reply.

Any resulting delay of the Board's decision resolving DC Water and WWP's appeal would be limited to a modest length of time required for those petitioners to file a reply to Citizen Petitioners' brief. (Indeed, DC Water and WWP could have further minimized any delay by filing a motion to reply and lodging their reply brief with the Board, rather than engaging in a

time-consuming argument over what will ultimately be a modest delay.) Moreover, because Citizen Petitioners' targeted brief does not raised any new issues beyond those raised in the petition in this appeal, and because DC Water and WWP have already addressed the relevant issue in their petition and their reply to EPA's response, *i.e.*, the issue of the legality of the permit's Consolidated TMDL Implementation Plan requirements, writing the reply should not be unduly burdensome.

**2. Citizen Petitioners' settlement agreement with EPA did not prejudice DC Water or WWP.**

Much of the opposition to Citizen Petitioners' participation in this appeal is devoted to an entirely unrelated and meritless grievance that DC Water and WWP have waged regarding the settlement agreement reached between the Citizen Petitioners and EPA as part of alternative dispute resolution ("ADR") in their case, NPDES Appeal 11-06. They allege that "behind [a] veil of secrecy, the Citizen Groups and EPA proceeded to settle certain issues that were not raised in the Citizen Groups' petition in NPDES Permit Appeal No. 11-06, and instead, were only raised in this appeal." Opp. at 3. This is preposterous, and in any event cannot support allegations of prejudice. Far from suffering prejudice to their right to adjudication of the issues raised in their petition, DC Water and WWP continue to press their objections to the challenged permit in this appeal notwithstanding the settlement agreement between Citizen Petitioners and EPA. This is appropriate (to the extent the objections are ripe and have been raised by a party with standing), given that the settlement agreement explicitly provides that "Petitioners and EPA have agreed to settle this action without any admission of fact or law." Dkt. 44 at 1. DC Water and WWP have identified no reason to believe the Board will withhold or limit adjudication of issues that touch on the agreed language modifications.

Moreover, to the extent that their opposition to intervention or non-party briefing is based on the “secrecy” of the ADR process, that objection is misplaced. The process by which the Citizen Petitioners and EPA reached the settlement in question was typical of such discussions, and did not deprive DC Water or WWP of their legal rights with respect to the affected provisions of the permit. To the contrary, EPA has published the potential changes to the permit and initiated a formal public comment period, during which time DC Water and WWP may raise any objections to the proposed changes. *See* EPA Notice of Proposed Modification to Permit at 2-3 (Dkt. 49). DC Water and WWP also may, in appropriate circumstances, seek the Board’s review of any changes with which they disagree under 40 C.F.R. § 122.62 and the procedures in 40 C.F.R. Part 124. *Id.* at 2.

In short, DC Water and WWP have failed to make a showing of prejudice that would justify denying Citizen Petitioners’ request to participate in their appeal.

**3. Citizen Petitioners’ ability to protect their interests may be prejudiced if they are not allowed to help defend provisions in the permit that are of vital importance to their members.**

As mentioned in Citizen Petitioners’ motion to participate in this appeal, DC Water and WWP seek to undermine crucial water quality-based effluent limits in the permit that are supported by fundamental requirements of the Clean Water Act for NPDES permits. The relief requested by DC Water and WWP would adversely affect the interests of the Citizen Petitioners’ members in having clean and safe waters in the District in which to swim, fish, and play.

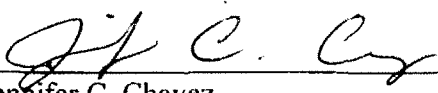
Prejudice to the Citizen Petitioners’ ability to protect their members’ interests may arise because they do not, in fact, have “nearly identical” interests in the Permit as EPA’s interests. This they made eminently clear in Citizen Petitioners’ challenge to the Permit as unlawfully weak. *See* Dkt. 3. That Citizen Petitioners have since reached a settlement agreement with EPA

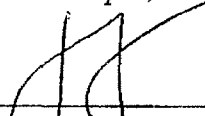
does not erase that adversary posture. Further, the motion to intervene in no way questions EPA's ability to defend its permit against DC Water and WWP's challenge, but is instead rooted in Citizen Petitioners' desire to provide their own additional perspective, which is distinct from EPA's. Their participation would therefore not be redundant. Finally, prejudice may result if Citizen Petitioners' intervention or non-party brief is denied, because DC Water and WWP have made brazen claims about the intent and effect of Citizen Petitioners' settlement with EPA, yet seek to bar Citizen Petitioners from responding. *See, e.g.* DC Water/WWP Reply at 11 (Dkt. 42).

### Conclusion

For the foregoing reasons, Citizen Petitioners respectfully request that the Board grant the relief requested in their July 6 motion to participate in DC Water and WWP's appeal.

Dated: July 18, 2012

  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Reply of Friends of the Earth, et al., In Support of Their Motion for Leave to Intervene and to File Nonparty Brief" were sent to the following persons via First Class U.S. Mail:

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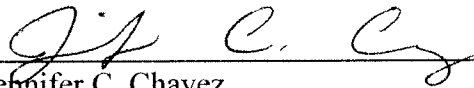
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