

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

In re:)	
)	
)	
Government of the District of Columbia, Municipal Separate Storm Sewer System.)	NPDES Permit Appeal No. 11-05
)	
NPDES Permit No. DC0000221)	
)	

**REPLY IN OPPOSITION TO THE MOTION FOR LEAVE TO INTERVENE AND TO
RESPOND OF FRIENDS OF THE EARTH, ANACOSTIA RIVERKEEPER, INC.,
POTOMAC RIVERKEEPER INC., AND NATURAL RESOURCES DEFENSE
COUNCIL, INC.**

The District of Columbia Water and Sewer Authority and the Wet Weather Partnership¹ (collectively, the “Petitioners”), jointly file this Reply in Opposition to the Motion for Leave to Intervene and to Respond filed by Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc. (collectively, the “Citizen Groups”) in the above-captioned matter.

The Environmental Appeals Board (the “Board”), in the sound exercise of its discretion,² should deny the Citizen Groups’ Motion for Leave to Intervene and to Respond because it is untimely filed, and, as such, is highly prejudicial to Petitioners.

¹ WWP’s participation in the reply brief is limited to issues related to condition 4.3.1.3 of the final MS4 Permit, pursuant to the Board’s order of February 2, 2012.

² Neither the regulations found at 40 C.F.R. § 124, nor the Environmental Appeals Board Practice Manual specifically address the filing of non-party briefs.

ARGUMENT

1. Granting the Citizen Groups' Motion Will Result in Undue Delay

The Citizen Groups' request to brief the Board and to participate in oral argument as party respondents is made too late and will result in undue delay in this proceeding. In the interest of preserving and respecting the efficiency and economy of the Board's appeal process, which contemplates prompt resolution of appeals,³ the Citizen Groups should have filed their motion in 2011, soon after the Petitioners' filed their November 4, 2011 Petition for Review. We note that the District Department of the Environment ("DDOE") timely sought to intervene on November 17, 2011, just 13 days after the Petition for Review was filed. (Document #8). The Citizen Groups were clearly on notice of the instant Petition for Review. Yet, rather than timely moving to participate, the Citizen Groups, without explanation, excuse or apology, waited more than eight (8) months before initially seeking to intervene.

The Citizen Groups were fully aware of the Board's May 16 Order Establishing Deadlines for Responses. (Document #35). That order required both EPA and DDOE to submit their briefs in this matter by June 11, 2012. At worst, the Citizen Groups should have filed their motion and brief no later than June 11, which would have allowed the Petitioners to respond to their briefs in our reply brief. The Citizen Groups provide no explanation whatsoever for their failure to seek to intervene at such a logical – albeit still extremely late – juncture.

A good deal has transpired to date without the Citizen Groups' participation, including the final briefing of the Petition for Review in this proceeding nearly one (1) month ago.

Granting the Citizen Groups party status in the case or accepting their brief at this time will be

³ See, for example, Environmental Appeals Board Practice Manual, III. D. 1., page 39, which explains the Board's practice of employing the so-called "first-track process" in as many cases as possible "in the interest of prompt and informed resolution of permit appeals".

highly prejudicial to the Petitioners and would warrant a further extension of the briefing schedule for the Petitioners to have an opportunity to respond.

2. Granting the Citizen Groups' Motion Prejudices Resolution of this Appeal

The Citizen Groups could have filed their motion anytime since November of last year, including prior to or during the parties' participation in the Board's alternative dispute resolution (ADR) pilot program, between December of 2011 and May of 2012. Significantly, had the Citizen Groups timely sought and been granted party status in this appeal, they would have been participants in ADR in this case, thereby avoiding the prejudice and incompleteness that has resulted from two isolated ADR processes. Instead, the Citizen Groups engaged in ADR separate and apart from this case, without the Petitioners and outside of their knowledge of the particulars. Behind this veil of secrecy, the Citizen Groups and EPA proceeded to settle certain issues that were not raised in the Citizen Group's petition in NPDES Permit Appeal No. 11-06 and, instead, were only raised in this appeal. All of this transpired without any notice to the Petitioners and it was the Petitioners who had to lodge the settlement agreement in the Citizen Groups' appeal with the Board so that the Board would understand that issues outside the scope of the Citizen Groups' Petition for Review were proposed to be addressed by the Citizen Groups, EPA, and DDOE in settlement, even though those issues were only directly raised in this appeal.

The Citizen Groups attempted to address the Petitioners' key objections in their appeal despite the fact that those issues are outside the scope of Appeal 11-06. The Petitioners pointed this fact out to the Board in our reply brief (Document #42), and now the Citizen Groups seek to intervene in the instant appeal. That is unfair. They were free to raise any issues of concern in their appeal. Admittedly very late, they nonetheless could have sought to intervene at anytime up to and until June 11 (eight (8) months since the filing of the Petition for Review in this

appeal) and minimized the prejudice to the Petitioners. Instead, only when their secret attempt to address issues in this appeal, without the participation of the Petitioners, was exposed that they now seek to intervene.

For example, in their separate ADR process, the Citizen Groups and EPA agreed to revise the draft NPDES Permit No. DC 0000221 (the “Permit”) to extend the deadline for development and submission of a consolidated total TMDL Implementation Plan from two (2) years to thirty (30) months and to render certain required elements of the Consolidated TMDL Implementation Plan unenforceable, change the definition of the “Permittee”, in addition to certain other changes. Had the Citizen Groups timely filed their motion, and the Petitioners been made aware that the Citizen Groups were interested in such a comprehensive discussion of the terms of the Permit, the Petitioners would have welcomed the Citizen Groups into ADR in this appeal. Instead, the Citizen Groups’ settlement with EPA has resulted in an incomplete and piecemeal outcome that the Petitioners’ were excluded from even though it is their Petition for Review alone that raises those issues.

3. Participation by the Citizen Groups Would Be Redundant

The Citizen Groups’ interest in this proceeding is nearly identical to that of EPA and DDOE. EPA’s participation alone renders their participation, especially at this time, redundant and unnecessary. When you add in DDOE’s participation in the case, it is clear that the Citizen Groups have espoused no interest different from either EPA or DDOE. EPA has ably advanced its position over these nearly nine (9) months and is better-suited to defend the Permit, which it drafted and proposed, including any specific provisions thereof.

Finally, adding yet another Respondent at this late stage imposes an additional financial burden on the Petitioners beyond the significant time and resources that they have devoted already in response to motions and briefing by EPA and DDOE.

CONCLUSION

The parties to this proceeding have been actively pursuing a resolution of the issues raised by the Petitioners in their Petition for Review for the better part of a year. To permit the Citizen Groups to intervene at this stage in the process as parties would result in a substantial prejudice to Petitioners, who are already dealing with both EPA and DDOE as respondents in this appeal. The Citizen Groups offer no basis for their egregious failure to seek intervention in this appeal in 2011, or certainly by the June 11 briefing deadline for EPA and DDOE in response to the Petition for Review. Moreover, their attempt to address issues raised in this appeal through the undisclosed settlement of Appeal No. 11-06 should not now be rewarded by granting them intervention in this appeal at this late date.

Further, EPA and DDOE would adequately represent the Citizen Groups' interests individually, and certainly do so together more than ably. Any participation by the Citizen Groups will result in undue delay in the prompt and efficient resolution of this proceeding and would be prejudicial to the Petitioners.

For the foregoing reasons, the Petitioners respectfully urge the Board to deny in its entirety the Citizen Groups' untimely and prejudicial Motion for Leave to Intervene and to Respond.

Dated: July 12, 2012

Respectfully submitted,

THE DISTRICT OF COLUMBIA WATER
AND SEWER AUTHORITY AND THE
WET WEATHER PARTNERSHIP



By Counsel

F. Paul Calamita
Carla S. Pool
AquaLaw, PLC
6 South 5th Street
Richmond, VA 23219
(804) 716-9021, ext. 201

Of Counsel:

Randy Hayman
General Counsel
District of Columbia Water and Sewer Authority
5000 Overlook Avenue, SW
Washington, DC 20032
(202) 787-2620

Gregory Hope
Principal Counsel
District of Columbia Water and Sewer Authority
5000 Overlook Avenue, SW
Washington, DC 20032
(202) 787-2657

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply in Opposition to the Motion for Leave to Intervene and to Respond filed by Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc. was filed electronically with the Environmental Appeals Board and was served by regular first class U.S. Mail, postage prepaid, this 12th day of July, 2012, upon the following:

Jennifer C. Chavez
Earthjustice
1625 Massachusetts Avenue, N.W., Ste. 702
Washington, D.C. 20036

Rebecca J. Hammer
Natural Resources Defense Council
1152 15th Street, N.W., Ste. 300
Washington, D.C. 20005

Irvin B. Nathan
Attorney General for the District of Columbia
441 4th Street, NW
Washington, D.C. 20001

Ellen Efros
Assistant Deputy Attorney General
Civil Litigation Division
441 4th Street, NW, Suite 600 South
Washington, D.C. 20001

Amy E. McDonnell
Alan Barak
Office of the Attorney General
District Department of the Environment
1200 First Street, NE, Seventh Floor
Washington, DC 20002

Kelly A. Gable, Assistant Regional Counsel
Office of Regional Counsel
EPA Region III
1650 Arch Street
Mail Code 3RC 20
Philadelphia, PA 19103



F. Paul Calamita