In The
COURT OF APPEALS OF MARYLAND

September Term, 2011

Case No. 70

ENVIRONMENTAL INTEGRITY PROJECT et al.,

Petitioners,

v.

MIRANT MD ASH MANAGEMENT, LLC, et al.,

Respondents.

On Writ of Certiorari from the Court of Special Appeals of Maryland

---

BRIEF OF AMICUS CURIAE CHESAPEAKE BAY FOUNDATION, INC.

Jon A. Mueller
Chesapeake Bay Foundation
6 Herndon Avenue
Annapolis, MD 21403
(410) 268-8816
Jmueller@cbf.org

Counsel for Chesapeake Bay Foundation, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

Amicus curiae, Chesapeake Bay Foundation, Inc. ("CBF"), hereby submits the following brief pursuant to Maryland Rule 8-511(b).

STATEMENT OF THE CASE

This is an appeal from a decision of the Court of Special Appeals upholding the Circuit Court for Charles County's denial of several citizens' and environmental groups' motion to intervene in a Maryland Department of the Environment ("MDE") environmental enforcement action.

On April 2, 2008, five individual Maryland citizens, along with the Environmental Integrity Project ("EIP"), and the Potomac Riverkeeper ("PRK") (collectively "Petitioners") provided GenOn Mid-Atlantic, LLC, GenOn Maryland Ash Management, LLC[1] (collectively "Respondent"), and MDE with notice of their intent to sue Respondent in federal court for violating Maryland's water pollution control laws and regulations. In response to Petitioners' notice of intent to sue, MDE filed suit against Respondent in circuit court on May 8, 2008, seeking injunctive relief and civil penalties, and alleging many of the same violations that Petitioners claimed in their notice.

On August 21, 2008, Petitioners moved to intervene in MDE's suit, both permissively and as a matter of right. The circuit court denied Petitioners' motion on September 23, 2008. Petitioners appealed to the Court of Special Appeals, which affirmed the circuit court's decision. This appeal followed.

[1] Until 2010, GenOn Mid-Atlantic, LLC and GenOn Maryland Ash Management, LLC were named Mirant Mid-Atlantic, LLC and Mirant Maryland Ash Management, LLC (respectively).

QUESTION PRESENTED BY *AMICUS CURIAE*

Did the Court of Special Appeals err in denying Petitioners' motion to intervene permissively and as a matter of right, in contravention of (1) the federal Clean Water Act ("CWA"), which the Court was obliged to consider; (2) Federal Rule of Civil Procedure 24, which, under Maryland case law, the Court should have looked to as a guide; and (3) the spirit and growing importance of citizen participation in environmental suits generally?

STATEMENT OF FACTS

GenOn Mid-Atlantic, LLC, owns and operates an electrical generation station in Charles County, Maryland. E. 3-4.[2] The station generates electricity by burning coal. The coal combustion process produces waste called coal combustion byproducts ("CCBs"), including fly ash, bottom ash, and sludge created by air pollution control equipment. CCBs are highly toxic to human health and the environment. E. 58.

For many years, GenOn Mid-Atlantic has dumped CCBs into disposal cells at a landfill on Faulkner Road in Charles County ("Faulkner Site"). E. 4. *See* http://maps.google.com/?sll=38.42028,-76.94417&spn=0.05,0.05 (satellite image of the Site visited on November 18, 2011). The Faulkner Site is operated by GenOn Maryland Ash Management, LLC, a subsidiary of GenOn Mid-Atlantic. E. 6.

The Faulkner Site is located in and around the Zekiah Swamp, which is the largest hardwood swamp in Maryland. E. 26. The swamp is an important spawning area for

[2] Most record citations are to the record extract that Petitioners submitted in the Court of Special Appeals.

many fish species in the Chesapeake Bay. E. 26. Indeed, it is considered one of the most significant ecological areas in the entire Chesapeake Bay watershed. E. 2. At least three streams flow between the disposal cells on the Faulkner Site, one of which flows directly into Zekiah Swamp. E. 7. Groundwater beneath the Faulkner Site flows in the direction of the swamp. E. 7.

On April 2, 2008, EIP initiated a citizen suit by sending Respondent and MDE its letter of intent to sue Respondent in federal court for violations of the CWA. E. 57-58. The letter claimed that the Faulkner Site was (1) discharging pollutants in locations beyond those permitted by Respondent's National Pollutant Discharge Elimination System ("NPDES") permit, which MDE issued to Respondent in 1997; (2) discharging toxic pollutants—specifically, selenium and cadmium—at levels exceeding Maryland's water quality criteria; and (3) failing to perform monthly monitoring for certain pollutants, as required by its 1997 permit. E. 59-62.

In response to EIP's letter, MDE filed a complaint for injunctive relief and civil penalties against Respondent in the state circuit court. E. 1-19. MDE alleged many of the same violations that EIP alleged in its letter. Specifically, MDE claimed that Respondent violated Md. Code Ann., Envt. Art §§ 9-322 (prohibiting "discharge [of] any pollutant into the waters of this State" except as provided in Subtitle 3 of Title 9, or Subtitle 4 of Title 4), and 9-323 (requiring a discharge permit issued by MDE to operate, *inter alia*, a disposal system, if "its operation could cause or increase the discharge of pollutants into the waters of this State"), and various Maryland regulations by, *inter alia*, (1) discharging pollutants from locations not authorized by Respondent's NPDES permit;

(2) discharging cadmium and selenium—both from locations allowed by the permit and locations not allowed by the permit—into surface waters at levels exceeding Maryland's water quality standards; and (3) polluting groundwater by allowing leachate to seep into the ground from permeable clay-lined disposal pits—again without a permit and in excess of groundwater quality standards for cadmium, aluminum, sulfate, iron, and other metals. E. 11-16.

On August 21, 2008, Petitioners—EIP, PRK, and the individual citizens—moved to intervene in MDE's suit, both as a matter of right under Md. Rule 2-214(a)(2), and, in the alternative, permissively under Md. Rule 2-214(b). E. 21.

In the motion, the individual citizens identified themselves as residents of Charles County who live directly on the Wicomico and Potomac Rivers, waters that are adversely impacted by Respondent's activities at the Faulkner Site. E. 22. In particular, the citizens alleged that their personal interests were adversely affected because they live, fish, sail, study nature, and recreate in the areas negatively impacted by Respondent's disposal activities. E. 22. Likewise, EIP and PRK explained that they are 501(c)(3) non-profit interest groups whose organizational interests are similarly adversely affected. E. 22. EIP was founded to advocate for more effective enforcement of state and federal environmental laws, with a specific focus on laws concerning power plants. E. 22. It has been heavily involved in ensuring that CCBs are properly regulated and disposed of in Maryland. E. 22. PRK, in turn, is dedicated to restoring and protecting the health of the Potomac River, its tributaries, and the environment supported by those waterways. E. 22. Its goal is to advocate for the Potomac watershed by ensuring that state and federal

environmental laws governing the watershed are adequately enforced, and by protecting the river and its tributaries from exploitation and degradation. E. 22.

Petitioners argued that they had the right to intervene under § 2-214(a)(2) because their motion was timely, they have an interest in the subject matter of the action, disposition of the case could impair their ability to protect that interest, and their interest was not adequately represented by MDE. E. 22. Alternatively, Petitioners argued that the court should permit them to intervene under Rule 2-214(b) because their claims have issues of law and fact in common with claims in the action and because their intervention would not unduly delay or prejudice the adjudication of the rights of the existing parties. E. 23.

The circuit court denied Petitioners intervention, a decision that Petitioners timely appealed to the Court of Special Appeals. MDE also filed a motion for leave to file an appellee's brief, but the Court of Special Appeals denied the motion. Thus, MDE filed an amicus curiae brief in support of Petitioners' position. Nonetheless, the Court of Special appeals upheld the circuit court's decision. *Envt'l Integrity Project v. Mirant Ash Mgmt., LLC*, 197 Md. App. 179, 195 (2010). More specifically, the Court of Special Appeals held that Petitioners lacked the right to intervene under Md. Rule 2-214(a)(2) because, although their motion was timely, (1) they lacked standing and thus did not have sufficient interest in the underlying action; and (2) their interests were adequately

represented by MDE.[3] *Id.* at 189, 193. The Court also concluded that the circuit court's denial of permissive intervention under Md. Rule 2-214(b) did not amount to an abuse of discretion. *Id.* at 194. Petitioners now challenge the Court of Special Appeals' decision. For the reasons set forth below, CBF strongly supports Petitioners' position.

ARGUMENT

The Court of Special Appeals erroneously denied Petitioners' intervention, and set forth an interpretation of Maryland's intervention statute that will discourage citizen participation. In so doing, the Court overlooked the increasing importance of citizen participation in environmental suits, and eschewed its obligation to consider the strong endorsement of citizen participation and intervention by both the CWA, 33 U.S.C. § 1251, *et seq.*, and Federal Rule of Civil Procedure 24 alike. Those two federal laws, and the regulations and case law generated pursuant to them, recognize citizen participation as a fundamental precept to effective environmental enforcement. After consideration of those laws and precepts, this Court should overturn the Court of Special Appeals' decision and grant Petitioners' motion to intervene.

A. The CWA and its Regulations Strongly Support Petitioners' Intervention.

Although this is a state proceeding, federal law--including the CWA and its regulations--are applicable to the issues presented here. State environmental laws invoked in the underlying suit (Md. Code Ann., Envt. Art. §§ 9-322 and 9-323) are predicated upon a federal delegation of authority pursuant to the CWA.

[3] The Court did not address the remaining requirement for intervention as of right under Md. Rule 2-214(a)—that disposition of the underlying action could impair Petitioners' ability to protect their interest. See id. at 190.

Recognizing the problems inherent in multiple state law systems, Congress passed the CWA to provide a national "floor" for permitting pollution discharges into our nation's waters. The Act allows states to administer permitting programs for state sources of pollution. *See id.* § 1342. However, prior to obtaining such a delegation, states have to certify that their programs will meet the federally mandated "floor." 33 U.S.C. § 1342(b) ("[T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters . . . may submit to [EPA] a . . . description of the program it proposes to establish and . . . such State shall submit a statement from the attorney general . . . that the laws of such State . . . provide adequate authority to carry out the described program. [EPA] shall approve each such submitted program unless [it] determines that adequate authority does not exist . . . ."). Maryland made such a certification, and received its delegation from EPA in 1974. *See* 39 Fed. Reg. 34601 (Sept. 26, 1974) ("[EPA] has granted the State of Maryland's request for approval of its program for controlling discharges of pollutants to navigable waters in accordance with the [NPDES]"); Mem. of Agreement MDE, State of Md., and Reg'l Adm'r, Region III, U.S. EPA, § II.A(1) (May 28, 1989) (wherein MDE agreed to implement the NPDES).

Because Maryland's CWA program is an extension of the federal CWA, federal law under the CWA is directly relevant to the Court's consideration of Petitioners' motion to intervene in this state CWA case. The Fourth Circuit made that clear in *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996), when it acknowledged that a federally delegated environmental program must comport with federal standards concerning public participation in judicial proceedings. In that case, Virginia challenged EPA's denial of its

proposed program for issuing Clean Air Act ("CAA") pollution permits. *Id.* at 872. EPA denied the program because it lacked adequate provisions for judicial review of the Commonwealth's permitting decisions. *Id.* Specifically, EPA concluded that Virginia's proposed program set forth stricter standing requirements for citizens than those required under the CAA itself (while the CAA provides for judicial review of permitting decisions to anyone who would have Article III standing, the Commonwealth's proposed program limited review to persons with "pecuniary and substantial" interests). *Id.* at 876. The Court agreed, holding that Virginia's limitation on public standing "violates [the] CAA." *Id.* Though *Browner* arose in a different context, it supports the principle that states administering federal environmental acts should allow at least the same level of public participation in judicial proceedings that is permitted under federal law.

The CWA welcomes citizen participation in federal courts by explicitly permitting both citizen suits and citizen intervention. *See* 33 U.S.C. § 1365(a) (authorizing citizens to file suit in federal court against persons violating the Act); *Id.* § 1365(b)(1)(B) (granting all citizens an automatic right to intervene in CWA enforcement actions—including NPDES enforcement actions—filed in federal court).

Indeed, CWA regulations setting forth the requirements that states must meet in order to administer the federal program explicitly require states to permit citizen participation in the enforcement process. Namely, 40 C.F.R. § 123.27(d) states that "[a]ny State administering a program shall provide for public participation in the State enforcement process" by either (1) providing "authority which allows intervention as of right" in enforcement actions; or (2) ensuring that MDE will (i) "[i]nvestigate and

provide written responses to all citizen complaints," (ii) "[n]ot oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation," and (3) "[p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action." 40 C.F.R. § 123.27(d).[4] That provision reveals the federal government's expectation that the State of Maryland will welcome citizen intervention in carrying out its federally delegated NPDES program.

Thus, both the CWA and the regulations governing state-administered programs establish intervention as a crucial component of citizen participation in the enforcement process. This Court must recognize the strong federal policy in favor of public participation in delineating requirements for citizen intervention under Md. Code Ann. § 9-301 *et. seq.*, Maryland's federally delegated clean water enforcement scheme.

B. Federal Rule of Civil Procedure 24 Also Strongly Supports Petitioners' Intervention.

In the case *sub judice*, the Court of Special Appeals incorrectly denied Petitioners' motion to intervene as a matter of right under Md. Rule 2-214(a)(2), reasoning that (1) Petitioners had inadequate interest in the underlying case because they lacked standing

[4] Notably, Maryland has not upheld its obligations under 40 C.F.R. § 123.27(d). It has neither passed legislation providing for intervention as a matter of right in clean water enforcement actions, nor provided a thirty-day notice and comment period for proposed settlement agreements. Respondent's argument that "whether Maryland met EPA's requirements or not is moot because EPA approved MDE to implement the NPDES permit requirements of the CWA thirty-seven years ago" carries no weight. See Respondent's Answer & Opposition to Cert Petition, at 13. The fact that Maryland has not met those requirements does not minimize the fact that Congress and EPA intended Maryland to effectuate the CWA's strong policy in favor of citizen participation. This Court should comply with that policy. In addition, this failure by the state bolsters Petitioners' argument that MD cannot adequately represent their interests. *See* Section B.ii. below.

(an element of the interest prong that was not previously required under Maryland law, but that the Court interpreted *Duckworth v. Deane*, 393 Md. 524 (2006), as requiring); and (2) Petitioners' interests were adequately represented by MDE.[5]

Petitioners have adequately shown why the Court of Special Appeals' conclusions were incorrect under Maryland law. But, federal cases under Federal Rule 24 provide even further support for Petitioners' right to intervene, and Maryland state courts delineating Md. Rule 2-214(a)(2) must look to Rule 24 as a guide.[6] *See, e.g.*, *Duckworth*, 393 Md. at 538 ("Rule 2-214 was based on Rule 24 of the Federal Rules of Civil

---

[5] As for the other two requirements under Md. Rule 2-214(a), the Court acknowledged that Petitioners' motion to intervene was timely, and declined to address whether disposition of the action could impair Petitioners' ability to protect their interests.

[6] The wording in the state and federal intervention statutes is nearly identical. Maryland Rule 2-214(a) provides:

> Upon timely motion, a person shall be permitted to intervene in an action: (1) when the person has an unconditional right to intervene as a matter of law; or (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest unless it is adequately represented by existing parties.

Federal Rule 24, in turn, provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: . . .
>
> (2) 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.

Procedure, and . . . intervention decisions under Rule 24 . . . serve as a guide to interpreting the Maryland intervention rule.") (internal quotations and citations omitted); *Maryland Radiological Soc. v. Health Services Cost Review Com.*, 285 Md. 383, 389 n.5 (1979) ("In the absence of Maryland authority, the similarity of Maryland Rule [2-214] and Federal Rule 24 makes the decisions of the federal courts interpreting their rule of considerable precedential value in construing our rule.").

Cases under Rule 24 should thus serve as a guide to this Court's interpretation of Rule 2-214(a)(2)—especially with respect to the two most contested issues on appeal—the test for "interest" and the question of adequate representation.

i. The Court Should Consider the Fact That The Majority of U.S. Courts of Appeals to Have Addressed Whether Intervention Requires Standing Have Concluded that Standing is Not Required Under Rule 24.

This Court should particularly look to Rule 24 in its reassessment of the intermediate court's imposition of standing as an element of "interest" under Rule 2-214(a), since Maryland's current jurisprudence on that subject is unclear, at best.[7] *Maryland Radiological Soc.*, 285 Md. at 389 n.5.

[7] The Court of Special Appeals cited Duckworth for the proposition that potential intervenors must meet standing requirements in order to meet the interest requirement under Rule 2-214(a)(2). However, as Petitioners explain, the discussion of standing in Duckworth was merely dicta. Should the Court determine that Duckworth is applicable, CBF submits that all Petitioners meet the test for standing as articulated by this Court in Patuxent Riverkeeper v. MDE, No. 139, 2011 Md. LEXIS 628 (Sept. 30, 2011) (rejecting the notion that plaintiffs only have standing where their "personal or property rights [are] adversely affected," and holding instead that individuals and organizations have standing if they allege "sufficient harm to [their] aesthetic, recreational, and economic interests," and show that the harm shares a "sufficient nexus" to the allegations); *see also* Mattaponi Indian Tribe v Commonwealth of Virginia, DEQ, 261 Va. 366, 541 S.E. 2d 920 (2001) (granting several organizations standing in context of challenge to wetland permit).

The majority (6 out of 9) of United States Courts of Appeals that have expressly addressed the question of whether Article III standing is required to intervene under Rule 24 have held that standing is not required. *See San Juan County v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) ("[W]e . . . hold that parties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing so long as another party with constitutional standing on the same side as the intervenor remains in the case.") (internal quotations and citations omitted); *United States v. Tennessee*, 260 F.3d 587, 595 (6th Cir. 2001) ("An intervenor need not have the same standing necessary to initiate a lawsuit.") (quotation omitted); *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1277-78 (11th Cir. 2000) ("We have held that a party seeking to intervene into an already existing justiciable controversy need not satisfy the requirements of standing as long as the parties have established standing before the court."); *Ruiz v. Estelle*, 161 F.3d 814, 829-30 (5th Cir. 1998) ("We hold that Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so."); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991) (noting that a party does not need standing to intervene in existing litigation so long as another party on its side in the litigation remains in the case with Article III standing); *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (explaining that "there was no need to impose the standing

requirement upon the proposed intervenor" because there was already a case or controversy between the existing parties to litigation).[8]

The Fourth Circuit has not squarely addressed the issue of whether standing is required for intervention under Rule 24. Notably, however, the only definition of Rule 24 "interest" that the Fourth Circuit has set forth is extremely broad, and would undoubtedly encompass Petitioners' professed interest. *See Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) ("[W]hile Rule 24(a) does not specify the nature of the interest required for a party to intervene as a matter of right, the Supreme Court has recognized that 'what is obviously meant . . . is a *significantly protectable interest*.'") (citing *Donaldson v. United States*, 400 U.S. 517, 531 (1971)) (emphasis added).

This Court should follow the majority of federal circuit courts to hold that standing is not a prerequisite to intervention under Md. Rule 2-214(a)(2).

ii. Case Law Under Federal Rule 24 Also Supports Petitioners' Argument that MDE Does Not Adequately Represent Their Interests.

Petitioners have made a compelling showing that their interest is not adequately represented by MDE. Their interests are adverse, distinct, and much narrower than those of MDE. For example, while MDE must weigh political and economic considerations,

[8] The Seventh, Eighth and D.C. Circuits are the three minority Courts of Appeals that have required standing to intervene under Rule 24. See Jones v. Prince George's County, 348 F.3d 1014, 1017 (D.C. Cir. 2003) ("Prospective intervenors in this circuit must possess standing under Article III of the Constitution."); South Dakota v. Ubbelohde, 330 F.3d 1014, 1023 (8th Cir. 2003) ("A party seeking to intervene must establish both that it has standing to complain and that the elements of Rule 24(a)(2) are met."); Solid Waste Agency v. United States Army Corps of Eng'rs, 101 F.3d 503, 507 (7th Cir. 1996) (noting that the Seventh Circuit requires any prospective intervenor to show it has Article III standing).

including budgetary constraints, and the fostering of economic growth and wellbeing of regulated industries like Respondent, Petitioners are unmitigated by those concerns. E. 35-36. That difference may explain the distinct remedies sought by Petitioners and MDE—while Petitioners seek to prohibit all further disposal of CCBs at the Faulkner Site, MDE seeks a temporary injunction of CCB disposal but contemplates future disposal. E. 36. Moreover, Petitioners seek to restore native fish populations that have been harmed by Respondent's activities, while MDE does not. E. 36. Even MDE acknowledges that "[a]lthough [Petitioners] and the Department share a commitment to enforcement of environmental laws and a concern about ground and surface water quality impairment due to discharges from the Faulkner Site . . . MDE's interests and those of [Petitioners] are not necessarily the same," and that Petitioners' "only means of ensuring the adequate representation of their specific interests is through intervention." *See* MDE Amicus Curiae Brief in Court of Special Appeals, at 9. MDE's explicit acknowledgment that it does not adequately represent Petitioners' interests conclusively demonstrates inadequate representation under Rule 2-214(a).

Cases under Rule 24 provide even further support for the proposition that MDE's representation is inadequate. Federal courts—including the Fourth Circuit—have held that a governmental agency's duty to serve the broad public interest can preclude it from adequately representing a particular group of citizens. In *In re Sierra Club*, 945 F.2d 776 (4th Cir. 1991), the Fourth Circuit held that several environmental groups could intervene in a suit brought by owners of a hazardous waste incinerator against the South Carolina Department of Health and Environmental Control challenging the Department's new

hazardous waste permitting regulation. The Court held that, although the Department shares some objectives with the environmental groups, it was not an adequate representative of the groups' interests. *Id.* at 780. The Court emphasized the divergent interests of public and private entities in hazardous waste permitting decisions. *Id.*; *see also Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986) (finding Department of Labor could not adequately represent the interests of apple pickers who sought intervention in a case threatening their interests).[9] Those same conflicting interests are present here.

C. The General Importance of Citizen Participation in Environmental Suits Should Also Guide the Court's Decision.

The CWA is not the only federal environmental statute that welcomes citizen participation by explicitly authorizing citizen suits in federal court. Indeed, since 1970,

[9] Other federal courts have held similarly. *See, e.g., Kleissler v. United States Forest Service*, 157 F.3d 964, 973–74 (3d Cir. 1998) ("[T]he government represents numerous complex and conflicting interests in matters of this nature" and "[t]he straightforward . . . interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies"); *Utah Ass'n of Counties v. Clinton*, 255 F. 3d 1246, 1255-56 (10th Cir. 2001) ("[T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation"); *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F. 2d 381, 384 (10th Cir. 1977) ("We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible."); *American Farm Bureau Federation v. EPA*, 2011 U.S. Dist. LEXIS 118233 (M.D. Pa., Oct. 13, 2011) (granting plaintiffs intervention in CWA case and emphasizing that "a government agency must represent numerous complex and conflicting interests and the straightforward business interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies.") (quotations and citations omitted); *Mountain Solutions v. State Corp. Comm'n*, 173 F.R.D. 300, 304 (D. Kansas 1997) ("As a general rule, governmental agencies seeking to protect the interests of the public in a lawsuit are not able to represent effectively the interests of intervenor applicants in the same action.").

Congress has enacted citizen suit provisions in at least nineteen other environmental statutes.[10] By including citizen suits in those federal environmental statutes, "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976). The Maryland legislature has also recently encouraged citizen participation in state environmental suits, by passing legislation adopting the more lenient federal rule of standing to allow citizens and other interested parties, including nonprofit associations, to request judicial review of MDE's permitting decisions. *See* Md. Code, Envt. Art. § 5-204(f) (2010).

Congress and the Maryland legislature were wise to include citizen provisions in those environmental statutes. Citizen participation in the enforcement of such laws works well. For one, citizen suits catalyze environmental enforcement—as occurred in this case.[11] In one study, Professor James May found that three out of every four judicial

[10] See Act To Prevent Pollution From Ships, 33 U.S.C. § 1910; Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Comprehensive Environmental Response, Liability, and Cleanup Act, 42 U.S.C. § 9659; Deep Water Port Act, 33 U.S.C. § 1515; Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427; Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11046; Endangered Species Act, 16 U.S.C. § 1540(g); Energy Conservation Program for Consumer Products, 42 U.S.C. § 6305; Marine Protection, Research and Sanctuary Act, 33 U.S.C. § 1415(g); National Forests, Columbia River Gorge National Scenic Area, 16 U.S.C. § 544m(b); Natural Gas Pipeline Safety Act, 49 U.S.C.A. § 1686; Noise Control Act, 42 U.S.C. § 4911; Ocean Thermal Energy Conservation Act, 42 U.S.C. § 9124; Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435; Resources Conservation and Recovery Act, 42 U.S.C. § 6972; Safe Drinking Water Act, 42 U.S.C. § 300j-8; Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270; Toxic Substances Control Act, 15 U.S.C. § 2619.

[11] The Court should note the irony and inequity that results if Petitioners are barred from intervening in the very suit they catalyzed.

opinions stemming from the nation's primary environmental enforcement laws began with a citizen suit. James R. May, *Now More Than Ever: Recent Trends in Environmental Citizen Suits*, 10 Widener L. Rev. 1, 4 (2003). He also found that there are at least 850 citizen suit legal events—judicial opinions, notices of intent to sue, complaints, and consent orders—per year. *Id.*

He accurately highlighted the importance of citizen suits as follows:

> Citizen suits work; they have transformed the environmental movement, and with it, society. Citizen suits have secured compliance by myriad agencies and thousands of polluting facilities, diminished pounds of pollution produced by the billions, and protected hundreds of rare species and thousands of acres of ecologically important land. The forgone monetary value of citizen enforcement has conserved innumerable agency resources and saved taxpayers billions.

Id.

Indeed, citizen participation matters now more than ever. Due to budget cuts and hiring freezes, both federal and state governments have been enforcing environmental laws with less frequency and less vigor over recent years. *Id.* at 5. Professor May's study explained that the U.S. EPA is referring fewer cases to the United States Department of Justice ("DOJ") for enforcement, and, accordingly, DOJ is bringing fewer civil environmental suits. *Id.* Similarly, he explained, state environmental administrative enforcement actions have been falling significantly. *Id.* at 46. His data shows that state actions from 1998 to 2001 fell 40%. *Id.* Notably, Professor May's 2003 study was published before the recession. Thus, the concerns he emphasized about reductions in state and federal enforcement are undoubtedly heightened today.

MDE confirmed that Maryland is among the states that have decreased enforcement due to dwindling resources. In its response to Petitioners' motion to intervene in the Court of Special Appeals, MDE explained that "the State is undergoing a period of budgetary constraints and hiring freezes. The convergence of this resources crisis with growing concern about the future of the Chesapeake and Coastal Bays makes citizen participation particularly welcome." E. 66-67.

In recognition of the increasingly important role that citizens and environmental interest groups play in the enforcement of environmental laws, the United States Supreme Court and, consequently, lower federal courts, have expanded citizen and associational standing doctrines over the last decade.

For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the Supreme Court relaxed standing for environmental interest groups by, *inter alia*, establishing that environmental advocates no longer had to show concrete harm to the environment in order to establish injury in fact. 528 U.S. 167, 169 (2000). Rather, environmental advocates need only show that the reasonable fear of environmental injury would reduce their members' recreational enjoyment of a place. *Id.*; *see also, e.g., Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) ("If the plaintiff can show that his claim to relief is free from excessive abstraction, undue attenuation, and unbridled speculation, the Constitution places no further barriers between the plaintiff and an adjudication of his rights."). One recent study shows that "*Laidlaw* reduced the number of environmental [advocacy group] claims dismissed due to lack of constitutional standing by more than 50%." Christopher

Warshaw, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 Harv. L. & Pol'y Rev. 289, 306, 321 (2011). Since *Laidlaw*, "only about 2% of environmentalists' claims have been dismissed due to lack of standing." Id.

The Supreme Court further loosened the standing barrier to environmental citizen suits in *Massachusetts v. EPA*, 549 U.S. 497 (2007). There, the Court concluded that petitioners—environmental organizations and state and local governments—had standing to challenge EPA's failure to regulate greenhouse gases. *Id.* at 522-23. The Court also held that the fact that an environmental injury is "widely shared" and not "imminent" does not minimize a party's interest for purposes of Article III standing. *Id.* 526.

The increasing importance and widespread encouragement of citizen and citizen group participation in environmental enforcement should guide this Court's decision. Given the decreasing ability of agencies, including MDE, to adequately enforce environmental laws, it would be unwise to impede citizen participation by adding new hurdles to Maryland's test for intervention.

CONCLUSION

The statutes under which this case was brought are part of a federally delegated program designed to assure that our nation's waters are fishable and swimmable. Thus, the state laws are governed by federal standards for intervention. The CWA explicitly invites citizens to initiate and intervene in enforcement suits. Hence, although this is a state proceeding, the Court should honor the CWA's clear policy in favor of citizen participation because the state clean water statutes under which MDE's suit arose were

passed in furtherance of Maryland's delegated authority to enforce the CWA. In delegating that authority to Maryland, EPA *explicitly* intended Maryland to embrace citizen participation in enforcement suits. Denying Petitioners' motion to intervene would unfairly deprive Petitioners of the role set out for them under the CWA.

Federal case law under Rule 24, to which this Court must pay tribute, lends even further support in favor of Petitioners' intervention. Federal courts have generously permitted citizen intervention by interpreting Rule 24 (which is nearly identical to Md. Rule 2-214) as not requiring Article III standing, and by recognizing the very real limits of agencies' ability to represent citizen interests.

Citizen participation—in the form of citizen suits and intervention alike—is crucial to the enforcement of environmental laws. That is more true now than ever, as government enforcement of environmental laws has dwindled in the wake of recent budget cuts and hiring freezes. *Amicus curiae* CBF urges this Court to look beyond this case at the bigger picture, and recognize the inherent value of permitting citizens to participate in enforcement actions they generated.

Dated: **November 21, 2011**

Respectfully submitted,

_____

Jon A. Mueller
Chesapeake Bay Foundation, Inc.
6 Herndon Avenue
Annapolis, MD 21403
Email: Jmueller@cbf.org
Phone: (410) 268-8816
Fax: (410) 268-6687

Counsel for Chesapeake Bay Foundation, Inc.

STATEMENT OF FONT TYPE USED AND TYPE SIZE

Pursuant to Maryland Rules 8-112 and 8-504(a)(8), this brief has been prepared using Times New Roman, 13 pt. type.

_____

Jon A. Mueller

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on November 21, 2011, two (2) copies of the foregoing Amicus Brief of Chesapeake Bay Foundation, Inc. were sent by U.S. mail, postage prepaid, to:

Jane F. Barrett
Christine M. Meyers
Andrew W. Keir
Environmental Law Clinic
University of Maryland School of Law
500 West Baltimore Street
Baltimore, Maryland 21201-1786

Attorneys for Potomac Riverkeeper, Inc.

Christopher T. Nidel
Nidel Law PLLC
1225 15th Street NW
Washington, DC 20005

Attorneys for Environmental Integrity Project and Individuals

Deborah E. Jennings
Andrew B. Schatz
DLA Piper LLP (US)
111 S. Calvert St., Suite 1950
Baltimore, MD 21201

Attorneys for Mirant MD Ash Management, LLC

Douglas F. Gansler
Attorney General of Maryland
Jacqueline S. Russell
Assistant Attorney General
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230

Attorneys for Maryland Department of the Environment

_____
Jon A. Mueller

CITATIONS AND TEXT OF PERTINENT STATUTES AND REGULATIONS

[SEE FOLLOWING PAGES]