IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANACOSTIA RIVERKEEPER, INC. and FRIENDS OF THE EARTH Plaintiffs, v. STEPHEN L. JOHNSON, Administrator, United States Environmental Protection Agency Defendant.	Case No. 1:09-cv-00097-RWR

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE OF THE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

The District of Columbia Water and Sewer Authority ("WASA") states the following in support of its Motion to Intervene.

I. INTRODUCTION

Anacostia Riverkeeper, Inc. and Friends of the Earth ("Plaintiffs") challenge the United States Environmental Protection Agency's ("EPA") approval and establishment of pollution load caps ("total maximum daily loads" or "TMDLs") for the Anacostia River and its tributaries. Plaintiffs allege that EPA violated the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and its own regulations in approving TMDLs for sediment and total suspended solids ("TSS").

WASA seeks to intervene of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure as a party defendant. WASA is responsible for the combined sewer system (CSS) in the District of Columbia which discharges combined sewer overflow ("CSO" or "CSOs") to the Anacostia River when runoff from rainfall exceeds the capacity of the CSS. These CSOs are authorized by a National Pollutant Discharge Elimination System ("NPDES") permit issued to WASA by EPA. WASA has prepared a Long-Term CSO Control Plan ("LTCP") pursuant to the Clean Water Act at a cost of approximately $10 million. Among other things, the LTCP calls for WASA to spend nearly $940 million in 2001 dollars to reduce the average year volume of CSO discharges to the Anacostia River by 97.5 percent. WASA's LTCP and the TMDLs in question are based in large part on the same factual, regulatory and legal analysis and conclusions challenged in this action. Accordingly, the relief Plaintiffs seek would, if granted, effectively invalidate one of the underlying bases for WASA's LTCP, require more stringent permit limits and conditions for the CSOs than those required by the LTCP, and, as a consequence, increase WASA's cost of controlling the CSOs. The existing parties do not represent these interests.

Alternatively, the Court should grant permissive intervention. There are common questions of law and fact between WASA's defenses and the Plaintiffs' action. Intervention would promote judicial efficiency by reducing the prospects of future litigation by WASA to protect its interests and the interests of its customers. As a representative of citizen, commercial and industrial ratepayers throughout the District of Columbia, as well as suburban communities in Virginia and Maryland, WASA will provide the Court with a broader perspective on the impacts and appropriateness of the Plaintiffs' claims and the relief sought.

II. STATUTORY AND REGULATORY BACKGROUND

The relevant provision of the Clean Water Act requires each state to "identify those waters within its boundaries for which [technology-based effluent limitations] are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). For any waters identified under this section, the State must establish TMDLs "for those pollutants . . . suitable for such calculation . . . at a level necessary to implement the applicable water quality standards" for any waters within a state's boundaries for which technology-based effluent limitations would not suffice to ensure attainment of these standards. 33 U.S.C. § 1313(d)(1)(C). A water quality standard consists of one or more "designated uses" of a waterbody and "water quality criteria" specifying the amount of various pollutants that may be present in the waterbody and still protect its designated use. 33 U.S.C. § 1313(c)(2). Further, EPA "shall either approve or disapprove such identification and load not later than thirty days after the date of submission." 33 U.S.C. § 1313(d)(2). The State must then incorporate any identification and load approved by the Administrator into its current water quality management plan. 33 U.S.C. § 1313(e). In addition, any point source discharge permit issued subsequent to the adoption of TMDLs must include "any more stringent limitation, including those necessary to meet water quality standards" consistent with the assumptions and requirements of the applicable TMDLs. 33 U.S.C. § 1311(b)(1)(C); *see also* 40 C.F.R. § 122.44(d)(1)(vii)(B).

On July 24, 2007 EPA approved the District of Columbia and State of Maryland TMDLs for sediment and TSS for the Anacostia River and its tributaries. Plaintiffs challenge EPA's approval of these TMDLs, charging that they violate the Clean Water Act and the Administrative Procedure Act.

III. WASA'S ROLE IN WASHINGTON-AREA WATER QUALITY MANAGEMENT

WASA is an independent authority of the District of Columbia government and serves over 500,000 residents in the District by collecting and treating wastewater at the Blue Plains Advanced Wastewater Treatment Plant.[1] WASA also provides wastewater treatment to approximately 1.6 million people in the surrounding counties of Montgomery and Prince George's in Maryland and Fairfax and Loudoun in Virginia. These suburban Washington D.C. counties have representation on the WASA Board of Directors. WASA's mission is to protect public health and the environment efficiently and cost-effectively and to ensure that the District's water quality programs are based on sound science and regulatory policy.

WASA holds an NPDES permit issued by EPA authorizing discharges from 15 permitted CSO outfalls to the Anacostia River according to the permit's terms.[2] As explained below, Plaintiffs' challenge to the TMDLs, if successful, will impact the operation of WASA's wastewater treatment system, particularly its implementation of the LTCP developed at significant effort and public expense.

IV. ARGUMENT

A. WASA is Entitled to Intervene in this Action as a Matter of Right.

WASA is 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

[1] WASA also distributes drinking water to the District's residents.

[2] Approximately one third of the District's wastewater collection system consists of combined sewers, which convey both sanitary wastewater and stormwater in a single pipe. When the capacity of a combined sewer is exceeded during rainfall events, the excess flow, which is a mixture of wastewater and stormwater, is discharged as combined sewer overflow to the receiving streams, including the Anacostia River. In contrast, separate sewers have two sets of dedicated pipes – one for sanitary wastewater and one for stormwater. Ronald E. Bizzarri Declaration ("Bizzarri Decl.") ¶ 3 (attached as Exhibit 1).

> 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.

This Court applies the following four-part test to determine whether to allow intervention: (1) whether the motion to intervene is timely; (2) whether the applicant has a cognizable interest relating to the property or transaction which is the subject of the action; (3) whether the disposition of the action, as a practical matter, may impair or impede the applicant's ability to protect that interest; and (4) whether the existing parties to the lawsuit cannot adequately represent the applicant's interests. *AmeriDream, Inc. v. Jackson*, 246 F.R.D. 37, 38 (D.D.C. 2007) (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003)). In addition, the Court of Appeals for the District of Columbia Circuit has held that, "a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." *Fund for Animals,* 322 F.3d at 731-32.

This Court interprets Rule 24(a) broadly in favor of intervention of right. Liberal intervention is desirable and "the purposes of Rule 24 are best served by permitting the prospective intervenors to engage in all aspects of this litigation." *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000).

As explained below, WASA has standing under Article III of the Constitution, satisfies all four criteria of Rule 24(a) and, accordingly, is entitled to intervene of right.

1. WASA Has Standing to Intervene in this Action.

To establish Article III standing, the intervenor must show: 1) injury-in-fact, 2) causation, and 3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). WASA easily meets all three requirements.

a. WASA Satisfies the Injury-In-Fact Standard.

An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotations and citations omitted). This Court has held that a party seeking to intervene as a party defendant seeking to uphold agency action "would have to establish that it will be injured in fact by the setting aside of the government's action it seeks to defend." *American Horse Protection Ass'n v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001); *see also Fund for Animals*, 322 F.3d at 273 (finding standing for a party seeking intervention where the intervenor "benefits from the . . . current regulations, and [intervenor] would suffer concrete injury if the court were to grant the relief the plaintiffs seek").

In this case, WASA operates the wastewater conveyance and treatment system for the District of Columbia and discharges to the Anacostia River from 15 permitted CSO outfalls pursuant to a valid NPDES permit issued by EPA. Bizzarri Decl. ¶ 2. WASA's operations and NPDES permit are subject to the TMDL regulations at issue, and WASA will be required to comply with permit limitations established to meet the TMDLs. *See* 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(vii)(B). A TMDL is "[t]he sum of the individual [waste load allocations or "WLAs"] for point sources and [load allocations or "LAs"] for nonpoint sources and natural background." 40 C.F.R. § 130.2(i). A WLA is "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation." 40 C.F.R. § 130.2(h).

WASA has developed, pursuant to section 402(q) of the Clean Water Act, 33 U.S.C. § 1342(q), a LTCP, which, when implemented, will reduce the average year volume of CSO

discharges from these outfalls to the Anacostia River by 97.5 percent. Bizzarri Decl. ¶ 7. WASA's LTCP consists of multiple components, and was designed, in part, to comply with the WLAs in the TMDLs challenged in this action. Bizzarri Decl. ¶ 11. To reduce CSO discharges to the Anacostia River, the LTCP calls for construction of two massive storage and conveyance tunnels under the District to capture and control CSOs during rain events, extensive rehabilitation of pumping stations, consolidation of CSO outfalls and other measures at a cost of approximately $940 million in 2001 dollars. Bizzarri Decl. ¶ 9. These measures were developed in a process that began approximately eleven (11) years ago, included substantial public and governmental involvement by representatives from governmental agencies, regulatory agencies, citizens' groups, and environmental advocacy groups, and cost approximately $10 million.[3] Bizzarri Decl. ¶ 10.

Plaintiffs' TMDL challenge attempts to undermine the basis of the LTCP. *See* Complaint at 11. Plaintiffs' challenge, if successful, could effectively invalidate one of the underlying bases for the LTCP, and require a reevaluation of the CSO controls selected in the LTCP. Complaint at 11-12. Any change in the TMDLs that would require a higher degree of CSO reduction than contained in the current LTCP would force WASA to make changes to its LTCP. Bizzarri Decl. ¶ 12. Such changes would add to the cost of controlling the CSOs. Bizzarri Decl. ¶ 13. These added costs will be passed on to WASA's customers in the form of higher sewer rates on top of the sewer rates already projected to pay for the cost of the selected controls in the current LTCP. Bizzarri Decl. ¶ 14.

[3] The total estimated capital cost of implementing the LTCP in 2001 dollars is $1.265 billion, and the estimated annual operating and maintenance cost is $13.36 million in 2001 dollars. Bizzarri Decl. ¶ 8.

Such direct economic harm alone is sufficient to establish injury-in-fact for Article III standing. *See Pharmaceutical Research & Mfrs. of Am. v. Thompson*, 259 F. Supp. 2d 39, 51 (D.D.C. 2003) (finding that an association of drug manufacturers had standing for challenging a Medicaid initiative which would force them to provide additional rebates greater than those already required). This Court has found an injury-in-fact in similar actions. In *Friends of the Earth v. EPA*, No. 04-0092 (D.D.C. order entered May 25, 2004) (attached hereto as Exhibit 2), WASA's motion to intervene in a substantially similar case was granted.

In sum, WASA's current and future wastewater operations will be significantly impacted by the setting aside of the TMDLs and other relief sought by Plaintiffs in this case, and, accordingly, WASA easily establishes that it would be injured in fact.

b. Plaintiffs Seek Relief that Would Cause Injury to WASA

To show causation, WASA's injury must be "fairly traceable to the regulatory action." *Fund for Animals,* 322 F.3d at 733. The injuries discussed above "will have been caused by [the] invalidation" of the TMDLs established and approved by EPA. *American Horse*, 200 F.R.D. at 156. There can be little doubt that the relief Plaintiffs seek in this case will cause injury to WASA.

c. Injury to WASA Would be Prevented If the EPA Upholds the TMDL's.

When an agency action is challenged, injury is redressable if "the injury would be prevented if the government action is upheld." *Id.*; *see also Fund for Animals*, 322 F.3d at 733 (D.C. Cir. 2003) (finding Article III standing for an intervenor in a case where agency action was challenged when "a decision favorable to [intervenors] would prevent that loss from occurring").

Here, WASA's injury will certainly be prevented if the Court upholds the TMDLs challenged in this action.

2. WASA Satisfies This Court's Four Criteria Under Rule 24(a)(2)

a. WASA's Motion is Timely

In determining whether an intervention motion is timely, the D.C. Circuit considers the "time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). The general rule is that a motion to intervene is considered timely until the case has progressed to trial. *Union Nat'l Bank v. Superior Steel Corp.*, 9 F.R.D. 124, 127 (W.D. Pa. 1949). This Court has held that "there is little, if any, basis for dispute over the timeliness [of a motion to intervene]" when only limited progress in the action has occurred. *Seminole Nation v. Norton*, 206 F.R.D. 1, 8 (D.D.C. 2001) (motion to intervene was timely when the only action had been service of summons, filing of an Amended Complaint, and filing of the Answer to the Amended Complaint); *see also Fund for Animals*, 322 F.3d at 735 (finding a motion to intervene timely when filed less than two months after the filing of the complaint, and prior to defendant's answer).

Here, timeliness is not a concern. WASA has moved to intervene only a short time after the time EPA filed its Answer to the Complaint. As the lawsuit has not yet progressed beyond this stage, there is no conceivable prejudice or delay to the original parties due to timing of the intervention.

b. WASA Has a Substantial Interest in EPA Action

Rule 24(a) does not specify the nature of the interest required for a party to intervene of right. This Court has opined that the "intervener's [sic] interest in the lawsuit . . . must be a legally protectable interest." *DSMC, Inc. v. Convera Corp.*, 273 F. Supp. 2d 14, 25 (D.D.C. 2002) (citing *Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994)). The test "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). In addition, as WASA has Article III standing, it has a substantial interest in this litigation. *See Fund for Animals*, 322 F.3d at 735 (a finding that an intervenor "has constitutional standing is alone sufficient to establish" that they have an interest sufficient to meet the requirements of Rule 24(a)(2)).

Here, as explained above in Section IV.A.1, WASA has a legally protectable interest arising from its operation of the District's wastewater system discharging to the waterbody involved in this case, and its efforts to upgrade and improve the wastewater system under the LTCP.[4]

Moreover, case law supports intervention of right under these circumstances. Responsibility for wastewater treatment systems that would be subject to additional or more stringent permit requirements as a result of litigation has been determined to be a "significantly

[4] The legal standard for finding Article III standing and that for finding a 'cognizable interest' for purposes of intervention of right under Rule 24(a) are essentially interchangeable. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (stating that "[w]ith respect to intervention as of right in the district court, the matter of standing may be purely academic. One court has rightly pointed out that any person who satisfies Rule 24(a) will also meet Article III's standing requirement.")(citationomitted), *cert. denied*, 542 U.S. 915 (2004); *American Horse*, 200 F.R.D. at 157 ("it is impossible to conjure a case in which an intervenor would have constitutional standing to intervene but not have a sufficient 'interest in the litigation' to justify intervention"). While separate arguments have been presented relating to each test, these arguments and supporting evidence can be used to support the conclusion that WASA has both standing and a cognizable interest.

protectable interest" meriting intervention of right. In *Sierra Club v. EPA*, the United States Court of Appeals for the Ninth Circuit ruled that the City of Phoenix, which held permits issued under the Clean Water Act for wastewater treatment facilities, had a protectable interest with respect to the compilation of lists of waters not meeting water quality standards and the identification of point sources discharging to those waters. *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993). The Ninth Circuit summarized best when it said:

> The legitimate interests of persons discharging permissible quantities of pollutants pursuant to NPDES permits are explicitly protected by the [Clean Water] Act. 33 U.S.C. § 1342. ***Because the Act protects the interest of a person who discharges pollutants pursuant to a permit, and the City of Phoenix owns such permits, the City has a protectable interest.*** These permits may be modified by control strategies issued as a result of this litigation, so the City's protectable interest relates to this litigation.

Id. at 1485-86 (emphasis supplied); *see also United States v. City of Niagara Falls*, 103 F.R.D. 164, 166 (W.D.N.Y. 1984) (unincorporated association of businesses had protectable interest in Clean Water Act litigation affecting the requirements under which the treatment plant treating their wastes was to operate).

The interests of WASA are even more direct than those at issue in *Sierra Club*. The City of Phoenix's interest was contingent on a possible action by EPA at a later time. It was uncertain whether changes to the City's permits would be required unless and until specific waters and sources of pollutants were targeted by EPA for regulation. Nevertheless, the Court of Appeals held that the City's intervention was appropriate. 995 F.2d at 1486. Here, Plaintiffs seek to have the Court determine that the current TMDLs are unlawful, arbitrary, and contravene the requirements of reasoned decision making. Complaint at 10-11. Plaintiffs' claims, if upheld in this case, would have serious and wide-ranging practical ramifications for WASA's wastewater

system and NPDES permit. Thus, an adverse disposition of this action is even more likely to have a direct and immediate effect on the interests of WASA than the outcome of the *Sierra Club* case would have had on the City of Phoenix.

In addition to this Court's holding in *Friends of the Earth v. EPA*, No. 04-0092 (D.D.C. order entered May 25, 2004), other district courts have followed this reasoning in allowing water and sewer authorities or their representative associations to intervene in similar actions. Five non-profit West Virginia trade associations were allowed to intervene in *Ohio Valley Environmental Coalition Inc. v. Browner*, which involved water quality issues. As is the case here, the *Ohio Valley* plaintiffs sought to require EPA to undertake actions with respect to water quality regulation. Like WASA, the members of the trade associations allowed to intervene in *Ohio Valley* discharged pursuant to NPDES permits, and it was possible that the litigation would affect the terms and conditions of their NPDES permits. The Court granted intervention of right. Order, *Ohio Valley Environmental Coalition, Inc. v. Browner*, Civ. A. No. 2:95-0529 (S.D.W. Va. Nov. 28, 1995) (granting motion to intervene) (attached as Exhibit 3).

In Maryland, the district court allowed the Maryland Association of Municipal Wastewater Agencies ("MAMWA"), to intervene in similar water quality standards-related litigation. The plaintiffs in that case sought to establish the nondiscretionary duties of EPA to identify waters in Maryland that did not meet water quality standards and to establish plans to improve the quality of those waters. Mem. and Order at 6, *Sierra Club v. United States EPA*, Civ. No. H-97-3838 (D. Md. Jan. 20, 1998) (granting motion to intervene) (attached as Exhibit 4). The court recognized that MAMWA had a significantly protectable interest that would be impaired if the litigation were allowed to proceed without its presence because the ability of

MAMWA's members to continue with previously approved discharges could be affected by the litigation. *Id.* at 8-9. In granting MAMWA's motion to intervene, the court relied on the observation of the Ninth Circuit that "it is one thing to hold that only the government can be a defendant in a suit where the statute regulates only government action, 'but quite another to exclude permit-holding property owners from a [Clean Water Act] suit where the statute directly regulates their conduct.'" *Id.* at 8 (quoting *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1485 (9th Cir. 1993)).

In each of these cases, the requirement of a substantial interest was satisfied by the same circumstance present here; namely, that the litigation concerned the implementation of regulations governing the operations of wastewater treatment systems. Because the Plaintiffs have called into question TMDLs which will impact WASA's LTCP, wastewater treatment system and its NPDES permit, WASA has a substantial interest in this case.[5]

c. The Relief Sought in This Case Will Impair and Impede WASA's Ability to Protect Important Public Interests Delegated to WASA.

The significantly protectable interests of WASA in implementing the selected controls in the LTCP and treating and discharging wastewater will be impeded by an adverse disposition of this action. Plaintiffs seek relief in the form of an order reversing and remanding EPA's approval of the TMDLs in question. Complaint at 11-12. If Plaintiffs prevail, WASA will be affected significantly by the resulting alterations to the existing regulations governing the present and future operations of WASA's conveyance and treatment facilities.

[5] Although WASA may seek to protect its interest in further rulemaking if the current TMDLs are invalidated by this proceeding, "[i]t is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Environmental Defense Fund, Inc. v. Costle*, 79 F.R.D. 235, 239 (D.D.C. 1978) (quoting *NRDC v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977), and concluding that municipal public entities did have an interest in litigation seeking to invalidate salinity standards promulgated by EPA, and compel the development of TMDLs).

For example, if Plaintiffs prevail, WASA will be required to expend additional resources on more extensive CSO control projects and modify its operations to comply with more stringent permit limitations and conditions. It might even be argued that WASA would be unable to challenge issues presented in this action in future individual permit proceedings under principles of *stare decisis*.

The relief Plaintiffs seek would adversely impair and impede the interests of WASA in operating existing public infrastructure and constructing new public facilities, including those facilities in the LTCP for controlling CSOs. Granting this motion to intervene is essential to provide WASA with an adequate opportunity to present its views and protect its interests. It will also assist the Court in understanding the far-reaching practical ramifications of Plaintiffs' allegations and the relief they seek.

d. WASA's Interests Are Not Adequately Represented at Present in this Action.

A petitioner "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee." *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (internal quotations and citation omitted). Indeed, the burden of demonstrating inadequate representation is minimal and "not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). An applicant for intervention need only show that representation of that party's interests "may be" inadequate, not that representation will in fact be inadequate. *See id.* (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see also Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204 F.R.D. 301, 306 (S.D.W. Va. 2001).

WASA is a regulated entity whose interest in this litigation is considerably different than the regulator named as the defendant. *See Fund for Animals*, 322 F.3d at 736 ("we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors"). The principal purpose of the Clean Water Act is not the regulation of EPA, but rather the regulation of public and private parties, such as WASA. The restrictions sought by Plaintiffs will impose compliance obligations on WASA, and not on EPA. WASA is, in fact, the real target of this litigation.

Furthermore, these increased compliance costs and the inability to implement the present LTCP that will result from an adverse disposition of this action presents significant economic concerns for WASA. These economic concerns, which can be considered by the Court, are not shared by EPA. S*ee NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (noting the differing scope of interests between regulated entities, whose principal interest is in protecting their operations, and the more narrowly focused interest of regulatory agencies in implementing the law); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (concluding that government's representation of timber industry's interest was inadequate); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (finding fishing groups' interest not adequately represented by Secretary of Commerce by whom fishing groups were regulated); *National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977) (a regulatory agency seeking to protect both the public interest and the interest of a private intervenor undertakes a "task which is on its face impossible"); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 896 (N.D. Cal. 1984) (commenting that ultimate interests of a trade association "clearly differ" from those of EPA).

Because EPA does not share WASA's interests in the proceeding, and WASA has more particularized ultimate objectives than EPA, EPA does not adequately represent its interests. For this and the foregoing reasons, WASA has a right to intervene.

B. WASA Also Meets the Standard for Permissive Intervention

Even if WASA does not meet the criteria for intervention of right, which it does, it satisfies the requirements for permissive intervention. Under Rule 24(b)(2), permissive intervention is appropriate when "an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24 is construed broadly as a tool to fully litigate the issues with all interested parties in one proceeding rather than encouraging piecemeal litigation. *NRDC v. Costle*, 561 F.2d at 910-11; *see also Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) ("liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process") (citation omitted).

In this case, allowing WASA to intervene would promote judicial efficiency by reducing the prospects of future litigation to protect the public interests WASA is obligated to protect. WASA is not asserting any unrelated cross-claims, counterclaims, or other claims that might cause undue delay. Significantly, WASA represents citizen, commercial, and industrial ratepayers throughout the District of Columbia. For the reasons stated throughout this brief, it should be allowed permissive intervention in order to facilitate the resolution of its common claims of law and fact in one proceeding consistent with the principle of judicial economy.

V. CONCLUSION

WASA has the Article III standing that is pre-requisite to intervention. In addition, WASA satisfies the four criteria for intervention of right under Rule 24(a)(2). It also satisfies the requirements for permissive intervention under Rule 24(b)(2). Accordingly, WASA respectfully requests that this Court allow it to intervene as a party defendant and to file the proposed Answer.

Respectfully submitted,

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

By Counsel

/s/ David E. Evans

David E. Evans (DC Bar No. PA0017)
Darin K. Waylett
McGuireWoods LLP
901 East Cary Street
Richmond, Virginia 23219
Telephone: (804) 775-1000
Facsimile: (804) 225-5410

Avis Marie Russell
General Counsel
District of Columbia
Water and Sewer Authority
5000 Overlook Avenue, SW
Washington, D.C. 20032

Counsel for the District of Columbia Water and Sewer Authority

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 2009, a true copy of the foregoing Memorandum in Support of the District of Columbia Water and Sewer Authority's Motion to Intervene was mailed first-class, postage pre-paid, to:

Jennifer C. Chavez
Katherine D. Renshaw
Earthjustice
Massachusetts Ave., NW, Suite 702
Washington, DC 20036-2212
(202) 667-4500
Counsel for Plaintiffs

Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1101A EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Eric H. Holder
Attorney General
United States of America
950 Pennsylvania Ave., NW
Washington, DC 20530

Jeffrey A. Taylor
United States Attorney
District of Columbia
Judiciary Center Building
555 Fourth Street, NW
Washington, DC 20530

/s/ David E. Evans

\8709527.2