

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ANACOSTIA RIVERKEEPER, INC.	)	
And FRIENDS OF THE EARTH	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:09-cv-00097-RWR
	)	
LISA JACKSON	)	
And THE DISTRICT OF COLUMBIA	)	
WATER AND SEWER AUTHORITY	)	
	)	
Defendants.	)	

**JOINT MOTION OF THE NATIONAL ASSOCIATION OF CLEAN WATER  
AGENCIES, THE WET WEATHER PARTNERSHIP, THE MARYLAND  
ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC., VIRGINIA  
ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC., VIRGINIA  
MUNICIPAL STORMWATER ASSOCIATION, INC., THE STORM WATER  
ASSOCIATION OF MARYLAND, AND THE WEST VIRGINIA MUNICIPAL WATER  
QUALITY ASSOCIATION TO INTERVENE AS DEFENDANTS**

The National Association of Clean Water Agencies (“NACWA”), the Wet Weather Partnership (“WWP”), the Maryland Association of Municipal Wastewater Agencies (“MAMWA”), the Virginia Association of Municipal Wastewater Agencies (“VAMWA”), the Virginia Municipal Stormwater Association (“VAMSA”), the Storm Water Association of Maryland (“SWAM”), and the West Virginia Municipal Water Quality Association (“WVMWQA”) (together, “Municipal Intervenor”), by counsel, move to intervene permissively in this action as party defendants, in the alternative, for intervention by right, pursuant to Fed. R. Civ. P. Rule 24(a)(2) and (b)(2) for the reasons set forth in the accompanying memorandum. In accordance with Fed. R. Civ. P. 24(c), the proposed Answer of Movants also accompanies this motion.

Respectfully submitted,

MUNICIPAL INTERVENORS

By Counsel

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Maryland, Inc., and the West  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of June, 2009, a true copy of the foregoing Motion to Intervene of the Municipal Intervenors was mailed first-class, postage pre-paid, to:

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Plaintiffs,	)	
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LISA JACKSON	)	
And THE DISTRICT OF COLUMBIA	)	
WATER AND SEWER AUTHORITY	)	
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Defendants.	)	

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**JOINT MEMORANDUM OF THE NATIONAL ASSOCIATION OF CLEAN WATER  
AGENCIES, THE WET WEATHER PARTNERSHIP, THE MARYLAND  
ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC., VIRGINIA  
ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC., VIRGINIA  
MUNICIPAL STORMWATER ASSOCIATION, INC., THE STORM WATER  
ASSOCIATION OF MARYLAND, AND THE WEST VIRGINIA MUNICIPAL WATER  
QUALITY ASSOCIATION IN SUPPORT OF THEIR MOTION TO INTERVENE AS  
DEFENDANTS**

**I. INTRODUCTION**

The National Association of Clean Water Agencies (“NACWA”), the Wet Weather Partnership (“WWP”), the Maryland Association of Municipal Wastewater Agencies (“MAMWA”), the Virginia Association of Municipal Wastewater Agencies (“VAMWA”), the Virginia Municipal Stormwater Association (“VAMSA”), the Storm Water Association of Maryland (“SWAM”), and the West Virginia Municipal Water Quality Association (“WVMWQA”) (together, “Municipal Intervenors”), by counsel, hereby move to intervene in this action. Anacostia Riverkeeper, Inc. and Friends of the Earth (the “Plaintiffs”) challenge the Environmental Protection Agency’s (“EPA”) approval of total maximum daily loads (“TMDLs”) for the Anacostia River and its tributaries. Plaintiffs assert that EPA violated the Clean Water

Act (“CWA”), its related regulations, and the Administrative Procedure Act when it approved TMDLs for sediment and total suspended solids (“TSS”).

The Municipal Intervenors seek permissive intervention, pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, as Defendants. Municipal Intervenors have an independent ground for subject matter jurisdiction. There are common questions of law and fact between the Municipal Intervenors’ defenses and the Plaintiffs’ action. Municipal Intervenors’ motion is timely. Intervention would promote judicial efficiency by reducing the chances for future litigation by the Municipal Intervenors. Lastly, intervention will in no way unduly delay or prejudice the adjudication of this action, as evidenced by the Municipal Intervenors participation in previous related litigation.

In the alternative, Municipal Intervenors meet intervention by right, pursuant to Rule 24(a)(2). Municipal Intervenors have standing to intervene. Municipal Intervenors’ motion is timely. Municipal Intervenors have a substantial interest in this action. The relief sought by Plaintiffs’ will impair Municipal Intervenors’ ability to protect their interests. Lastly, the existing parties cannot adequately represent Municipal Intervenors’ interests, particularly in regard to the regulation of storm water (as compared to WASA’s CSO) discharges.

## **II. STATEMENT OF FACTS**

Municipal Intervenors collectively represent more than 500 water, sewer, and storm water utilities nationwide, including a number who discharge either directly to waters of the District of Columbia or upstream of waters of the District of Columbia. Accordingly, they will be affected by the decision of this Court regarding how daily loads must be developed for waters of the District of Columbia. Also, because US EPA Region III also regulates the States of Virginia, Maryland, and West Virginia, any ruling by this Court regarding Region III’s legal

obligation to establish daily loads will also affect how Region III develops TMDLs in the other Region III states.

NACWA represents the interests of nearly 300 of the nation's wastewater treatment agencies. Its membership includes: Alexandria Sanitation Authority, D.C. Water & Sewer Authority, Fairfax County Wastewater Management Program, and the Washington Suburban Sanitary Commission, among other dischargers to or upstream of waters of the District of Columbia.

The WWP's approximately 80 members are located across the country and include DC WASA, along with numerous other cities regulated by EPA Region III. Many of the WWP's members discharge from both combined sewers as well as municipal stormwater outfalls.

MAMWA is a non-profit, non-stock corporation incorporated under the laws of the State of Maryland. Its membership includes the following owners and operators of publicly-owned wastewater treatment works ("POTWs") throughout Maryland: the counties of Anne Arundel, Baltimore, Charles, Frederick, Harford, Howard, Queen Anne's and Washington, the cities of Baltimore, Cumberland, Fruitland, Hagerstown, Pocomoke City, and Salisbury, the towns of Berlin and Ocean City, the St. Mary's Metropolitan Commission, the Somerset Sanitary District and the Washington Suburban Sanitary Commission.

VAMWA is an incorporated association under the laws of the Commonwealth of Virginia. Its membership includes the following owners and operators of POTWs throughout Virginia: the counties of Arlington, Chesterfield, Fairfax, Frederick, Hanover, Spotsylvania, Stafford, the cities of Bedford, Danville, Fredericksburg, Lynchburg, Martinsville, Richmond and Waynesboro, the towns of Abingdon, Amherst, Blackstone, Bowling Green, Front Royal, Kilmarnock, South Boston, and Waverly, and numerous regional facilities and authorities,

including the Alexandria Sanitation Authority, the Augusta County Service Authority, the Blacksburg-V.P.I. Service Authority, Coeburn-Norton-Wise, Hampton Roads Sanitation District, Harrisonburg Rockingham Regional, the Henry County Public Service Authority, the Hopewell Regional Wastewater Facility, Loudoun County Sanitation Authority, Pepper's Ferry Regional, Prince William County Service Authority, Rapidan Service Authority, Rivanna Water and Sewer Authority, South Central Wastewater Authority, and the Upper Occoquan Sewage Authority.

VAMSA is an incorporated association under the laws of the Commonwealth of Virginia. Its membership includes the following owners and operators of regulated municipal separate storm sewer systems: Albemarle County, Arlington County, the City of Charlottesville, the City of Chesapeake, Fairfax County, Falls Church, Fredericksburg, Hanover County, the City of Harrisonburg, Henrico County, Loudoun County, the City of Lynchburg, the City of Norfolk, the City of Richmond, Stafford County, and the City of Virginia Beach.

SWAM is a newly formed, non-profit, non-stock corporation incorporated under the laws of the State of Maryland. Its membership includes owners and operators of stormwater (MS4) systems in Maryland. This matter involves the Court's determination of the proper application of certain water quality standards of the State of Maryland. SWAM members will be subject to this Court's determination of the application of those standards in TMDLs.

WVMWQA is an incorporated association under the laws of the State of West Virginia. Its membership includes the following owners and operators of publicly owned treatment works: Beckley Sanitary Board, Bluefield Sanitary Board, Bluewell PSD, Boone County PSD, the City of Bridgeport, Charleston Sanitary Board, Clarksburg Sanitary Board, Claywood Park PSD, Elk Valley PSD, the City of Fairmont, the City of Follansbee, Greater Harrison County PSD, Huntington Sanitary Board, Lubeck PSD, Malden PSD, the City of Martinsburg, Moundsville



Sanitary Board, the City of New Martinsville, the City of Oak Hill, Parkersburg Utility Board, the City of Philippi, Princeton Sanitary Board, the City of Ripley, St. Albans Municipal Utility Commission, the Town of New Haven, Union PSD, Weston Sanitary Board, Wheeling Water Pollution Control Division, and Williamstown Public Works.

The Municipal Intervenors are organizations that represent the collective interests of Municipal Separate Storm Sewer Systems (“MS4”) in the mid-Atlantic region. Significantly, Municipal Intervenors’ memberships include MS4 municipalities who discharge to waters of the District of Columbia (“the District”) and their tributaries. These upstream discharges to District waters are regulated by boundary/State line allocations affected by District TMDLs.

MS4 discharges are highly variable, intermittent and difficult to control and then only through best management practices. These discharges are authorized by National Pollutant Discharge Elimination System (“NPDES”) permits issued by the various State governments and EPA (in the case of the District of Columbia). When MS4s discharge to impaired waters, they are issued a wasteload allocation. WLA are implemented through NPDES permit limitations. Pollutants associated with stormwater discharges are typically regulated on a non-daily basis (monthly, seasonal or annual).

### **III. ARGUMENT**

#### **A. Municipal Intervenors Satisfy the Requirements for Permissive Intervention**

The Municipal Intervenors satisfy the requirements for permissive intervention, as established by Fed. R. Civ. P. 24(b)(1)(B). Rule 24(b)(1)(B) states that, “[o]n timely motion, the court may permit anyone to intervene who...has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B).

Rule 24(b)(2) requires a potential intervenor to show “(1) an independent ground for

subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action.” *Equal Employment Opportunity Comm’n v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). The rule also requires the court to consider whether intervention “will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3). This Court construes Rule 24 liberally as a tool to fully litigate the issues with all interested parties in one proceeding rather than encouraging separate litigation. *NRDC v. Costle*, 561 F.2d 904, 910-11 (D.C. Cir. 1977).

The Municipal Intervenors meet all the requirements of Rule 24(b)(1)(B) and 24(b)(3). As such, the Court should grant Municipal Intervenors’ Motion for Intervention.

**1. Municipal Intervenors have an independent ground for subject matter jurisdiction.**

The first requirement for permissive intervention is an independent ground for subject matter jurisdiction. United States District Courts have original jurisdiction over all civil actions arising under “the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. The Municipal Intervenors seek to defend an agency action which arises under federal law. The TMDL at issue here was established and approved under the Clean Water Act and its related regulations. See 33 U.S.C. § 1313(d) and 40 C.F.R. § 130.7. As it relates to MS4 discharges, Municipal Intervenors consider the TMDL at issue not only in compliance with the Clean Water Act’s requirements, but also believe the methodology behind its creation and approval to be the only adequate means to develop and implement TMDLs of this nature. Because they seek to defend claims which arise under federal law, Municipal Intervenors have independent grounds for subject matter jurisdiction.

## **2. Municipal Intervenors have made a timely motion for intervention.**

The second requirement for permissive intervention is a timely motion from the potential intervenor. The D.C. Circuit examines 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). Generally, a motion to intervene is considered timely until a case has moved to trial. *Union Nat’l Bank v. Superior Steel Corp.*, 9 F.R.D. 124, 127 (W.D. Pa. 1949).

This Court has stated that “there is little, if any, basis for dispute over timeliness” when the action had not proceed past the point of filing an Answer. *Seminole Nation v. Norton*, 206 F.R.D. 1, 8 (D.D.C. 2001). This Court has even considered intervention timely four years after the initial filing, after the parties entered Stipulation of Facts and Exhibits, and after the Plaintiff moved for Partial Summary Judgment. *Hardin v. Jackson*, 2009 WL 530066, \*3 (D.D.C. 2009). In finding the applicant’s motion to be timely, this Court found it dispositive that it had “not issued any decisions on the merits of the claim, and [that] no discovery has or will occur in [the] case, as it [was] based on the administrative record.” *Id.*

Here, Municipal Intervenors’ motion is timely. Municipal Intervenors have moved to intervene shortly after EPA has filed its Answer. The Court has not issued any decisions on the merits of the claims, nor has (or will there be) any discovery taking place. Furthermore, EPA has not filed the administrative record with the Court. As such, there is no prejudice or delay to the original parties based on the timing of NACWA’s motion.

Importantly, Municipal Intervenors have participated as intervenors before this Court, and participated in the prior litigation of the very TMDL at issue here. At no point were

allegations of prejudice or delay made against any of the Municipal Intervenor.

**3. Municipal Intervenor has a defense that has a question of law or fact in common with the main action.**

The party seeking to intervene must have “a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). This requirement is satisfied when “[t]he facts necessary to assert [the intervenor's] claim are essentially the same facts as those necessary to establish [an existing party's] claim.” *MeWuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, 246 F.R.D. 315, 320 (D.D.C. 2007). This Court has also found this requirement satisfied when “defense of Defendants' actions would raise the same factual and legal issues that Defendants will likely raise in support of their decisions.” *Butte County, CA v. Hogen*, 2008 WL 2410407, \*2 (D.D.C. 2008).

Municipal Intervenor satisfy this requirement for permissive intervention. As in *Butte County, CA* and *MeWuk Indian Cmty.*, Municipal Intervenor's defense of EPA's action would raise the same factual and legal issues that EPA will likely raise in support of its decision. Municipal Intervenor assert that the TSS daily loads, which are directed towards achieving seasonal and/or annual loadings, fully comply with the CWA's TMDL requirements. Moreover, Municipal Intervenor contend that daily loads of this type are the only appropriate and attainable way to achieve WQS for pollutants such as TSS. These defenses share questions of law and fact with Plaintiffs' claims. As such, Municipal Intervenor satisfy this requirement for permissive intervention.

**4. Municipal Intervenor will not unduly prejudice or delay adjudication of the rights of the original parties.**

The Court must also examine whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b)(3). In this case, the risk of

such delay or prejudice is minimal, if not nonexistent. Municipal Intervenors will not assert any cross-claims, counterclaims, or other claims unrelated to the TMDL litigation that would cause undue delay. Municipal Intervenors' intervention will not cause any prejudice, as it would occur prior to EPA's filing of the administrative record, and prior to Plaintiffs' filing of a Motion for Summary Judgment. As previously stated, Municipal Intervenors have participated as in prior litigation of this very TMDL before this Court, as well as in many other District Courts around the country and at no point were allegations of prejudice or delay made against Municipal Intervenors. As such, Municipal Intervenors' intervention will cause no undue delay or prejudice to the original parties.

For the reasons stated above, Municipal Intervenors meet the requirements for permissive intervention. In addition, intervention would facilitate the resolution of its common defenses of law and fact in one proceeding consistent with the principle of judicial economy. As such, Municipal Intervenors' motion should be granted.

**B. Municipal Intervenors are entitled to Intervene as a Matter of Right.**

In the alternative, Municipal Intervenors are entitled to intervene as a matter of right, pursuant to Fed. R. Civ. P. 24(a)(2). Rule 24(a)(2) states that a party is entitled to intervene in an action when it

claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposition 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.

In determining whether to allow intervention by right, the D.C. Circuit "ha[s] identified

four prerequisites to interven[tion] as of right: ‘(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests.’” *Atlantic Sea Island Group LLC v. Connaughton*, 592 F.Supp.2d 1, 6 (D.D.C. 2008) (quoting *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008)). Also, the applicant “must establish that he has standing to participate in the action.” *Id.* (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003)). This Court has interpreted Rule 24(a) broadly, in favor of intervention of right.

As we explain below, Municipal Intervenors have standing under Article III of the Constitution, and satisfy all four requirements of Rule 24(a)(2). Accordingly, Municipal Intervenors are entitled to intervene as a matter of right.

**1. Municipal Intervenors have Article III standing to intervene.**

Article III requires the applicant to show injury-in-fact, causation, and redressability to establish standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Municipal Intervenors meet all three requirements.

**a. Municipal Intervenors satisfy the injury-in-fact requirement.**

An injury-in-fact is one which is against a legally protected interest, and is “concrete and particularized,” and “actual or imminent, not conjectural or hypothetical.” *Id.* at 560. Specifically, this Court has ruled that, when moving to intervene as a defendant to uphold agency action, a party must “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).

Here, Municipal Intervenors’ members operate MS4s (municipal storm water systems) in

close proximity to the District and either discharging to District waters or upstream. In either case, Municipal Intervenors will be affected by how the TMDL at issue is written. In fact, Municipal Intervenors will likely face the greatest impact from more stringent daily loads given that municipal storm water outfalls do not have treatment systems (unlike wastewater plants and even some CSO outfalls). Thus, any tightening of the daily loads in this case will have a particular impact on Municipal Intervenors (both directly where our members discharge to District waters and indirectly where our members discharge to waters that are tributary to District waters).

This Court has ruled that economic harm alone is sufficient to establish injury-in-fact for Article III standing. *Pharmaceutical Research & Mfrs. Of Am. v. Thompson*, 259 F. Supp. 2d 39, 51 (D.D.C. 2003). Of course, stricter limits would impose more challenging (if not impossible) requirements for Municipal Intervenors and this will increase our compliance costs.

In sum, Municipal Intervenors' would face greater compliance costs if the daily loads in the TSS TMDL at issue are made more stringent in any way.

**b. Municipal Intervenors would be injured by the relief which Plaintiffs' seek.**

Causation requires Municipal Intervenors' injury to be "fairly traceable to the regulatory action." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Setting aside the TMDL at issue will cause the injuries described above, as permits must impose loadings consistent with applicable TMDL wasteload allocations. Municipal Intervenors discharge either directly or tributary to waters of the District under such permits. Stricter limits would adversely affect our ability to comply and our costs to comply, particularly with waste load allocations in our permits. As such, Municipal Intervenors will certainly be injured by the relief which Plaintiffs' are seeking.

**c. Municipal Intervenor would not be injured if the TMDL is upheld.**

Injuries revolving around agency action are redressable if “the injury would be prevented if the government action is upheld.” *American Horse Protection Ass’n*, 200 F.R.D at 156. As in *American Horse Protection Ass’n*, the injury to Municipal Intervenor would definitely be prevented if the Court upholds the challenged TMDLs. Municipal Intervenor would not be subject to stricter, unnecessary, and unattainable limits if the Court upholds EPA’s approval. This would prevent Municipal Intervenor from having to make additional operational and capital investments to comply with the TMDL. Therefore, Municipal Intervenor’s injuries are redressable.

**2. Municipal Intervenor meet the criteria for intervention under Rule 24(a)(2).**

**a. Municipal Intervenor’s motion is timely.**

For the reasons described above in section III(A)(2), Municipal Intervenor’s motion is timely.

**b. Municipal Intervenor have a substantial interest in this action.**

The intervenor’s 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). Because Municipal Intervenor meet the requirements for Article III standing in this matter, they have a substantial interest in this litigation. *See Fund for Animals*, 322 F.3d at 735.

Caselaw supports a finding of substantial interest in these circumstances. Ownership of wastewater and storm water management systems that are subject to permit limits derived in accordance with the ruling in this case has been determined to be a “significantly protectable interest” meriting intervention as of right. *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir.



1993). The Ninth Circuit in *Sierra Club* went on to say that because “[t]hese 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; see also *National Wildlife Federation v. U.S. Army Corps of Engineers*, 188 F.R.D. 381, 385 (D. Or. 1999) (“Because the relief sought by plaintiff...could have a direct effect upon the legitimate interests of applicant intervenor Potlatch Corporation by discharging permissible quantities of pollutants pursuant to NPDES permits issued under the Clean Water Act regulations, the court will grant the motion to intervene...”).

Here, Municipal Intervenors meet the interests established in *Sierra Club*. Municipal Intervenors have a legally protected interest arising from its members’ operation of MS4 systems discharging into waters upstream from the waterbody involved in this case. In addition, Municipal Intervenors are regulated under a number of TMDLs for District waters which will have daily loads developed in accordance with the decision in this case. Thus, Municipal Intervenors meet the second requirement for mandatory intervention.

**c. Plaintiffs’ relief will impair and impede Municipal Intervenors’ ability to protect its interests.**

Municipal Intervenors’ interest in continuing to operate their wastewater and storm water systems under daily loads developed by using EPA’s approach in this case would be jeopardized by an adverse decision by the Court. Changes in how TMDLs can be implemented would mean Municipal Intervenors will likely be required to comply with stricter limits on their stormwater discharges. The more stringent daily loads which Plaintiffs seek, will impose a major hardship on Municipal Intervenors’ storm water programs and may even result in impossible compliance requirements given the variable and uncontrolled nature of urban storm water discharges.

Municipal Intervenors must also be able to participate in this action to avoid a need to relitigate the daily loads question when loads developed consistent with this Court’s ruling are

placed in their permits.

Plaintiffs' relief would adversely impair and impede Municipal Intervenors' interests in insuring its current and future infrastructure plans comply with permit conditions. It is imperative that the Court provide Municipal Intervenors with adequate opportunity to present its views, to protect its interests, and to explain the regional and local effects of Plaintiffs' relief to the Court.

**d. The existing parties to the lawsuit cannot adequately represent Municipal Intervenors' interests.**

In order to meet the fourth requirement for intervention by right, a movant need only show that "the representation of [its] interest may be inadequate; and the burden of making that showing should be treated as minimal." *Akiachak Native Community v. Department of the Interior*, 584 F. Supp. 2d 1, 7 (D.D.C. 2008) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). Furthermore, the D.C. Circuit has "often concluded that government entities do not adequately represent the interests of aspiring intervenors." *County of San Miguel, Colorado, et al. v. MacDonald, et al.*, 244 F.R.D. 36, 48 (D.D.C. 2007) (quoting *Fund for Animals*, 322 F.3d at 736).

Municipal Intervenors' interests in this matter are significantly different than EPA's. The Clean Water Act does not, first and foremost, regulate the EPA. Rather, it primarily regulates those parties who discharge to waters of the United States, such as Municipal Intervenors. Significantly, the outcome of this litigation will ultimately impose mandates upon Municipal Intervenors. Further, increased compliance costs and inability to implement present stormwater management plans that would result from Plaintiffs' relief being granted imposes significant economic concerns for Municipal Intervenors. EPA does not share in these concerns, and therefore does not represent Municipal Intervenors' interests.

WASA also does not adequately represent Municipal Intervenors' interests. WASA intervened in order to protect its interests surrounding its Combined Sewer Overflow (CSO) Long Term Control Plan (LTCP). Significantly, WASA does not operate an MS4 storm water system. Its interest in this case is specifically limited to CSO discharges and it's LTCP. MS4s are entirely different systems which are operated and designed in a vastly different manner than Combined Sewer Systems. Because WASA does not have an interest in this case's effects on MS4s, it does not adequately represent Municipal Intervenors' interests.

#### **IV. CONCLUSION**

Municipal Intervenors have satisfied the criteria for permissive intervention under Rule 24(b). Municipal Intervenors have also satisfied the requirements for intervention as of right under Rule 24(a). Accordingly, Municipal Intervenors respectfully request that this Court grant their motion to intervene as a party defendant.

Respectfully submitted,

MUNICIPAL INTERVENORS

By counsel

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## **CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of June, 2009, a true copy of the foregoing Motion to Intervene of the Municipal Intervenors was mailed first-class, postage pre-paid, to:

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