IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD AND WATER WATCH and FRIENDS OF THE EARTH, **Plaintiffs,** **v.** **U.S. ENVIRONMENTAL PROTECTION AGENCY, and LISA JACKSON, in her official capacity as Administrator, U.S. Environmental Protection Agency,** **Defendants,** **and** **AMERICAN FARM BUREAU FEDERATION, and NATIONAL ASSOCIATION OF HOME BUILDERS,** **Proposed Defendant-Intervenors.**	**No. 12-cv-1639**

MOTION TO INTERVENE AS DEFENDANTS BY AMERICAN FARM BUREAU FEDERATION AND NATIONAL ASSOCIATION OF HOME BUILDERS

American Farm Bureau Federation and National Association of Home Builders (together, "Proposed Intervenors") respectfully move this Court for leave to intervene as defendants in this action pursuant to Fed. R. Civ. P. 24 and Local Rule 7(j). Proposed Intervenors seek to intervene in order to defend against the claims raised by Food and Water Watch and Friends of the Earth (together, "Plaintiffs") with respect to the legality of state water quality trading and offset programs under the Clean Water Act.

Proposed Intervenors are national trade associations representing the interests of the agricultural and home building industries throughout the United States, including within the Chesapeake Bay watershed. Proposed Intervenors' members are subject to limitations on nutrient loadings in the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment ("Bay TMDL") established by Defendant U.S. Environmental Protection Agency ("EPA"). *See* 76 Fed. Reg. 549 (Jan. 5, 2011) (notice of availability of the Final TMDL); *available at* http://www.epa.gov/reg3wapd/tmdl/ ChesapeakeBay/tmdlexec.html. A decision in favor of Plaintiffs in this case would adversely affect the interests of Proposed Intervenors' members who will depend on, and benefit economically from, state-established offset and trading programs to meet the requirements EPA seeks to impose in the Bay TMDL. A decision in favor of Plaintiffs could also jeopardize Proposed Intervenors' members' ability to rely on state trading and offset programs in general.

Proposed Intervenors seek to intervene in this action pursuant to Fed. R. Civ. P. 24(a). Under Rule 24(a), a party may intervene as of right when it has an interest that may be impaired or impeded by the disposition of the action and its interest is not adequately represented by other parties. Alternatively, Proposed Intervenors seek permissive intervention under Rule 24(b). As explained in the accompanying statement of points and authorities in support of this motion, and the declarations attached thereto, Proposed Intervenors meet the requirements to intervene under both Rule 24(a) and Rule 24(b).

Counsel for Proposed Intervenors contacted counsel for Plaintiffs regarding this Motion on December 5. As of the time of this filing, counsel for Plaintiffs has not indicated what Plaintiffs' position on this motion will be. Counsel for Proposed Intervenor has conferred with counsel for the Defendants, who indicated that the Defendants take no position on this motion.

Accordingly, Proposed Intervenors respectfully request that the Court grant their motion to intervene as defendants.

December 7, 2012

Respectfully submitted,

/s/ Kirsten L. Nathanson

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was filed with the Clerk of the Court on December 7, 2012 via electronic mail at dcd_cmecf@dcd.uscourts.gov.

I further certify that on December 7, 2012, a true and correct copy of the foregoing was sent via electronic mail to the following counsel of record in this case:

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FOOD AND WATER WATCH, and FRIENDS OF THE EARTH **Plaintiffs,** **v.** **U.S. ENVIRONMENTAL PROTECTION AGENCY, and LISA JACKSON, in her official capacity as Administrator, U.S. Environmental Protection Agency,** **Defendants,** **and** **AMERICAN FARM BUREAU FEDERATION, and NATIONAL ASSOCIATION OF HOME BUILDERS,** **Proposed Defendant-Intervenors.**	**No. 12-cv-1639**

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY AMERICAN FARM BUREAU FEDERATION AND NATIONAL ASSOCIATION OF HOME BUILDERS

American Farm Bureau Federation and National Association of Home Builders (together, "Proposed Intervenors") hereby file this statement of points and authorities in support of their motion to intervene as defendants pursuant to Fed. R. Civ. P. 24 and Local Rule 7(j).

I. BACKGROUND

In this lawsuit, Plaintiffs seek a ruling that water quality trading and offset programs violate the Clean Water Act ("CWA"). Plaintiffs characterize their claims as a challenge to provisions of the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and

Sediment ("Bay TMDL"), issued by Defendant U.S. Environmental Protection Agency ("EPA"),[1] which Plaintiffs allege "authorized" or "approved" water quality trading and offsets. *See* Compl. ¶¶ 66-90. Before discussing the grounds for Proposed Intervenors' intervention in this case, we provide a brief overview of relevant portions of the CWA and of the Bay TMDL.

A. Relevant Clean Water Act Provisions

Under the CWA, states are responsible for adopting water quality standards for their water bodies. *Id.* § 1313(c)(2)(A). Each state must designate one or more uses for each of its water bodies (*e.g.*, recreation, drinking water supply, aquatic life uses) and establish water quality criteria necessary to protect these uses. *Id.* § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11. Each state is also responsible for identifying "impaired" waters "within its boundaries" – *i.e.*, waters that are not meeting applicable water quality standards – and establishing total maximum daily loads ("TMDLs") for pollutants that EPA identifies are "suitable for such calculation." 33 U.S.C. §§ 1313(d)(1)(A), (C). The Act does not define the term "total maximum daily load," but it directs that a TMDL be established "at a level necessary to implement the applicable water quality standards." *Id.*

Water quality standards, state lists of impaired waters, and TMDLs are all subject to EPA review and approval. 33 U.S.C. § 1313(d)(2). If EPA disapproves of state action, or if a state fails to take any action, EPA has authority to establish water quality standards, list impaired waters, and establish TMDLs for the state. *Id.* In keeping with congressional policy to preserve and protect the primary responsibilities and rights of each state over its planning for the development and use of its land and water resources, *see* 33 U.S.C. §§ 1251(b), 1370(2), the CWA "puts the responsibility for implementation of TMDLs on the states." *Sierra Club v.*

[1] The Bay TMDL and its appendices are available on EPA's website at http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html (last visited December 6, 2012).

Meiburg, 296 F.3d 1021, 1031 (11th Cir. 2002). This is true even in cases where EPA establishes the TMDL itself. *See id.* at 1031.

Implementation of TMDLs may be achieved through a number of mechanisms under the Act. For example, most states have authority to administer the section 402 permitting program regulating point source[2] discharges. *See* 33 U.S.C. § 1342. Section 402 permits must contain effluent limits that are consistent with applicable requirements in a TMDL. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B). Reductions in nonpoint source[3] pollution can be attained through state programs aided by the section 319 planning and grant funding program. 33 U.S.C. § 1329. The Act assigns responsibility to the states to prepare waste treatment management plans (33 U.S.C. § 1288), non-point source management plans (33 U.S.C. § 1329), and a continuing planning process (33 U.S.C. § 1313(e)), "which is essentially a plan for how the state is going to clean up pollution." *Meiburg*, 296 F.3d at 1026.

The CWA does not expressly mention offset or water quality trading programs as examples of ways for states to implement a TMDL. Under the former (offset), new or increased loadings of a particular pollutant that are not accounted for in a state's allocation scheme for a TMDL can be offset by loading reductions achieved by, and credits generated by, existing sources. *See, e.g.*, Bay TMDL at Appendix S. Under the latter (trading), sources within a particular water segment or watershed that face higher pollutant control costs to meet the requirements in permits may, under state-established trading programs, purchase water quality credits from other sources that can achieve pollutant reductions at lower costs, so long as such

[2] A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14).

[3] Nonpoint sources are not defined in the CWA, but generally include any source of water pollution other than a point source discharge. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165-66 (D.C. Cir. 1982). Nonpoint sources may be regulated by the states. But "nothing in the CWA demands that a state adopt a regulatory system for nonpoint sources." *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005).

"trades" do not cause or contribute to violations of applicable water quality standards and do not delay or weaken implementation of a TMDL. *See, e.g.*, EPA, Water Quality Trading Policy (2003), *available at* http://www.epa.gov/owow/watershed/trading/finalpolicy2003.pdf. At bottom, both offset and trading programs contemplate the generation of water quality credits, which can then be used by other sources to meet their obligations. EPA has issued guidance documents setting forth how state offset and trading programs are consistent with the requirements of the CWA and its implementing regulations. *See, e.g.*, Bay TMDL at Appendix S (citing EPA guidance).

B. Chesapeake Bay TMDL

EPA describes the Bay TMDL as a "historic and comprehensive 'pollution diet' with rigorous accountability measures to initiate sweeping actions to restore clean water" in the entire watershed. Bay TMDL at ES-1. It is the "largest and most complex thus far" of the 40,000 TMDLs completed to date across the United States. *Id.* at ES-3. The Bay TMDL sets limits for the 64,000-square mile Chesapeake Bay watershed of 185.9 million pounds of nitrogen, 1.2 million pounds of phosphorus, and 6.45 billion pounds of sediment per year. *See id.* at ES-1. The Bay TMDL purports to establish hundreds upon hundreds of allocations of those total limits, which are assigned to: each water segment within the watershed; source sectors (*e.g.*, forestry, agricultural, wastewater, etc.) that discharge into those segments; and even individual facilities throughout the watershed. *See id.* at Sec. 9 and Appendices Q and R. In addition to the aforementioned allocation scheme, the Bay TMDL purports to authorize implementation of the Bay TMDL through state offset and trading programs. *See* Bay TMDL at 10-1 to 10-4. It is this alleged "authorization" that forms the basis of Plaintiffs' claims in this litigation. *See* Compl. ¶¶ 66-90.

In a separate lawsuit, Proposed Intervenors have challenged the Bay TMDL – in particular, its allocation scheme – as contrary to the CWA and as arbitrary and capricious and procedurally defective in violation under the Administrative Procedure Act. *See Am. Farm Bureau Fed'n v. EPA*, No. 11-cv-00067 (M.D. Pa.).[4] Proposed Intervenors seek vacatur of the Bay TMDL in that lawsuit – a remedy that would render this present action moot.

Proposed Intervenors seek intervention in this case to defend the legality of trading and offset programs under the CWA. Under such programs, certain of Proposed Intervenors' members can generate water quality credits from achieving pollutant loading reductions that are greater than the required reductions EPA seeks to impose in the Bay TMDL. *See* Decl. of Don Parrish, at ¶ 7 (Dec. 6, 2012) ("Parrish Decl.," attached hereto as Ex. A). Those members can then sell such credits to other sources within the same water segment or elsewhere within the Chesapeake Bay watershed so long as the trade does not cause an exceedance of water quality standards. *See id.* Conversely, some of Proposed Intervenors' members stand to benefit from state trading programs by purchasing water quality credits from other sources in the watershed that can generate credits by reducing nutrient and sediment loadings at lower costs. *See* Decl. of Thomas Ward, at ¶¶ 12-14 (Dec. 6, 2012) ("Ward Decl.," attached hereto as Ex. B). For those members, state trading programs are essential to meeting the requirements EPA seeks to impose in the Bay TMDL "in a cost effective manner." *Id.* ¶ 14.

II. ARGUMENT

A. Proposed Intervenors May Intervene as of Right Under Rule 24(a).

Fed. R. Civ. P. 24(a)(2), which provides for intervention as of right, states, as follows:

> Upon timely application to the court, anyone shall be permitted to intervene in an action . . . when the applicant claims an interest

[4] Thus, any reference in this filing to requirements, required limits, or required reductions set forth in the Bay TMDL does not equate to an admission that EPA has lawfully imposed such requirements in the Bay TMDL.

> relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In the D.C. Circuit, an applicant's right to intervene depends upon (1) "the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Although the D.C. Circuit requires "a party seeking to intervene as of right [to] demonstrate that it has standing under Article III of the Constitution," *id.* at 731-32, it has also noted that "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003).

As explained below, Proposed Intervenors meet the requirements for intervention as of right under Rule 24(a)(2).

1. Proposed Intervenors' Motion to Intervene is Timely.

Proposed Intervenors' motion is timely. "[T]imeliness is to be judged in consideration of all the circumstances, especially weighing the factors of 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." *See United States v. British Am. Tobacco Australian Servs.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006) (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)).

This case is still at a preliminary stage. Plaintiffs filed their complaint on October 3, 2012, and the defendants have not yet filed an answer. A motion to intervene prior to a

defendant's answer is timely. 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1916, at 557 (3d ed. 2007) (motion to intervene "made before the existing parties have joined issue in the pleadings has been regarded as clearly timely"). In addition, no preliminary or dispositive motions have been filed, nor have any rulings on the merits been entered or a briefing schedule set. Moreover, Proposed Intervenors' intervention will not prejudice any existing parties or delay the proceedings. Proposed Intervenors seek to "participate in an upcoming . . . phase of the litigation," *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977), and not to reopen settled issues that would otherwise remain closed. Proposed Intervenors will comply with all deadlines set forth in any scheduling orders from the Court.

Given the short amount of time since the filing of the Complaint, the significance of Proposed Intervenors' interests in intervention (discussed below), and the absence of prejudice to any party, this motion "cannot be regarded as untimely." *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998).

2. Proposed Intervenors Have Cognizable Interests That Could Be Impaired By The Disposition Of This Action.

We discuss the closely related interest and impairment factors together. The "cognizable interest requirement assists in 'disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6, 8 (D.D.C. 1993) ("*PETA")* (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). Proposed Intervenors are clearly "concerned persons," because their members engage in activities relating to the agricultural and home building industries that Plaintiffs seek to burden, and possibly prohibit, through their attempts to secure a ruling from this Court that offset and trading programs violate the CWA. If Plaintiffs are correct in

characterizing this case as a challenge to aspects of a "rulemaking" under the CWA, *see* Compl. ¶ 3, the Court's assessment of Proposed Intervenors' interests must be guided by the even "greater impetus to intervention that inheres in administrative cases" than in ordinary private litigation. *Nuesse*, 385 F.2d at 700.

The potential for economic loss to Proposed Intervenors' members if Plaintiffs prevail in this lawsuit is another strong interest that warrants intervention. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967), *vacated on other grounds sub nom. Utah Public Service Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969) (economic loss from implementation of a proposed consent decree warrants intervention). Plaintiffs have broadly alleged that *all* water quality trading violates the CWA. *See* Compl. ¶¶ 67-71. The economics of some of Proposed Intervenors' members' operations would be harmed greatly, for instance, if they could not generate water quality credits under state trading programs (*e.g.*, from achieving pollutant loading reductions beyond what the Bay TMDL purports to require) to sell to other sources within the Chesapeake Bay watershed under existing trading agreements. *See* Parrish Decl. at ¶¶ 7-10. Other of Proposed Intervenors' members, *i.e.*, those that hold point source permits, would be harmed significantly if they are unable to purchase water quality credits under state programs, for example, in the context of Bay TMDL implementation. *See* Ward Decl. ¶¶ 12-14. Because compliance with the new limits EPA seeks to impose in the Bay TMDL will be, in some cases, far more costly for existing sources to meet without trading with other sources within the watershed, state trading and offset programs are critical compliance mechanisms for some of Proposed Intervenors' members. *See id.*

In addition to the foregoing interests, if Plaintiffs prevail in this lawsuit, the inability to engage in offsets and trading would disrupt the legitimate expectations of regulated entities that

would suddenly be prohibited from relying on offsets or trades with respect to the Bay TMDL. *See* Parrish Decl. ¶ 9. Proposed Intervenors' members' interests are certainly of the "significantly protectable" type referred to by the Supreme Court in *Donaldson v. United States*, 400 U.S. 517, 531 (1971), and fall well within the interest test enunciated by the D.C. Circuit in *Nuesse*.

Lastly, due process and simple fairness suggest that all persons potentially affected by Plaintiffs' claims should be represented in this litigation – the Federal Defendants, who Plaintiffs allege authorized offset and trading programs; Plaintiffs, who challenge broadly the legality of state offset and trading programs under the CWA; and Proposed Intervenors, whose members (particularly those with existing water quality trading contracts, *see* Parrish Decl. ¶¶ 8-9) would bear the brunt of any relief awarded. *See Kleissler*, 157 F.3d at 971 (in cases pitting private, state, and federal interests against each other, "[r]igid rules [barring intervention] contravene a major premise of intervention – the protection of third parties affected by the pending litigation. Evenhandedness is of paramount importance.) (emphasis added).

As to impairment of Proposed Intervenors' interests, Rule 24(a)(2) focuses on the *practical* impairment of the ability to protect one's interests under the particular circumstances of the case. The Rule itself expressly provides for intervention of right when "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest" (emphasis added). The D.C. Circuit has consistently interpreted this language as requiring a court to look at the "practical consequences" of denying intervention when evaluating an intervention request. *Nuesse*, 385 F.2d at 702. *See Smuck v. Hobson*, 408 F.2d 175, 180-81 (D.C. Cir. 1969); *Textile Workers Union v. Allendale Co.*, 226 F.2d 765, 767 (D.C. Cir. 1955). The practical effect of granting Plaintiffs their requested relief would be to significantly impede

or impair certain of Proposed Intervenors' members' ability to utilize offset and trading programs. *See* Ward Decl. ¶¶ 12-14; Parrish Decl. ¶¶ 7-9. Intervention therefore is necessary to avoid depriving them of a meaningful opportunity to protect the interest in having offset and trading programs available.

3. Proposed Intervenors' Interests Are Not Adequately Represented By The Existing Parties.

"The Supreme Court has held that th[e] 'requirement of the Rule [to show inadequate representation] is satisfied if the applicant shows that representation of [its] interest may be inadequate; and the burden of making that showing should be treated as minimal." *Fund for Animals, Inc.*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)) (emphasis added). The D.C. Circuit has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc.*, 322 F.3d at 736; *accord Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001) (finding that the necessary showing of inadequate representation by existing parties "is easily made when the party upon which the intervenor must rely is the government").

Notably, in *Trbovich*, the Supreme Court found that a prospective intervenor met his "minimal" burden of showing possible inadequate representation of its interests by the government even though the statute at issue in the case expressly obligated the Secretary of Labor to serve his interests. *See* 404 U.S. at 538-39 (statute required Secretary to protect simultaneously: (1) the rights of individual union members, *e.g.*, the proposed intervenor, against the union; and (2) the public interest in ensuring democratic union elections). The Supreme Court noted that the statute effectively required the Secretary to serve as the proposed intervenor's lawyer "for purposes of enforcing [certain] rights" against the union. *Id*. at 539. Nonetheless, it emphasized that, "even if the Secretary is performing his duties, broadly

conceived, as well as can be expected," the proposed-intervenor "may have a valid complaint about the performance of 'his lawyer,'" *i.e.*, the Secretary, with respect to protecting proposed-intervenor's narrower interests. *Id*. at 539.

Here, the potential harm confronting Proposed Intervenors, *i.e.*, inability to rely on, and benefit from, state trading and offset programs, is entirely separate and distinct from the broader public interest, which the Federal Defendants must defend. The Federal Defendants do not have any express statutory duty to protect Proposed Intervenors' interests in engaging in offsets and trading. Accordingly, the need for intervention is even stronger here than that in *Trbovich*. *See id.* at 538-39. That Proposed Intervenors and the Federal Defendants may share some common objective, *e.g.*, denial of Plaintiffs' claims in this litigation, is insufficient to establish that Proposed Intervenors' interests are adequately represented by the Federal Defendants. *See Utah Ass'n of Counties*, 255 F.3d at 1255 (collecting cases from numerous federal appellate courts finding that the government's representation of the broad interests of the general public may compromise its representation of the narrower interests of would-be intervenors and concluding that "the 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").

The difference between the interests of Proposed Intervenors and the Federal Defendants could well affect briefing strategy and arguments, and could also affect the interest in settlement or appeal – just as happened in *National Parks Conservation v. Salazar*, No. 1:09-cv-00115-HHK (D.D.C.). There, environmental groups challenged regulations issued by the Department of the Interior, and an industry trade association intervened to defend the regulations. The Department, however, moved to vacate the regulations rather than litigate, and it fell to the

intervenor trade association to argue – successfully – that the requested vacatur conflicted with the Administrative Procedure Act's provisions for repealing a rule. *Id.* (D.D.C. Aug. 12, 2009) (order denying motion to vacate). Such differences in interests between Proposed Intervenors and the government warrants intervention of right. *See Trbovich*, 404 U.S. at 539.

B. Proposed Intervenors Have Article III Standing To Intervene.

In the D.C. Circuit, a prospective intervenor – even one who seeks to intervene as a defendant[5] – must demonstrate that it has Article III standing by showing "(1) injury in fact, (2) causation, and (3) redressability." *Fund for Animals*, 322 F.3d at 733 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The Court "need not conclude that all [proposed intervenors] have standing." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012). Should the Court "determine that even one of the [proposed intervenors] has Article III standing," that is sufficient. *See id.* Indeed, Supreme Court precedent confirms that so long as one party has standing, a court need not consider the standing of other parties. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 446 (2009); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977) ("[W]e have at least one individual plaintiff who has demonstrated standing. . . . Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.").

For Proposed Intervenors to sue on behalf of their members, they must first demonstrate that their "members would otherwise have standing to sue in their own right." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 533 (1996). Proposed Intervenors satisfy the test for Article III standing, which is "self-evident" in this case

[5] The D.C. Circuit has noted the anomaly of requiring standing of a movant who seeks to intervene as a defendant, given that the standing inquiry is directed at persons who invoke a court's jurisdiction. *Roeder*, 333 F.3d at 233. But in a recent case the Circuit found no need to dwell on the issue, because "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Id.* (citing with approval *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 7th Cir. 2000)). Here, because Proposed Intervenors satisfy Rule 24(a)(2), they have standing.

just as it is in "many if not most cases . . . [involving] review of administrative action." *See Fund for Animals*, 322 F.3d at 733. If a party is itself the object of the government action at issue, there is "ordinarily little question" that the party can be harmed by the government action and that a judgment preventing the action will redress the injury. *Lujan v. Defenders*, 504 U.S. at 561-62. That is the situation here. Proposed Intervenors' members are subject to the requirements EPA seeks to impose in the Bay TMDL. In particular, the Bay TMDL purports to establish allocations that "will have significant regulatory consequences," and EPA expects those consequences on discharges in the watershed to be "immediate and direct." EPA's Resp. to Comments, Chesapeake Bay TMDL for Nitrogen, Phosphorus, and Sediment, at 1048 (Dec. 29, 2010), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/AppendixWRTCPart1final.pdf. If Plaintiffs succeed in this litigation, Proposed Intervenors' members would be injured by the inability to rely on state trading and offset programs during implementation of the Bay TMDL.

Specifically, Proposed Intervenors' members stand to suffer two distinct injuries – each sufficient to confer standing – should the Plaintiffs obtain the relief they seek. If Proposed Intervenors' members cannot rely on state trading and offset programs, certain members would be unable to benefit economically from the sale of water quality credits that they generate to other sources within the Chesapeake Bay watershed, and Proposed Intervenor AFBF identifies at least one of its members who can make this showing. *See* Parrish Decl. ¶¶ 7-9 (describing economic injury that the Brubaker Farm would suffer if it cannot sell water quality credits to the Mount Joy Borough under an existing trading agreement for the Borough to meet the pollutant loadings in the Bay TMDL). Separately, other members also stand to suffer economic injury because Plaintiffs' requested remedy would inappropriately restrict, make more costly, and in

some circumstances potentially prohibit altogether, Proposed Intervenors' members' home building-related operations. *See* Ward Decl. ¶¶ 12-14 (detailing how state trading programs are essential for home builders to meet the requirements EPA seeks to impose in the Bay TMDL in a cost-effective manner). These injuries, which would be redressed by a favorable ruling from this Court, *see* Parrish Decl. ¶ 10; Ward Decl. ¶ 15, demonstrate standing sufficient to support intervention. *See, e.g., Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (association intervened in support of EPA on behalf of members who "would suffer concrete injury if the court grants the relief the petitioners seek" and therefore "would have standing to intervene in their own right"); *County of San Miguel v. MacDonald*, 244 F.R.D. 36, 44-45 (D.D.C. 2007) (expected increase in regulatory restrictions if suit were successful created sufficient basis for standing for affected business interests; intervention granted).

Proposed Intervenors also satisfy the remaining elements of associational standing. The interests they seek to protect through intervening in this litigation are germane to their purposes. *See United Food*, 517 U.S. at 533. "Germaneness is satisfied by a 'mere pertinence' between litigation subject and an organization's purpose." *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 111 (D.C. Cir. 1990). Here, Proposed Intervenors' primary purposes are to advance and promote the interests of their members' activities, and thus, they have an interest influencing the development of reasonable and lawful environmental regulations and regulatory policies that affect the use and development of their members' property. *See, e.g.*, Parrish Decl. ¶¶ 2-3, 11; Ward Decl. ¶¶ 2-4, 16. As described above, the ability to rely on state offset and trading programs during implementation of a TMDL directly affects Proposed Intervenors' members' ability to use their land and conduct business. Thus, there is more than a

"mere pertinence" between this lawsuit and Proposed Intervenors' associational purposes. *Competitive Enter.*, 901 F.2d at 111-12.

Moreover, "neither the claim[s] asserted nor the relief requested requires the participation of individual members in the lawsuit." *United Food*, 517 U.S. at 553. No parties to this litigation are seeking monetary damages. Rather, the remedy at stake in this litigation is a declaratory judgment that trading and offsets violate the CWA. *See* Compl. ¶ 101. Because such relief is equitable, individual member participation is not required. *See id.* at 553-54.

C. Alternatively, Proposed Intervenors Should Be Permitted To Intervene Under Rule 24(b).

In the alternative, Proposed Intervenors should be permitted to intervene in this action. Rule 24(b) permits parties, upon timely application "to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). "In order to litigate a claim on the merits under Rule 24(b)(2), the putative intervenor must ordinarily present: (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 Emp't Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (citation omitted). In deciding whether to grant permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(2).

Permissive intervention by Proposed Intervenors is proper in this action. Proposed Intervenors seek to intervene for the purpose of defending the legality of state offset and trading programs under the CWA. Proposed Intervenors are not "ask[ing] the district court to adjudicate an additional claim on the merits." *Equal Emp't Opportunity Comm'n*, 146 F.3d at 1046. To the

extent this Court has subject matter jurisdiction over Plaintiffs' claims, Proposed Intervenors satisfy the jurisdiction requirement.

Next, Proposed Intervenors' defenses to Plaintiffs' claims involve "questions of law and fact" that are common to the original parties. *See Wilderness Soc'y v. Wisely*, 524 F. Supp. 2d 1285, 1294 (D. Colo. 2007). Specifically, Proposed Intervenors intend to argue that trading and offsets do not violate the CWA or its implementing regulations.

Other factors support permissive intervention by Proposed Intervenors. As explained above, the intervention request is timely. Neither Plaintiffs nor the Federal Defendants would be prejudiced by Proposed Intervenors' intervention in this action, as no dispositive motions have been filed and Proposed Intervenors commit to complying fully with the Court's scheduling order. Next, Proposed Intervenors' interests in this lawsuit are considerable and may not be adequately represented by the existing parties. Proposed Intervenors would benefit from intervention, for if they contribute to a successful defense of this action, Plaintiffs' lawsuit would be dismissed, and Proposed Intervenors' interests in engaging in water quality trading and offsets would be protected. Finally, Proposed Intervenors will significantly contribute to the just and equitable adjudication of the legal questions presented, as it seeks to raise important points of law, including arguments regarding the appropriate construction of the CWA and its implementing regulations.

In sum, the Court should exercise its discretion by finding it is in the interests of justice to allow all affected interest groups (the environmental group plaintiffs, the government regulators, and the economically-affected regulated community) to participate as parties in this case. *See Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10-11 (D.D.C. 2007).

D. If Intervention Is Denied, Proposed Intervenors Request Amicus Status.

Should this Court deny either (or both) of Proposed Intervenors' requests for intervention as of right or permissive intervention, Proposed Intervenors hereby request that the Court grant them leave to file amicus briefs addressing the merits of Plaintiffs' claims, whether in support of a motion to dismiss or a motion for summary judgment.

III. CONCLUSION

For the reasons stated above, Proposed Intervenors request that the Court grant their Motion to Intervene as Defendants in this action.

December 7, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was filed with the Clerk of the Court on December 7, 2012 via electronic mail at dcd_cmecf@dcd.uscourts.gov.

I further certify that on December 7, 2012, a true and correct copy of the foregoing was sent via electronic mail to the following counsel of record in this case:

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