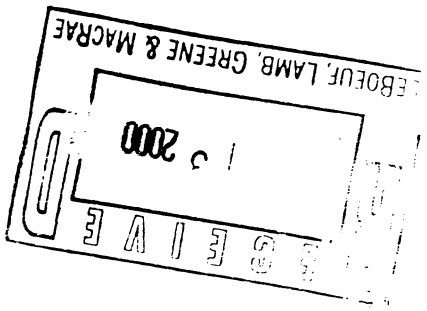

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FARM BUREAU FEDERATION, Petitioner, v. CAROL M. BROWNER, Administrator, United States Environmental Protection Agency, and ENVIRONMENTAL PROTECTION AGENCY Respondents.	)	No. 00-1320 and consolidated cases

PETITIONER'S BRIEF IN OPPOSITION TO THE MOTION FOR LEAVE TO INTERVENE OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

Petitioner American Farm Bureau Federation ("AFBF") opposes the Motion for Leave to Intervene filed by the Association of Metropolitan Sewerage Agencies ("AMSA") and submits this memorandum pursuant to Fed. R. App. P. 27. Leave for the AMSA to intervene should be denied for two reasons: (1) AMSA's interests are adequately represented by the U.S. Environmental Protection Agency ("USEPA") and Petitioners in this review of USEPA's regulatory authority, and (2) AMSA has not demonstrated a sufficient interest in the review to warrant its intervention.

BACKGROUND

AFBF and Petitioners in the consolidated cases brought their review actions to challenge USEPA's authority to promulgate a sweeping regulation revamping the Total Maximum Daily Load program under the Federal Water Pollution Control Act (the "Act"). USEPA published the

Rule in the Federal Register on July 13, 2000 (the "Rule"). 65 Fed. Reg. 43586. Promptly after promulgation, on July 18, 2000, AFBF filed its initial petition and then filed a subsequent petition on July 28, 2000.[1/] On August 11 and 29, 2000, the Court consolidated AFBF's two cases with two others filed by other organizations. On August 29 and September 20, 2000, two groups of environmental organizations filed motions to intervene, which AFBF opposes.[2/]

Since the focal point of AFBF's challenge is USEPA's authority under the Act (and the nature of that challenge, and the issues it presents, is a major reason for denying intervention), a brief summary of the Act's provisions involved in this case may be helpful. The Act requires the regulation of point sources of pollution through the NPDES permit program. The NPDES permit program requires that each point source obtain a permit prior to discharging pollutants into navigable waters. Nonpoint sources are not covered by NPDES permits. NPDES permits limit the quantities of pollutants that point sources are allowed to discharge in their effluent. NPDES permits may contain effluent limitations based on technology or the quality of receiving waters. Section 502 of the Clean Water Act, 33 U.S.C. § 1362, defines "effluent limitation" as a restriction established on "quantities, rates and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters * * * * ." If technology-based effluent limitations are not stringent enough to meet state water quality

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[1/] EPA purported to extend the date of issuance of the rule for purposes of judicial review to July 27, 2000, 65 Fed. Reg. 43586 col. 2, but it is unclear whether EPA has the authority to do that. Therefore, the American Farm Bureau Federation filed two petitions to ensure that its filing satisfied the 10-day window established by 28 U.S.C. § 2112.

[2/] The first motion to intervene was filed by the Sierra Club, Friends of the Earth, and Water Keeper Alliance. The second motion was filed by Northwest Environmental Advocates, the Center for Marine Conservation, Coast Action Group, Lake Michigan Federation, National Wildlife Federation, Southern Environmental Law Center and Trout Unlimited. AFBF filed its respective briefs in opposition on September 13 and October 3, 2000.

standards, water-quality based effluent limitations are established and included in NPDES permits.

The purpose of Section 303(d) is to help convert water quality standards into water-quality based effluent limitations, which are then incorporated into NPDES permits. Section 303(d)(1)(A) of the Act requires States to identify waters for which certain effluent limitations "are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). Section 303(d)(1)(C) requires States to establish for the waters identified in Section 303(d)(1)(A) the "total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation." The load is to be established at a level necessary to "implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C).

States are required to submit their Section 303(d)(1)(A) lists and TMDLs to the Administrator for approval. If the Administrator approves the list or TMDL, it is incorporated into the state water quality management plan. 33 U.S.C. § 1313(d)(2). But if he or she disapproves of the list or TMDL, the Administrator mush establish the list or TMDL for the State "as he determines necessary to implement the water quality standards applicable to such waters." *Id.*

USEPA published a proposed rule in the Federal Register on August 23, 1999, 64 Fed. Reg. 46012, dramatically revising and expanding EPA's authority with respect to the authority reserved to the States by Section 303(d). AFBF submitted initial and supplemental comments

on the proposed rule. AFBF has filed this appeal seeking review of the statutory authority for the Rule regarding the following issues:

(1) Whether the Rule unlawfully requires waters impaired by nonpoint sources, ground water, atmospheric deposition and/or solar input to be listed pursuant to Section 303(d)(1)(A) of the Act;

(2) Whether the Rule unlawfully requires waters impaired by "pollution" to be listed pursuant to Section 303(d)(1)(A) of the Act;

(3) Whether the Rule unlawfully requires the establishment of TMDLs for waters impaired by nonpoint sources, ground water, atmospheric deposition and/or solar input pursuant to Section 303(d)(1)(C) of the Act;

(4) Whether the Rule unlawfully requires TMDLs established pursuant to Section 303(d)(1)(C) of the Act to include implementation plans;

(5) Whether the Rule unlawfully requires implementation plans to provide "reasonable assurance" that TMDLs will be implemented;

(6) Whether the Rule authorizes unlawful methods to demonstrate "reasonable assurance";

(7) Whether the Rule unlawfully requires that TMDLs allow for reasonably foreseeable increases in pollutant loads, including future growth;

(8) Whether the Rule unlawfully vests USEPA with authority to review, object to and reissue environmentally significant State-issued NPDES permits that have been administratively-continued after expiration;

(9) Whether USEPA based the Rule on improper information because it failed to revise its identification of pollutants suitable for maximum daily load measurement as required by the Act;

(10) Whether USEPA unlawfully failed to comply with the requirements of the Regulatory Flexibility Act. 5 U.S.C. 601 *et seq.*

(11) Whether USEPA failed to comply with Section 553 of the Administrative Procedure Act;

(12) Whether the Act, as construed in the Rule, creates an unconstitutional delegation of legislative authority to the USEPA.

ARGUMENT

Fed. R. App. P. 15(d) requires only that a party seeking leave to intervene in a pending agency review action provide a concise statement of the party's interest and the grounds for intervention. Courts of Appeals look to the standards developed under Fed. R. Civ. P. 24, governing intervention in the district courts, in determining the whether a party should be permitted to intervene. *Internat'l Union v. Scofield*, 382 U.S. 205, 216 n.10 (1965); *Massachusetts School of Law at Andover, Inc. v United States*, 118 F.3d 776, 779-80 (D.C. Cir. 1997); *Building and Const. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). A party seeking to intervene as a matter of right must satisfy four requirements:

> (1) the application to intervene must be timely, (2) the party must have an interest relating to the property or transaction which is the subject of the action, (3) the party must be so situated that the disposition of the action may, as a practical matter, impair or impede the party's ability to protect that interest, and (4) the party's interest must not be adequately represented by existing parties to the action.

Building and Const. Trades Dept., AFL-CIO, 40 F.3d at 1282; *see* Fed. R. Civ. P. 24(a)(2). In this case, AMSA's motion should fail because (1) their interests are adequately represented by USEPA and Petitioners and (2) their interests do not relate to the property or transaction which is the subject of the action.

1. AMSA's Interests Are Adequately Represented by USEPA and Petitioners.

AMSA represents that its interest in this case stems from the allegation that "TMDLs developed pursuant to EPA's Final Rule (as shaped by the outcome of this action) will . . . directly impact the terms and conditions of AMSA's members' NPDES permits." Motion for Leave to Intervene ("Motion") at 3. But AMSA has not demonstrated how or why "the entire burden for improving the quality of impaired waters would be foisted upon POTWs and other point source dischargers." Motion at 5. This "interest" is entirely speculative and, therefore,

insufficient grounds to warrant intervention. In any event, AMSA's various positions as to certain issues raised by AFBF and other petitioners do not show inadequate representation by parties to the case. For example, AMSA states that it "disagrees with Petitioners that will argue that nonpoint sources should not be included in the TMDL process" and "believes that implementation plans are an essential part of an effective TMDL" (Motion at 5) in order to show a divergence of interest with Petitioners. However, as set forth more fully below, USEPA can be expected to defend vehemently its authority to include nonpoint sources in, and require implementation plans for, TMDLs. Likewise, AMSA attempts to demonstrate inadequate representation by USEPA by asserting that it agrees with Petitioners that the Court should review whether USEPA should have authority to reissue administratively-expired state-issued NPDES permits. But again, AMSA has failed to show how its arguments or positions will differ from Petitioners enough to warrant intervention. AMSA has not raised any issues, arguments or points of view in its moving papers that demonstrate its goals will not be served by participating as *amicus* in this case.

The real interest at issue in this case is in establishing the boundaries of USEPA's power under the Act. For that reason, necessarily, AMSA's stated interests are adequately represented by USEPA in this action and any issue regarding USEPA's authority to reissue administratively-expired state-issued NPDES permits is adequately represented by Petitioners. As AFBF has already established with its non-binding Statement of Issues attached to its Docketing Statement filed on August 21, 2000, and set forth above, this action is a matter of statutory interpretation.[3/]

[3/]AFBF also may assert procedural failures by the agency in this appeal; these issues should not bear on the outcome of this motion since they have no relation to the "interests" recited by the AMSA.

As such, the real interest implicated by these consolidated actions--to determine the scope of the power Congress vested in USEPA to promulgate the Rule--no doubt will be vigorously defended by USEPA. There is no question that USEPA has invested considerable time, resources and political capital in refining and promulgating the Rule and has the motivation to protect its efforts and its authority.[4/] *See Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 105 F.R.D. 106, 112 (D.D.C. 1985) (holding there was adequacy of representation of tort claimants where petrochemical company's survival depended on successful litigation with insurer), *aff'd*, 784 F.2d 1131 (D.C. Cir. 1986).

This Circuit has held that "adequacy of representation must be assessed in relation to the specific purpose that intervention will serve." *United States v. Amer. Telephone & Telegraph Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) ("*AT&T*"). In finding inadequacy of representation in *AT&T*, the Court looked to the government's interest in expeditiously trying its antitrust suit against AT&T as clearly divergent from the proposed intervenor's interest in appealing an adverse ruling on the proposed intervenor's privileged documents. *Id.* at 1293-94. AMSA has set forth no such specific adversity of interests in relation to USEPA's authority under the Act to warrant a determination that the government's defense of this action will be inadequate. Where there is no conflict of interest, "adequacy of representation is presumed." *Solid Waste Agency of*

[4/]For example, USEPA flouted Congress' attempt to stop the agency from issuing the Rule. Apparently because issuance was imminent, on June 30, 2000, Congress passed H.R. 4425 (that later became Public Law 106-246), which provided that USEPA's appropriations for fiscal years 2000 and 2001 could not be used to make a final determination on or implement the Rule. Thus, once H.R. 4425 was signed by the President, USEPA could not have finalized the Rule. But before the President signed 4425, Respondent Browner signed the Rule in the face of congressional intent to the contrary. As this recent history surrounding the Rule demonstrates, USEPA will do whatever it takes to preserve the considerable effort it has expended on this far-reaching Rule.

Northern Cook County v. United States Army Corps of Engineers, 101 F.3d 503, 507 (7th Cir. 1996) (holding that the interest of the proposed intervenors, a village and citizens group, was the same as the Corps--to defeat challenge to denial of a landfill permit).

When the only issue raised by the petitions is one of law, particularly when the legal issue is the scope of a federal agency's authority, representation by the government is deemed adequate. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (government found to represent alleged interest of environmental group adequately when only issue before the court was the interpretation of a section of a federal act); *Associated Industries v. Train*, 543 F.2d 1159 (5th Cir. 1976) (state denied intervention when court found EPA would adequately defend the legality of its own actions, including a challenge to its statutory authority); *United States Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978) (motion to intervene denied when issues before the court were purely legal); *U.S. West Communications v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997) (FCC denied intervention because United States adequately represented its interest in defending the constitutionality of Telecommunications Act).

This Circuit has denied intervention where the government's interest is closely aligned with the interest of the proposed intervenor. In *Massachusetts School of Law*, 118 F.3d at 781, this Court denied the law school's intervention in an antitrust action brought by the government against the American Bar Association for anticompetitive practices in law school accreditation. In finding the law school adequately represented by the government, the Court held that the government brought the suit for the benefit of students who are forced to pay artificially high tuition at accredited law schools; even though the law school was not in the class of consumer beneficiaries, "it would benefit, just as they would, from a greater ability to engage in voluntary,

mutually advantageous transactions." *Id.* at 781. Similarly, AMSA has expressed no real divergence from USEPA. *See Nuesse,* 385 F.2d at 702 ("the mere fact that there is a slight difference in interests between the applicant and the supposed representative does not necessarily show inadequacy"); *Amalgamated Transit Union Internat'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985) (denying intervention where case involved statutory limits on Secretary's discretion and designating Secretary the "real party in interest").

2. AMSA's Stated Interests Do Not Relate to the Property or Transaction That is the Subject Matter of the Action.

Rule 24(a)(2)'s requirement of "an interest relating to the property or transaction which is the subject of the action" refers "not to any interest the applicant can put forward, but only to a legally protectable one." *Southern Christian Leadership Conf. v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984). The "property or transaction" at issue in this action is the scope of EPA's statutory authority under the Act. Only the government can claim an interest in this legal issue. *See Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982); *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir. 1988); *Oregon Environmental Council v. Oregon Dep't of Environmental Quality*, 775 F. Supp. 353 (D. Ore. 1991).

The *Wade* case illustrates this point most clearly. Property owners alleged the Department of Transportation's actions relating to the proposed construction of an expressway and bridge across the Illinois River violated various federal statutes. *Wade*, 673 F.2d at 183-84. As in this action, the Wade plaintiffs alleged that the government had exceeded its authority. Entities sought to intervene on behalf of the government, alleging that their environmental, economic and safety interests were in jeopardy. *Id.* at 185. The district court denied the motion and the Seventh Circuit affirmed. The court held:

> None of the actions taken, nor the statutory authority called into question in this case, involves the proposed intervenors who seek to intervene as defendants. The only interest involved is of the named defendants, governmental bodies . . . In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. As to the determination involved in this suit, all other entities have no right to intervene as defendants. Thus we hold that the proposed intervenors' interests do not relate "to the property or transaction which is the subject of the action" and they have therefore failed to assert an interest in the lawsuit sufficient to warrant an intervention of right.

Id. at 185.

In *Portland Audubon Society*, the Ninth Circuit affirmed the district court's reliance on *Wade* in denying environmental groups' motion to intervene as to plaintiff's National Environmental Policy Act ("NEPA") claims because the environmental groups "lacked an interest relating to the property or transaction which is the subject of this action." *Portland Audubon Soc'y*, 866 F.2d at 308-09. Like the issues in this appeal, NEPA claims deal exclusively with the propriety and legality of the federal government's conduct.

Similarly, in *Oregon Environmental Council*, the Oregon District Court denied industry groups' motion to intervene in a suit alleging that the state environmental agency violated the Clean Air Act by failing to follow the procedures and meet the requirements set forth in the state implementation plan for issuing permits and exemptions. Relying on *Wade* and *Portland Audubon Society*, the court concluded that despite the fact that the proposed intervenors permits were threatened, proposed intervenors did not have an interest in such a case. The court noted that while the permits may be admissible as evidence, they "are not the focus of this litigation." *Oregon Environmental Council*, 775 F. Supp. at 359. The focus, rather, is whether the agency is "interpreting and applying the terms of the implementation plan for the State of Oregon in the manner that is required by the Clean Air Act." *Id.* Intervenors have no place in suits brought to compel EPA to comply with legal procedures. *Id.* at 358.

CONCLUSION

For the foregoing reasons, the Court should deny AMSA's Motion for Leave to Intervene pursuant to Fed. R. App. P. 15(d).

Respectfully submitted,

AMERICAN FARM BUREAU FEDERATION

October 10, 2000

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CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing Brief in Opposition to Applicants' Motion to Intervene to be served by U.S. mail, postage prepaid, on this 10th day of October, 2000, upon the following:

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