SQUIRE, SANDERS & DEMPSEY L.L.P.
David W. Burchmore
Steven C. Bordenkircher
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
Telephone: + 216.479.8500
Facsimile: + 216.479.8780

Joseph A. Meckes (State Bar No. 190279)
One Maritime Plaza, Suite 300
San Francisco, California 94111-3492
Telephone: + 415.954.0200
Facsimile: + 415.393.9887

Attorneys for Intervenor-Defendant
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OUR CHILDREN'S EARTH FOUNDATION and ECOLOGICAL RIGHTS FOUNDATION,

Plaintiff,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL LEAVITT, as Administrator of the United States Environmental Protection Agency,

Defendant.

Case No. C 04-2132 PJH

NOTICE OF MOTION AND MOTION TO INTERVENE OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

Date: September 29, 2004
Time: 9:00 a.m.
Judge: Honorable Phyllis J. Hamilton
Courtroom 3, 17th Floor

CLEAN WATER ACT CASE

E-FILING

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One Maritime Plaza, Suite 300
San Francisco, CA 94111-3492

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NOTICE AND MOTION TO INTERVENE

PLEASE TAKE NOTICE that Intervening Defendant Association of Metropolitan Sewerage Agencies ("AMSA") will move Judge Phyllis J. Hamilton at 9:00 a.m. on September 29, 2004, or as soon thereafter as counsel may be heard, in Courtroom 3, 17th Floor, United States District Courthouse, 450 Golden Gate Avenue, San Francisco, California, 94102, for an order allowing AMSA to intervene in the above-captioned action as a defendant pursuant to Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure.

AMSA's members have a vital interest in the subject matter of this proceeding and are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect that interest. AMSA's interests are distinct from those of the existing parties in that AMSA is an association whose members include wastewater utilities throughout the United States whose operations will be directly and adversely impacted by any actions that Defendants take or are required to take as a result of the action. Accordingly, AMSA seeks to intervene in this action as a matter of right under Fed. R. Civ. P. 24(a)(2). Alternatively, AMSA respectfully requests that this Court permit AMSA to intervene under Fed. R. Civ. P. 24(b)(2).

In support of AMSA's Motion, AMSA relies on this Notice, the accompanying Memorandum of Points and Authorities and such other and further evidence as may be presented to this Court.

REQUESTED RELIEF

AMSA moves for an order permitting AMSA to intervene in this proceeding pursuant to Fed. R. Civ. P. 24(a) or, in the alternative, Fed. R. Civ. P. 24(b).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On May 28, 2004, plaintiffs Our Children's Earth Foundation and Ecological Rights Foundation (collectively, "Plaintiffs"), brought this action against the U.S. Environmental Protection Agency ("EPA") for declaratory and injunctive relief. Plaintiffs' Complaint asserts that EPA has not been reviewing effluent limitations or effluent limitation guidelines ("ELGs"), or issuing ELG plans ("ELG Plans"), as frequently as Plaintiffs advocate under the Clean Water Act ("CWA").

AMSA now seeks to intervene in this proceeding as a party-Defendant in order to protect and preserve the interests of its members nationwide. AMSA is a national, non-profit trade association, acting on behalf of its members, which own and operate publicly owned treatment works ("POTWs") throughout the United States. AMSA's member agencies hold National Pollutant Discharge Elimination System ("NPDES") permits pursuant to CWA § 402(a), 33 U.S.C. § 1342(a), authorizing the discharge of municipal treated sewage and other treated wastewaters to the waters of the United States.

AMSA, which has represented the interests of the nation's POTWs and municipal wastewater treatment agencies since 1970, is comprised of nearly 300 POTW members who collectively serve the majority of this country's sewered population and treat over 18 billion gallons of wastewater each day. AMSA strives to maintain a leadership role in the development and implementation of scientifically-based, technically-sound, and cost-effective environmental programs for protecting public and ecosystem health. AMSA's members operate municipal wastewater treatment plants under federal and state laws and regulations in cities and towns across the United States, including 32 California agencies.

Federal ELGs are implemented by AMSA member agencies as co-regulators with EPA through delegated local pretreatment programs. In 2002, more than 1500 POTWs nationwide were implementing pretreatment programs. Through pretreatment limits, AMSA member agencies ensure that nondomestic and industrial sources meet federal, state, and local limitations on the amounts of pollutants they discharge to public wastewater utilities.

As governmental entities, AMSA's members must be involved in regulatory development in order to adequately protect the current and future interests of its members and to allow them to appropriately plan for future financial constraints on their citizens and ratepayers, who would ultimately bear the increased costs of compliance.

Accordingly, AMSA is entitled to intervene as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. Plaintiffs' challenges to EPA's actions, if successful, will impair and impede the interests of AMSA's members in treating and discharging municipal wastewater and in regulating industries discharging to POTWs. Moreover, a decision in Plaintiffs' favor requiring EPA to review ELGs and effluent limitations, and to issue ELG Plans, more often than is authorized or permitted by law will require significant budget reallocations by AMSA's members, which will impact all other municipal services among AMSA's members, including their programs for police, fire, social and health services. The existing parties, EPA and its Administrator, do not adequately represent the interests of AMSA's member local governments.

Alternatively, this Court should grant permissive intervention. There are common questions of law and fact between AMSA's defenses and the Plaintiffs' action. Moreover, intervention would promote judicial efficiency by reducing the prospects of future litigation by AMSA and/or its individual members to protect their interests. As representatives of municipal wastewater treatment agencies throughout the United States, AMSA will provide this Court with a broader perspective on the impacts and appropriateness of Plaintiffs' claims and the relief sought.

II. ARGUMENT

A. AMSA Is Entitled to Intervene As of Right.

Rule 24(a) of the Federal Rules of Civil Procedure provides:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest 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.

Fed. R. Civ. P. 24(a). "The rule is construed 'broadly, in favor of the applicants for intervention.'" *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993) (quoting *Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924, 926 (9th Cir. 1990)).

The Ninth Circuit has enumerated four requirements for intervention as of right under Rule 24(a)(2): "(1) the motion must be timely; (2) the applicant must assert a 'significantly protectable' interest relating to property or a transaction that is the subject matter of litigation; (3) the applicant must be situated so that disposition of action may as a practical matter impair or impede the interest; and (4) the applicant's interest must be inadequately represented by the parties." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107-08 (9th Cir. 2002) (citing *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1113-14 (9th Cir. 2000); *Sierra Club*, 995 F.2d at 1481).

1. AMSA's Motion to Intervene Is Timely.

Rule 24(a) authorizes intervention as of right upon "timely" motion by the applicant. Whether a motion to intervene is timely is determined by several factors, including "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986).

Here, timeliness is not a concern. This action was commenced less than three months ago and EPA filed an Answer less than one month ago. At this very early stage, the litigation has scarcely progressed and there is no possibility that AMSA's participation will have any disruptive effect on the proceedings or result in any prejudice to any existing party. Accordingly, AMSA's motion clearly is timely.

2. AMSA Has a Significant and Recognizable Interest in the Subject Matter of This Action

While Fed. R. Civ. P. 24(a) does not specify the nature of the interest required for intervention as a matter of right, the Supreme Court held that "what is obviously meant . . . is a significantly protectable interest." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Whether an applicant for intervention as of right demonstrates sufficient interest in an action is a

"practical, threshold inquiry," and "no specific legal or equitable interest need be established." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993), *aff'd*, 64 F.3d 1266 (9th Cir. 1995). In *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980), the Court of Appeals "agree[d] with the D.C. Circuit that 'the "interest" 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.'" (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). As such, and in order to further the intent that Rule 24(a) should be liberally construed, the interest requirement should be interpreted broadly. *See, e.g.*, *Natural Resources Defense Council v. U.S. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (stating that the interest prong of Rule 24(a)(2) "has been interpreted in broad terms"). To demonstrate this interest, a prospective intervenor must establish only that "the interest is protectable under some law," and there is a "relationship between the legally protected interest and the claims at issue." *Sierra Club*, 995 F.2d at 1484.

In *Sierra Club*, the court held that ownership of wastewater treatment plants subject to effluent limitations that may be affected by the litigation is a sufficient interest to merit intervention as of right. In that case, the Sierra Club sued EPA and alleged that:

> The state of Arizona was required to submit lists of impaired waters, point sources discharging pollutants into them, and control strategies to reduce such discharges under 33 U.S.C. §1314(l)(1). Its lists were insufficient under the statute, so the EPA had a duty to make a final decision on the lists, and to implement control strategies.

995 F.2d at 1480. The Sierra Club then sought to require EPA to promulgate water quality standards for toxic pollutants in Arizona. The City of Phoenix moved to intervene in the litigation because the case might have resulted in development of a toxic control strategy for the receiving waters where the City's two wastewater treatment plants discharged, thus impacting the City's NPDES permits. The Ninth Circuit reversed the district court's denial of intervention for lack of a "protectable interest," holding that the City's possession of NPDES permits allowing the discharge of wastewater to impaired waters constituted a sufficient protectable interest. *Id*. at 1478. The Ninth Circuit characterized the holding of these permits as a real property interest and held that the lawsuit would affect this interest by requiring EPA to "change the terms of permits it

issues to the would be intervenors, which permits regulate the use of that real property." *Id*. at 1482. The court concluded that these interests fall squarely within the class of interests traditionally protected by law. *Id*.

As demonstrated in the accompanying Declaration of Alexandra Dapolito Dunn, in this case, AMSA's members have real property interests in their NPDES permits and disposition of this action might adversely affect those property interests. As regulated entities who are required to impose and enforce effluent limitations on industrial dischargers that are affected by ELGs and resulting limitations, AMSA's members, and their current and future operations, budgets, and planning, will be impacted by any resolution of this action. AMSA's members have a need to remain in compliance with their NPDES permits by imposing, monitoring compliance with, and enforcing effluent limitations promulgated by EPA. As public entities, AMSA's members represent the interests of their citizens and ratepayers, who would ultimately bear the increased costs of compliance. AMSA's members have a vital interest in being involved at all stages of regulatory development in order to protect the current and future interests of their constituents and to appropriately plan for future financial constraints, and any adjudication or settlement that requires EPA to review ELGs and effluent limitations or to issue final ELG Plans more often than required or authorized by law will directly impact such interests. Therefore, AMSA clearly has a significantly protectable interest in the subject matter of this proceeding for intervention as of right under Rule 24(a)(2).

3. <u>The Disposition of This Action May as a Practical Matter Impair or Impede AMSA's Ability to Protect Their Interests</u>

The Ninth Circuit has held that "the relevant inquiry is whether [a resolution of an action] 'may' impair rights 'as a practical matter' rather than whether the [resolution] will 'necessarily' impair them." *United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002) (quoting Fed. R. Civ. P. 24(a)(2)). A 1966 Supreme Court amendment of Rule 24(a), which added the language authorizing intervention of right based upon the mere possibility that disposition of the action ***may*** as a practical matter impair or impede the applicant's ability to protect its interest, was "obviously designed to liberalize the right of intervene in federal actions" since "an earlier draft

would have required that the judgment 'substantially' impair or impede the interest, but that higher barrier was deleted in the course of approving the amendment." *Nuesse*, 385 F.2d at 701.

In *Natural Resources Defense Council v. EPA*, the D.C. District Court determined that pesticide manufacturers' interests might in fact be practically impaired if they were not permitted to intervene in that action. 99 F.R.D. at 609. Although the plaintiffs argued that they sought to challenge only EPA's procedures rather than any substantive standards, and that intervenors would have subsequent opportunities to comment of EPA actions, the court nonetheless found that the intervenors' interests would be practically impaired if the regulatory procedures were invalidated. *Id.* (citing *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977), and *Environmental Defense Fund, Inc. v. Costle*, 79 F.R.D. 235 (D.D.C. 1978)). Similarly, in *Natural Resources Defense Council v. Costle*, the D.C. Circuit held that the manufacturer groups' interests might be impaired as a practical matter unless they were permitted to intervene, even though they would have been able to challenge the CWA regulations to be promulgated by EPA under the terms of the settlement agreement in a separate proceeding. The Court of Appeals noted that:

> [T]his court read Rule 24(a)(2) as looking to the "practical consequences" of denying intervention, even where the possibility of future challenge to the regulation remained available. Judicial review of regulations *after* promulgation may, "as a practical matter," afford much less protection than the opportunity to participate in post-settlement proceedings that seek to ensure sustainable regulations in the first place, with no need for judicial review.

561 F.2d at 909 (emphasis in original; footnote omitted). Therefore, the court concluded "it is not enough to deny intervention under [Rule] 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome litigation." *Id.* at 910. The court also noted that involvement of the industry intervenors "may lessen the need for future litigation to protect their interests." *Id.* at 911.

Similarly, disposition of this action may as a practical matter impair or impede AMSA's ability to protect its interests. Any adjudication or settlement that requires EPA to review and revise ELGs, effluent limitations or ELG Plans more frequently than is authorized under the

Clean Water Act will subject AMSA and its members to additional costs associated with remaining in compliance with their NPDES permits. The mere fact that AMSA may have a later opportunity to challenge effluent limitations or to comment on ELG or ELG Plans released by EPA does not negate the fact that the interests of AMSA and its members will be impaired by the increased and unauthorized frequency of those actions. Intervention in this action is therefore essential to allow an adequate opportunity for AMSA to protect and prevent impairment of those interests.

4. AMSA's Interests Are Not Adequately Represented

The Ninth Circuit has stated that in determining adequacy of representation, the court considers "'whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; whether the present party is capable and willing to make such arguments; and whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect.'" *California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986) (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). "The applicant is required only to make a minimal showing that representation of its interests ***may be*** inadequate." *Id.* (emphasis added); *see also United States v. Union Electric Co., et al.*, 64 F.3d 1152, 1168 (8th Cir. 1995); *Diamond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (holding that an intervention applicant's burden of showing inadequate representation of his interest "is not onerous. The applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate."); *Nuesse*, 385 F.2d at 702 (noting that the adequate representation language in Rule 24(a)(2) "underscores both the burden on those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention").

By itself, the varied regulatory status of AMSA and EPA, the only defendant, more than satisfies the minimal burden of showing that EPA will inadequately represent AMSA's interests. EPA is the federal agency charged with enforcing and implementing the CWA. In contrast, AMSA consists of municipal and regional wastewater authorities who must comply with the CWA's water quality standards and effluent limitations as implemented in their NPDES permits,

and as co-regulators, impose pretreatment standards that are dictated by the development of ELGs on their regulated customers. AMSA, and *not* EPA, will be in the position of enforcing the resulting pretreatment limitations against regulated parties. "It is one thing to hold that only the government can be a defendant in a NEPA suit, where the statute regulates only government action, but quite another to exclude permit-holding property owners from a CWA suit, where the statute directly regulates their conduct." *Sierra Club*, 995 F.2d at 1485. This divergent regulatory status alone is sufficient to allow Applicants to meet their minimal burden of showing that EPA will not adequately represent their interests.

Furthermore, EPA cannot adequately represent AMSA's interests because such interests are far narrower and "cannot be subsumed within the shared interest of the citizens" represented by EPA. *See Union Electric Co.*, 64 F.2d at 1169. In *Union Electric Co.*, several non-settling potentially responsible parties (PRPs) sought to intervene in an action involving a settlement between EPA and several other PRPs. Although EPA was a party to the action, the court "compare[d] the interests of proposed Intervenors with the interests of current parties," *id.* at 1169, and found that EPA could not adequately represent the interests of the non-settling PRPs as citizens:

> Here, the interests of the prospective Intervenors cannot be subsumed within the shared interest of the citizens of the United States. The interests of the prospective Intervenors are narrower and not subsumed by the general interest of the United States in providing for the clean up of polluted sites. Because of this difference in interests, the EPA can hardly be expected to litigate with the interests of the non-settling PRPs uppermost in its mind. The prospective Intervenors are seeking to protect a more "parochial" financial interest not shared by other citizens in not losing a right to seek contribution from other PRPs and in not being subjected to excessive liability for the clean up. . . . [T]he EPA would be shirking its duty were it to advance this narrower interest at the expense of its representation of the general public interest. There is no existing party to this litigation who can adequately represent the identified interests of the applicants for intervention.

Id. at 1170 (citations omitted).

Here, AMSA's interests cannot be subsumed within the shared interests of the citizens of the United States. AMSA's members operate under NPDES permits issued by the United States or by states authorized to oversee the NPDES program, are required to impose limitations on

industrial dischargers that are developed from ELGs, and would be most directly and adversely impacted by any actions that EPA takes or is required to take as a result of any settlement of or judgment in these proceedings. While AMSA's members, like EPA, are concerned with environmental protection, AMSA's members are also faced with the challenge of properly operating their utilities while remaining fiscally responsible to their ratepayers. AMSA therefore has a unique and vital interest in ensuring that legislation and regulations provide an appropriate benefit to the environment as well as their ratepayers. These interests are not shared with the general citizenry of the United States and EPA would be "shirking its duty" if it were to litigate the issues involved in this action with AMSA's unique interests "uppermost in its mind." *Union Electric Co.*, 64 F.2d at 1170. Therefore, there is no present party to this litigation that will undoubtedly make all of AMSA's arguments, nor will any party be capable or willing to make such arguments.

Furthermore, AMSA will offer insights to the proceedings that other parties would neglect. Excluding the AMSA from this case would exclude the voices of those who are most directly impacted by the outcome of this litigation. AMSA, though its national membership, can speak to the impact of the ELGs and revised effluent limitations on their ability to comply with any new standards and the impact such changes may have on basic local government functions and services such as police and fire protection, health and social services, and infrastructure maintenance. These interests are not shared by the general citizenry, and are unique to the AMSA's members. Based on the foregoing, AMSA's motion to intervene clearly satisfies the "minimal" burden under Rule 24(a)(2) of showing that representation of AMSA's interests by the existing parties "may be" inadequate.

B. Alternatively, AMSA Should Be Permitted to Intervene under Fed. R. Civ. P. 24(b).

Even if AMSA did not meet the criteria for intervention of right, which they do, they would satisfy 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." Fed. R. Civ. P. 24(b)(2). 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. *See NRDC v. Costle*, 561 F.2d at 910-11; *see also Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) ("[L]iberal 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."). In the Ninth Circuit, permissive intervention requires "that intervenor's 'claim or defense and the main action have a question of law or fact in common.'" *Kootenai Tribe of Idaho*, 313 F.3d at 1108 (quoting Fed. R. Civ. P. 24(b)(2)).

In this case, AMSA intends to assert several defenses that are both legally and factually related to Plaintiffs' claims, including that several facets of Plaintiffs' requested relief are inappropriate and unnecessary, and are neither required nor authorized by the CWA. These issues constitute common factual and legal questions sufficient to justify permissive intervention.

Furthermore, intervention in this action at this early stage would not unduly delay or prejudice the adjudication of the rights of the original parties in any way. AMSA does not seek to expand the scope of this proceeding by incorporating new issues that are unrelated to Plaintiffs' allegations, but only to ensure that their members' interests are adequately protected. The participation of AMSA would not result in an unmanageable number of parties and clearly would be compatible with efficiency and due process. If anything, intervention would promote judicial efficiency by diminishing the prospects of future litigation by AMSA or its members and would ensure the adequate representation of others who have similar governmental, economic and regulatory interests. Consequently, AMSA should be permitted to intervene under Rule 24(b) in order to facilitate the resolution of its common claims of law and fact in one proceeding consistent with the principles of judicial economy.

III. CONCLUSION

Accordingly, because AMSA's present motion is timely, AMSA clearly has an interest in the subject matter of this litigation, the disposition of this action may as a practical matter impair or impede AMSA's ability to protect that interest, and none of the parties can adequately represent the interests of AMSA and their members in this litigation, AMSA is entitled to intervene in this action as a matter of right under Rule 24(a)(2).

Alternatively, because AMSA's claims have many issues of law and fact in common with the main action, and because their participation at this early stage of this proceeding would not cause undue delay or prejudice any existing party, AMSA should be permitted to intervene in this action under Rule 24(b)(2).

Dated: August 20, 2004

Respectfully submitted,

DULY SIGNED ORIGINAL ON FILE AT THE OFFICES OF SQUIRE, SANDERS & DEMPSEY L.L.P.

/s/ Joseph A. Meckes
Squire, Sanders & Dempsey L.L.P.
One Maritime Plaza, Suite 300
San Francisco, California 94111-3492
Telephone: + 415.954.0200
Facsimile: + 415.393.9887
Email: jmeckes@ssd.com

Attorney for Intervenor-Defendant
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

SQUIRE, SANDERS & DEMPSEY L.L.P.
David W. Burchmore
Steven C. Bordenkircher
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
Telephone: + 216.479.8500
Facsimile: + 216.479.8780

Joseph A. Meckes (State Bar No. 190279)
One Maritime Plaza, Suite 300
San Francisco, California 94111-3492
Telephone: + 415.954.0200
Facsimile: + 415.393.9887

Attorneys for Intervenor-Defendant
ASSOCIATION OF METROPOLITAN
SEWERAGE AGENCIES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OUR CHILDREN'S EARTH FOUNDATION and ECOLOGICAL RIGHTS FOUNDATION, Plaintiff, vs. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL LEAVITT, as Administrator of the United States Environmental Protection Agency, Defendant.	Case No. C 04-2132 PJH [PROPOSED] ORDER GRANTING THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES' MOTION TO INTERVENE Judge: The Honorable Phyllis J. Hamilton Hearing Date: September 29, 2004 Hearing Time: 9:00 a.m. Courtroom 3, 17th Floor CLEAN WATER ACT CASE

The Motion by the Association of Metropolitan Sewerage Agencies to Intervene pursuant to Rules 24(a) and (b) of the Federal Rules of Civil Procedure came on regularly for hearing before this Court in Courtroom 3 before the Honorable Phyllis J. Hamilton on _____ at _____.

After full consideration of the evidence, the Memoranda of Points and Authorities and supporting documentation submitted by the parties, the entire file and record in this action,

IT IS HEREBY ORDERED that the Association of Metropolitan Sewerage Agencies'

Motion to Intervene as Defendant is hereby GRANTED;

IT IS FURTHER ORDERED that the Association of Metropolitan Sewerage Agencies may file the proposed Answer in Intervention attached to their Motion to Intervene.

IT IS SO ORDERED.

Dated:

Judge of the United States District Court