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NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN'S EARTH FOUNDATION
and ECOLOGICAL RIGHTS FOUNDATION,

Case No. C 04-2132 PJH

Plaintiff,

**ORDER GRANTING AMSA'S
MOTION TO INTERVENE**

v.

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

Defendant.

The motion of third party Association of Metropolitan Sewerage Agencies ("AMSA") to intervene came on for hearing on September 29, 2004, before this court. Plaintiffs appeared through their counsel, Christopher Sproul, and AMSA appeared through its counsel, David W. Burchmore. Defendant EPA filed a notice of non-opposition and did not appear at the hearing. The motion is GRANTED for the reasons that follow.

BACKGROUND

Plaintiffs Our Children's Earth Foundation and the Ecological Rights Foundation ("Plaintiffs") filed suit against the EPA under the Clean Water Act ("CWA") seeking judicial review of (1) the EPA's failure to conduct an annual review of Effluent Limitation Guidelines ("ELGs") in accord with CWA sections 304(b) and 304(m)(1)(A); (2) the EPA's failure to review ELGs every five years as required by CWA section 301(d), (b)(2); (3) the EPA's failure to adopt Effluent Guideline Plans governing their annual review and promulgation of ELGs in accord with the deadlines established by CWA section 304(m). In their opposition to AMSA's motion to intervene, plaintiffs note that they also seek to compel the EPA to evaluate whether the technological advances or changed economic circumstances have made it feasible to

1 intervention. Id. at 427. The FWS had not yet designated any land as critical habitats, so it
2 was unclear whether the applicants' land interests were at risk.

3 Likewise, plaintiffs contend that the relevant CWA sections in this case specifically
4 exempt POTWs and indirect dischargers, and that AMSA's interests in this litigation are
5 therefore beyond the scope of this case. Plaintiffs assert that it is similarly unclear whether
6 this action will have any affect on POTWs and indirect dischargers. However, it is EPA's
7 practice to apply and develop ELGs for both direct and indirect dischargers concurrently.
8 "EPA establishes national technology-based regulations, termed 'effluent guidelines,' to
9 reduce pollutant discharges from industrial facilities to surface waters and publicly owned
10 treatment works." 67 Fed. Reg. 71165-01, 2002 WL 31669775 (Nov. 29, 2002) ("Draft
11 Strategy for National Clean Water Regulations"). Additionally, AMSA presents sufficient
12 evidence that the EPA promulgates ELGs to apply to all dischargers into our nation's waters,
13 regardless of source, and that AMSA has been instrumental in developing and complying with
14 these guidelines. While it is true that the relevant statutes pled by plaintiffs do not literally
15 encompass the protectable interests claimed by AMSA, the Ninth Circuit "ordinarily do[es] not
16 require that a prospective intervenor show that the interest he asserts is one that is protected
17 by the statute under which the litigation is brought. It is generally enough that the interest is
18 protectable under some law, and that there is a relationship between the legally protected
19 interest and the claims at issue." Sierra Club, 995 F.2d at 1484 (emphasis added).

20 Because plaintiffs seek to compel the EPA to evaluate and perhaps revise ELGs,
21 AMSA members' NPDES permits and POTWs may be directly impacted by plaintiffs' case.
22 The promulgation and enforcement of Effluent Limitation Guidelines ("ELGs"), which directly
23 govern the scope and operation of the applicant's permits under the CWA, are central to the
24 relief plaintiffs' seek in this action. The Ninth Circuit has deemed NPDES permits and
25 wastewater treatment plants significantly protectable property interests; therefore, this court
26 finds that the second Sierra Club prong is satisfied. Sierra Club, 995 F.2d at 1482.

27 The third prong of the Sierra Club test requires a potential impairment of the
28 applicant's ability to protect those interests. The facts satisfying the second prong similarly

1 apply to the third. Plaintiffs seek to compel the EPA to review ELGs, which may lead to a
2 revision of existing guidelines. Because NPDES permits follow these ELGs, it is advisable to
3 have NPDES permit holders participate in any action which may alter those guidelines, and
4 as a consequence, the permits. As owners and operators of POTWs which lawfully discharge
5 effluents under their NPDES permits, AMSA claims that a resolution in plaintiffs' favor could
6 alter the disposition of these permits. "[T]he issue is participation in a lawsuit, not the
7 outcome." Id. at 1483. As such, AMSA's intervention is warranted to protect against any
8 possible change to those interests, and denial of intervention may practically impede its ability
9 to defend those interests.

10 As to the fourth prong, the applicant has shown that the representation by the named
11 parties will not adequately protect its interests. AMSA's interests are those of its corporate
12 membership, while the EPA focuses on governmental and public interests. EPA's arguments
13 in this action may differ significantly from AMSA's; therefore, it is appropriate that AMSA be
14 given an opportunity to make its case on behalf of its membership.

15 Finally, the first prong is unquestionably met; it is undisputed that applicant's motion
16 was timely.

17 AMSA's motion to intervene as a matter of right is GRANTED. This order fully
18 adjudicates the matter listed at number 13 on the clerk's docket for this case.

19 **IT IS SO ORDERED.**

20 Dated: October 14, 2004

21 _____
22 /s/
23 PHYLLIS J. HAMILTON
24 United States District Judge
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