## NOT FOR CITATION 1 2 UNITED STATES DISTRICT COURT 3 NORTHERN DISTRICT OF CALIFORNIA 4 5 OUR CHILDREN'S EARTH FOUNDATION Case No. C 04-2132 PJH 6 and ECOLOGICAL RIGHTS FOUNDATION, 7 Plaintiff, ORDER GRANTING AMSA'S MOTION TO INTERVENE 8 9 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL EAVITT, as Administrator of the United States Environmental Protection Agency, 12 Defendant. 13 The motion of third party Association of Metropolitan Sewerage Agencies ("AMSA") to 14 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. 17 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. 18 19 BACKGROUND 20 Plaintiffs Our Children's Earth Foundation and the Ecological Rights Foundation 21 ("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 23 review ELGs every five years as required by CWA section 301(d), (b)(2); (3) the EPA's failure 25 to adopt Effluent Guideline Plans governing their annual review and promulgation of ELGs in 26 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

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revise and make ELGs more stringent for any of the categories of industry covered by existing ELGs, and to compel the EPA to review and determine whether to revise ELGs required by CWA section 301(d).

Claiming that the outcome of this action affects significantly protectable interests of its members. AMSA filed this motion to intervene.

## ANALYSIS

In Sierra Club v. EPA, 995 F.2d 1478, 1484 (9th Cir. 1993), the 9<sup>th</sup> Circuit sets forth the requirements for intervention as a matter of right under Federal Rule of Civil Procedure 24(a) as the following: (1) the applicant's motion is timely; (2) the applicant claims a significantly protectable interest relating to the property or transaction subject to the action; (3) disposition of the action may impair or impede protection of the interest; and (4) the current parties do not 12 adequately represent the interests of the applicant. Because argument at the hearing focused on whether AMSA has a significantly protectable interest in this matter, the second prong will be discussed first.

AMSA states that the National Pollutant Discharge Elimination System ("NPDES") permits owned by many of its members are real property interests. These NPDES permits allow AMSA members to lawfully discharge effluents, and have been found to be protectable interests. Sierra Club, 995 F.2d at 1482. Indeed, AMSA's members own and operate the publicly owned treatment works ("POTWs") which discharge effluents in compliance with their NPDES permits. POTWs are also termed indirect dischargers.

Plaintiffs argue that AMSA's interests are too far removed from the subject of this 22 |action. Plaintiffs cite Silver v. Babbitt, 166 F.R.D. 418 (D. Ariz. 1994), where the court applied Sierra Club to deny a request to intervene by a County, a forest products corporation, and the Arizona State Land Department in an action against the Fish and Wildlife Service ("FWS"). In Silver, the plaintiff contended that the FWS breached its statutory duty by failing to designate critical habitats for the endangered Mexican Spotted Owl. The applicants moved to intervene claiming that their economic interests in the land could potentially be affected by the suit. The district court, however, found their interests too "speculative and generalized" at the time of

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

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

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

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

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

As to the fourth prong, the applicant has shown that the representation by the named 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 in this action may differ significantly from AMSA's; therefore, it is appropriate that AMSA be given an opportunity to make its case on behalf of its membership.

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

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

IT IS SO ORDERED.

Dated: October 14, 2004

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United States District Judge