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14
15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17) Case No. C 04-2132 PJH
18 OUR CHILDREN'S EARTH)
19 FOUNDATION and ECOLOGICAL)
RIGHTS FOUNDATION,) PLAINTIFFS' MEMORANDUM OF
Plaintiff,) POINTS AND AUTHORITIES IN
20 vs.) OPPOSITION TO ASSOCIATION OF
21 UNITED STATES ENVIRONMENTAL) MUNICIPAL SEWAGE AGENCIES'
PROTECTION AGENCY and MICHAEL) MOTION TO INTERVENTE
22 LEAVITT, as Administrator of the United)
23 States Environmental Protection Agency,) Judge: The Honorable Phyllis J.
Defendant.) Hamilton
24)
25) Hearing Date: September 29, 2004
26) Hearing Time: 9:00 a.m.
27) Courtroom 3, 17th Floor
)
) CLEAN WATER ACT CASE

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1 Plaintiffs OUR CHILDREN’S EARTH FOUNDATION and ECOLOGICAL RIGHTS
2 FOUNDATION hereby submit this Opposition to the Association of Metropolitan Sewage
3 Agencies’ (“AMSA”) Motion to Intervene.
4

5 **I. Introduction**

6 AMSA has applied to intervene in this case as defendants-intervenors under Federal
7 Rule of Civil Procedure 24(a) and (b). This Court should deny its application. AMSA does
8 not satisfy the required criteria for intervention as of right or for permissive intervention as
9 established by the Federal Rules of Civil Procedure and by applicable case law.
10

11 **II. Background**

12 On May 28, 2004, Plaintiffs Our Children’s Earth Foundation and Ecological Rights
13 Foundation (collectively “Plaintiffs”) filed a Complaint under the Clean Water Act (“CWA”)
14 section 505(a)(2), 33 U.S.C. §1365(a)(2), seeking judicial review of the United States
15 Environmental Protection Agency’s (“EPA”) failure to conduct an annual review of Effluent
16 Limitation Guidelines (“Effluent Guidelines”) in accord with CWA sections 304(b) and
17 304(m)(1)(A). 33 U.S.C. §§ 1314(b), (m)(1)(A). Plaintiffs additionally sought review of
18 EPA’s failure to review Effluent Limitations every five years as required by CWA section
19 301(d), (b)(2), 33 U.S.C § 1311(d), (b)(2), and EPA’s failure to adopt Effluent Guidelines
20 Plans governing their annual review and promulgation of Effluent Guidelines in accord with
21 the deadlines established by CWA section 304(m). 33 U.S.C. §§ 1311(d), 304(m). Plaintiffs
22 seek to compel EPA to evaluate whether technological advances or changed economic
23 circumstances have made it feasible to revise and make Effluent Guidelines more stringent for
24 any of the categories of industry covered by existing Effluent Guidelines. Plaintiffs also seek
25 to compel EPA to review and determine whether to revise Effluent Limitations required by
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1 CWA section 301(d). 33 U.S.C. § 1311(d).

2 Plaintiffs contend that AMSA should not be permitted to intervene in this case because
3 it does not and cannot satisfy the requirements for intervention under the Federal Rules and
4 the case law in this Circuit. AMSA has misstated the law as to its obligations to enforce
5 effluent limitations. In addition, AMSA misconstrues both the nature of Plaintiffs' complaint
6 and the relief sought, neither of which affect AMSA or its members' interests.

8 **III. Statutory and Regulatory Background**

9 **1. Relationship Between Effluent Guidelines and Effluent Limitations**

10 CWA section 304(b) requires EPA to adopt regulations setting out "Effluent
11 Guidelines," which identify the degree of reduction of water pollutant discharge attainable by
12 specific categories of industries discharging to navigable waters through the application of
13 progressively more stringent levels of pollution control. See 33 U.S.C. § 1362(7) (defining
14 navigable waters as "waters of the United States, including the territorial seas"). The CWA
15 identifies these levels of control as: (1) best practicable control technology currently available
16 ("BPT"), (2) best conventional pollutant control technology ("BCT"), and (3) best available
17 technology economically achievable ("BAT"). CWA § 301(b), 33 U.S.C. § 1311(b). CWA
18 section 304(b) Effluent Guidelines are closely interrelated with technology-based "Effluent
19 Limitations" established under CWA section 301(b). CWA Effluent Limitations are
20 enforceable limitations on the amount of pollutants that any point source of pollution can
21 discharge to regulated waters of the United States. The CWA specifies that Effluent
22 Limitations must be "determined in accordance with" Effluent Guidelines. CWA §
23 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A).

24 The CWA requires EPA to promulgate Effluent Limitations based on Effluent
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1 Guidelines by various deadlines ranging from July 1, 1977 to March 31, 1989. *See* CWA §§
2 301(b)(1)(A) (BPT deadline), 301(b)(2)(F) (BCT deadline), 301(b)(2)(A), (C), (D) & (F) (BAT
3 deadline); 33 U.S.C. § 1311(b)(1)(A), (b)(2). Although EPA could have elected to promulgate
4 separate regulations establishing Effluent Guidelines under CWA section 304(b) and Effluent
5 Limitations under CWA section 301(b), EPA has in fact promulgated only a single set of
6 regulations setting forth both Effluent Guidelines and Effluent Limitations combined. 33
7 U.S.C. §§ 1314(b), 1311(b), see also, E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112,
8 124-25 (1977). These regulations are codified at 40 C.F.R. chapter I, subchapter N. 40 C.F.R.
9 Parts 405-71.
10

11 EPA has promulgated Effluent Guidelines and Effluent Limitations for fifty-five classes
12 and categories and over 450 subcategories of industrial water polluters, which represents some,
13 but not all, of the classes and categories of industries that discharge to navigable waters. See 40
14 C.F.R. Parts 405-71. CWA section 304(b) requires EPA to revise Effluent Guidelines annually,
15 if appropriate. 33 U.S.C. § 1314(b). CWA section 301(d) specifies that EPA must review the
16 Effluent Limitations required by CWA section 301(b)(2) “at least every five years.” 33 U.S.C.
17 § 1311(d), (b)(2). In addition, EPA must also revise these Effluent Limitations “if appropriate.”
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20 The CWA makes it unlawful to discharge pollutants from a point source to navigable
21 waters in violation of an Effluent Limitation or without CWA permit authorization. CWA §
22 301(a), 33 U.S.C. § 1311(a). EPA issues National Pollutant Discharge Elimination System
23 (“NPDES”) permits authorizing the discharge of pollutants from point sources to navigable
24 waters. CWA § 402, 33 U.S.C. § 1342. Such permits, *inter alia*, must include Effluent
25 Limitations based upon CWA section 301(b)(2). 33 U.S.C. § 1311(b)(2). EPA may authorize
26 states to issue NPDES permits in lieu of EPA. CWA § 402(b), 33 U.S.C. § 1342(b).
27

1 **2. Regulation of Publicly Owned Treatment Works and Industrial Users**

2 The effluent guidelines EPA promulgates under CWA section 304(b) and the subsequent
3 effluent limitations that EPA promulgates under CWA section 301(d) do not regulate Publicly
4 Owned Treatment Works (“POTWs”). POTWs are specifically exempted from the point
5 sources that are covered by Effluent Guidelines issued pursuant to CWA section 304(b). See,
6 33 U.S.C. § 1314(b)(1)(A), (b)(2)(A), (b)(4)(A) (explicitly stating the guidelines do not apply to
7 any POTWs). Instead, CWA section 301(b)(1)(B) indicates that POTWs will comply with
8 “effluent limitations based on secondary treatment as defined by the [EPA] Administrator
9 pursuant to [CWA section 304(d)(1)].” 33 U.S.C. §§ 1311(b)(1)(B), 1314(d)(1). CWA section
10 304(d)(1), in turn, requires EPA by December 17, 1972 to define the level of pollutant reduction
11 attainable by POTWs if they apply secondary treatment. 33 U.S.C. § 1314(d)(1). EPA’s
12 regulation defining the level of pollutant reduction attainable by POTWs if they apply
13 secondary treatment is set forth at 40 C.F.R. Part 133. CWA section 304(d)(1) further specifies
14 that EPA must update its secondary treatment standard “from time to time.” 33 U.S.C. §
15 1314(d)(1).

16 In addition to complying with secondary treatment limitations, POTWs have special
17 obligations with respect to the toxic wastewater they accept from industrial sources. Industrial
18 sources that discharge wastewater to POTWs, rather than to navigable waters, are referred to as
19 Industrial Users (“IUs”). See 40 C.F.R. § 403.3(h). CWA section 307(b) requires EPA to
20 promulgate pretreatment standards that apply to any wastewater received by POTWs that
21 otherwise could not be properly treated at the POTW. 33 U.S.C. § 1317(b)(1). Pretreatment
22 standards are the minimum treatment required by the industrial facility before it can send its
23 wastewater onto the POTW. Consequently, IUs and the POTWs who receive wastewater
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1 directly from IUs are regulated by these pretreatment programs. 33 U.S.C. § 1317(b). EPA is
2 required to revise the pretreatment standards that apply to POTWs and IUs “from time to time,
3 as control technology, processes, operating methods, or other alternatives change.” 33 U.S.C. §
4 1317(b)(2).

5
6 Thus, as described above, EPA’s regulatory requirements under CWA sections 304(b)
7 and 301(d) to promulgate Effluent Guidelines and Limitations for industrial point source
8 dischargers are separate and distinct from EPA’s regulation of POTWs and IUs via pretreatment
9 standards promulgated under CWA section 307(b). 33 U.S.C. §§ 1314(b), 1311(d), 1317(b).

10 POTWs that receive wastewater from IUs must implement a pretreatment program and
11 ensure that the IUs are complying with the applicable pretreatment standards issued by EPA
12 under CWA section 307(b)(1), 33 U.S.C. § 1317(b)(1). Although IUs are not required to apply
13 for a NPDES permit in order to send their wastewater to a POTW, IUs must have a binding
14 legal agreement with the POTW to ensure that the IU complies with the appropriate
15 pretreatment standards and pretreatment programs. 40 C.F.R. § 403.8.

16
17 Again, EPA could have elected to promulgate separate regulations establishing
18 pretreatment standards under CWA section 307(b). 33 U.S.C. § 1317(b). However, EPA
19 codified the regulations setting forth the pretreatment standards applied to IUs and POTWs
20 within the same subchapter of EPA regulations that also contain the Effluent Guidelines
21 promulgated under CWA section 304(b) and Effluent Limitations promulgated under CWA
22 section 301(b). 33 U.S.C. §§ 1314(b), 1311(b). All of these regulations are codified at 40
23 C.F.R. chapter I, subchapter N. 40 C.F.R. Parts 405-71. Although the regulations governing
24 industrial point source dischargers and IUs all appear under the same subchapter, EPA
25 promulgates them under the authority of separate and distinct sections of the CWA. Likewise,
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1 EPA has separate and distinct duties with respect to revision for each class of regulation.

2 **IV. Standard of Review**

3 To intervene as of right under Federal Rule of Civil Procedure 24(a)(2), an applicant
4 must claim an interest, the protection of which may, as a practical matter, be impaired or
5 impeded if the lawsuit proceeds without the applicant as a party to the action. Donnelly v.
6 Glickman, 159 F.3d 405, 409 (9th Cir. 1998). The Ninth Circuit applies a four-part test under
7 Rule 24(a)(2). First, the application must be timely; second, the applicant must claim a
8 “significantly protectable interest” relating to the property or transaction that is the subject of
9 the action; third, the applicant must be so situated that the disposition of the action may as a
10 practical matter impede or impair its ability to protect its interests; and fourth, the applicant’s
11 interest must be inadequately represented by the parties to the action. Id.
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14 The proposed intervenor bears the burden of establishing that the requirements for
15 intervention are met. Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1010 n.5
16 (9th Cir.), cert. denied, 454 U.S. 1098 (1981). Further, if this Court chooses to grant
17 intervention, this Court has the authority to limit intervenor’s participation “subject to
18 appropriate conditions or restrictions responsive among other things to the requirements of the
19 efficient conduct of the proceedings.” Fed.R.Civ.P. 24(a); United States v. Oregon, 913 F.2d
20 576, 588 (9th Cir. 1990).
21

22 **V. Argument**

23 **1. AMSA Lacks a Significant Protectable Interest in this Matter**

24 Interveners cite Sierra Club v. US EPA, for the contention that they have a protected
25 interest in the outcome of this litigation. 995 F.2d 1478, 1484 (9th Cir. 1993). In Sierra Club,
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1 the City of Phoenix was allowed to intervene as a defendant in a CWA citizen suit. The
2 underlying claims there alleged EPA had failed to promulgate water quality standards and
3 associated control strategies for the State of Arizona under CWA section 303(c)(4), 33 U.S.C. §
4 1313(c)(4). Sierra Club, 995 F.2d 1478, 1480 (9th Cir. 1993). The underlying claims
5 specifically sought to make the NPDES permits more stringent because the implementation of
6 control strategies necessitated a reduction of various toxic effluents. The relief sought was the
7 issuance of a control strategy which would force EPA to revise the City of Phoenix's NPDES
8 permit. Thus, because the treatment works owned by the city would be immediately affected by
9 revisions to their NPDES permit, the court found the City of Phoenix had a protected interest at
10 stake. Id. at 1485-86.
11

12
13 This case differs significantly from the facts of Sierra Club. Here, Plaintiffs allege EPA
14 has failed to review effluent guidelines pursuant to CWA section 304(b), (m)(1)(A) as well as
15 BAT-based and BCT-based Effluent Limitations pursuant to CWA section 301(d). 33 U.S.C.
16 §§ 1314(b), (m)(1)(A), 1311(d). The Effluent Guidelines and Limitations at issue in this case
17 *do not* regulate the POTWs that comprise AMSA's members. See, 33 U.S.C. § 1314(b)(1)(A),
18 (b)(2)(A), (b)(4)(A) (explicitly stating the guidelines do not apply to any POTWs). POTWs that
19 discharge to navigable waters are instead regulated by EPA's secondary treatment regulations
20 and effluent limits based upon those regulations. See 40 C.F.R. Part 133. The revision or
21 issuance of any new Effluent Guidelines or Limitations regulating industrial point source
22 dischargers would not impact any POTWs' NPDES permits. Nor do the Effluent Guidelines
23 and Limitations at issue here regulate IUs, which send their wastewater to POTWs after initial
24 pretreatment. Instead, any new or revised Effluent Guidelines and Limitations that may result
25
26 from Plaintiffs' claims would only impact and subsequently regulate industrial point sources
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1 that discharge effluent into navigable waters.

2 AMSA misstates the law when it says that “Federal ELGs [effluent limitation
3 guidelines] are implemented by AMSA member agencies as co-regulators with EPA through
4 delegated local pretreatment programs.” (AMSA Motion, p.2, ¶ 24). AMSA also incorrectly
5 states that its members are “required to impose and enforce effluent limitations on industrial
6 dischargers.” (AMSA Motion, p.6, ¶ 6). AMSA’s members do not regulate the various classes
7 of industry that discharge effluent to navigable waters. Industries that discharge effluent to
8 navigable waters are regulated only by the EPA and states that have been granted the authority
9 to administer the CWA’s NPDES permitting requirements established by CWA sections 301
10 and 402. 33 U.S.C. §§ 1311, 1342. Only EPA issues regulations establishing Effluent
11 Limitations. Only EPA and authorized states issue NPDES permits to industries that discharge
12 to navigable waters which impose Effluent Limitations based upon CWA section 301(b)(2). 33
13 U.S.C. § 1311(b)(2). AMSA’s members have no role in setting Effluent Limitations by
14 regulation nor in issuing NPDES permits.

15 AMSA confuses industrial point source dischargers regulated by Effluent Guidelines
16 and Limitations with IUs that are regulated by pretreatment standards. Again, IUs are industrial
17 facilities that send their wastewater to POTWs, rather than discharge effluent into navigable
18 waters. 40 C.F.R. § 403.3(h). AMSA’s members regulate IUs in that POTWs must have some
19 kind of enforceable legal agreement with IUs requiring the IUs to meet pretreatment standards
20 before accepting wastewater from IUs. 40 C.F.R. § 403.8(f)(1)(iii) (indicating that POTWs
21 must ensure each IUs compliance with applicable Pretreatment Standards and Requirements
22 through “through permit, order, or similar means”).

23 However, pretreatment standards are a completely different class of regulations than the
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1 Effluent Guidelines and Limitations under CWA sections 304(b) and 301(b)(2) that are at issue
2 in this case. 33 U.S.C. § 1314(b), 1311(b)(2). The EPA promulgates the pretreatment standards
3 implemented by POTWs under CWA section 307(b), 33 U.S.C. § 1317(b). EPA’s review of
4 Effluent Guidelines and Limitations under CWA sections 304(b) and 301(d) *are separate and*
5 *distinct legal duties and tasks from EPA review of Pretreatment Standards* under CWA section
6 307(b)(2). The CWA does not require EPA to revise pretreatment standards simply because the
7 agency reviews the Effluent Guidelines and Limitations that apply to industrial facilities
8 discharging effluent into navigable waters. EPA’s obligations to review Effluent Guidelines
9 “annually” under CWA sections 304(b), (m)(1)(A), 33 U.S.C. § 1314(b), (m)(1)(A), are
10 unrelated to the agency’s obligations to review pretreatment standards “from time to time”
11 under CWA section 307(b)(2), 33 U.S.C. § 1317(b). In the event that EPA determines that
12 revision of existing Effluent Guidelines or Limitations or promulgation of new Effluent
13 Guidelines or Limitations new categories of Effluent Limitations under CWA sections 304(b)
14 and 301(d) are warranted, EPA is not obligated to revise pretreatment standards under CWA
15 section 307(b). 33 U.S.C. §§ 1314(b), 1311(d), 1317(b).

18
19 For this reason, AMSA misapplies the holding from Natural Resources Defense Council
20 v. US EPA here. 99 F.R.D. 607 (D.D.C. 1983). In that case, although the environmental
21 plaintiffs were not challenging the substance of EPA’s regulation, the effect of a ruling in
22 plaintiff’s favor would have required immediate rulemaking by EPA. Id. at 609. The rules at
23 issue directly regulated the intervenors, and thus, the court allowed intervention. Id. Here,
24 there is no analogous triggering of rulemaking action that would directly regulate AMSA or its
25 members.

26
27 Plaintiffs do not seek any relief related to pretreatment standards in this action. Nor do

1 Plaintiffs do allege EPA has failed to review the pretreatment standards from time to time.
2 Again, the relief sought relates only to EPA's obligations to review Effluent Guidelines and
3 Limitations for industrial point sources discharging to navigable waters, which AMSA's
4 members are neither regulated by nor enforce. AMSA may have mistakenly assumed that
5 Plaintiffs' claims affect their members' interests given that the pretreatment standard
6 regulations happen to be codified in the same subchapter as the Effluent Guidelines and
7 Limitations that apply to industrial point sources. See 40 C.F.R. chapter I, subchapter N (40
8 C.F.R. parts 405-71). The statutory requirements and codification schemes for each of these
9 classes of regulations, although somewhat confusing, are not interrelated. It is clearly improper
10 for AMSA to intervene in this action given that neither their members nor IUs are regulated by
11 the Effluent Guidelines and Limitations that are at issue in this case. Thus, AMSA has no
12 protectable interest in the subject of Plaintiffs' claims.

15 **2. Permissive Intervention is Also Inappropriate and Should Be Denied**

16 This Court should also deny AMSA's alternative request for permissive intervention
17 under FRCP 24(b). A court may allow permissive intervention under FRCP 24(b) only if the
18 applicant demonstrates that: "(1) it shares a common question of law or fact with the main
19 action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction
20 over the applicant's claims." Donnelly v. Glickman, 159 F.3d 405, 412 (9th Cir. 1998) citing
21 Northwest Forest Resource Council v. Glickman, 82 F.3d 825 (9th Cir. 1996). It is generally
22 within the district court's discretion whether to grant permissive intervention, and in
23 exercising this discretion, the district court must consider whether intervention will unduly
24 delay the main action or will unfairly prejudice the existing parties. Donnelly v. Glickman,
25 159 F.3d at 412.
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1 AMSA fails to meet its burden of showing that it will significantly contribute to the
2 development of relevant legal or factual issues raised by this case. Rather than focus on the
3 issues raised by this action, which concern only Effluent Guidelines and Limitations under
4 CWA sections 304(b) and 301(b)(2), AMSA appears to intend to raise issues related to
5 Pretreatment Standards under CWA section 307(b). 33 U.S.C. §§ 1314(b), 1311(b)(2),
6 1317(b). The latter, as discussed, are not implicated by the current claims before the Court,
7 and thus AMSA appears to intend to interject new issues and claims into the case, delaying
8 the disposition of the action. These additional claims would cause prejudice to the existing
9 parties and the Court, which is grounds for denying permissive intervention. See Venegas v.
10 Skaggs, 867 F.2d 527 (9th Cir. 1989). To the extent AMSA wishes to alert the Court to any
11 legal or factual issues, AMSA's participation as *amicus curiae* would provide adequate
12 opportunity for those issues to be raised. In addition, AMSA cannot claim an independent
13 basis for jurisdiction, because the claims at issue in this case can only be remedied by the
14 Federal Defendant. League of Wilderness Defenders v. Forsgren, 184 F.Supp.2d 1058 (D. Or.
15 2002). Accordingly, AMSA has failed to meet its burden that it is entitled to permissive
16 intervention, and this Court should also deny its alternative application on that ground.
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VI. Conclusion

In light of the above arguments, Plaintiffs hereby respectfully request the Court DENY

AMSA's Motion to Intervene.

Respectfully submitted,

Dated: September 7, 2004

/S/ Rachel E. Shapiro

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