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15 UNITED STATES DISTRICT COURT  
16 CENTRAL DISTRICT OF CALIFORNIA

17  
18  
19 NATURAL RESOURCES  
DEFENSE COUNCIL,

20 Plaintiff,

21 vs.

22 STEPHEN L. JOHNSON,  
ADMINISTRATOR, UNITED  
23 STATES ENVIRONMENTAL  
PROTECTION AGENCY, and  
24 UNITED STATES  
ENVIRONMENTAL  
25 PROTECTION AGENCY,

26 Defendants.

Case No. 2:06-cv-04843-GAF-(JTLX)

**NATIONAL ASSOCIATION OF  
CLEAN WATER AGENCIES'  
NOTICE OF MOTION AND  
MOTION TO INTERVENE;  
MEMORANDUM OR POINTS AND  
AUTHORITIES IN SUPPORT**

Judge: The Honorable Gary A. Feess  
Hearing Date: January 22, 2007  
Hearing Time: 9:30 a.m.  
Courtroom: 740

CLEAN WATER ACT CASE

[Declaration of Alexandra Dunn Filed  
Herewith; [Proposed] Order and  
[Proposed] Complaint for Declaratory  
and Injunctive Relief Lodged Herewith]

1 TO THE HONORABLE COURT, ALL PARTIES AND THEIR  
2 ATTORNEYS OF RECORD

3 PLEASE TAKE NOTICE that Intervening Plaintiff National Association of  
4 Clean Water Agencies ("NACWA") will move this Court on January 22, 2007 at  
5 9:30 a.m. or as soon thereafter as counsel may be heard, in Courtroom 740 of the  
6 United States District Court for the Central District of California, Western Division,  
7 Roybal Federal Building, located at 255 East Temple Street, Los Angeles CA  
8 90012, for an order allowing NACWA to intervene in the above-captioned action as  
9 a plaintiff pursuant to Rules 24(a) and 24(b) of the Federal Rules of Civil  
10 Procedure.

11 NACWA's members have a vital interest in the subject matter of this  
12 proceeding and are so situated that the disposition of this action may as a practical  
13 matter impair or impede their ability to protect that interest. NACWA's interests  
14 are distinct from those of the existing parties in that NACWA is an association  
15 whose members include wastewater utilities throughout the United States whose  
16 operations are directly and adversely impacted by the Defendants' failure to comply  
17 with the statutory requirements cited in the Plaintiff's Complaint. Accordingly,  
18 NACWA seeks to intervene in this action as a matter of right under Fed. R. Civ. P.  
19 24(a)(2). Alternatively, NACWA respectfully requests that this Court permit  
20 NACWA to intervene under Fed. R. Civ. P. 24(b)(2).

21 This motion is made following conferences of counsel pursuant to Local  
22 Rule 7-3 which took place on November 22, 2006, after which counsel for  
23 NACWA provided counsel for the other parties with copies of this Motion, the  
24 [Proposed] Complaint and the Declaration of Alexandra Dunn in support. On  
25 December 1, 2006, counsel for Plaintiff Natural Resources Defense Council  
26 ("NRDC") advised NACWA that NRDC would oppose this motion. On December  
27 5, 2006, counsel for Defendant United States Environmental Protection Agency  
28 advised that it would "take no position" on this motion.

1 In support of NACWA's Motion, NACWA relies on this Notice of Motion  
2 and Motion, the accompanying Memorandum of Points and Authorities, the  
3 Declaration of Alexandra Dapolito Dunn filed in support herewith, the [Proposed]  
4 Complaint lodged herewith and attached hereto as Exhibit A, the [Proposed] Order  
5 submitted herewith and upon such other and further evidence as may be presented  
6 to the Court.

7 **REQUESTED RELIEF**

8 NACWA moves for an order permitting NACWA to intervene in this  
9 proceeding pursuant to Fed. R. Civ. P. 24(a) or, in the alternative, Fed. R. Civ. P.  
10 24(b).

11 Dated: December 13, 2006 Respectfully submitted,

12   
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On August 3, 2006, plaintiff Natural Resources Defense Council (“NRDC”  
4 or “Plaintiff”), brought this action against the U.S. Environmental Protection  
5 Agency (“EPA”) for declaratory and injunctive relief. Plaintiff’s Complaint asserts  
6 that EPA has failed to comply with the mandatory requirements established under  
7 the Beaches Environmental Assessment and Coastal Health Act of 2000 (“BEACH  
8 Act”), Pub. L. 106–284, Oct. 10, 2000 (amending the Federal Water Pollution  
9 Control Act (“Clean Water Act”), 33 U.S.C. §§ 1251 et seq.) to (i) initiate and  
10 complete appropriate studies to provide additional information for use in  
11 developing an assessment of potential human health risks resulting from exposure  
12 to pathogens in coastal recreational waters and (ii) publish revised water quality  
13 criteria for pathogens and pathogen indicators (including a revised list of  
14 appropriate testing methods) based on those studies.

15 NACWA now seeks to intervene in this proceeding as a party-Plaintiff in  
16 order to protect and preserve the interests of its members nationwide. NACWA is a  
17 national, non-profit trade association, acting on behalf of its members, which own  
18 and operate publicly owned treatment works (“POTWs”), combined sewer  
19 overflow treatment facilities and municipal separate storm sewer systems  
20 throughout the United States. NACWA’s member agencies hold National Pollutant  
21 Discharge Elimination System (“NPDES”) permits pursuant to CWA § 402(a), 33  
22 U.S.C. § 1342(a), authorizing the discharge of municipal wastewater, combined  
23 sewer overflows, and stormwater to the waters of the United States, including the  
24 Great Lakes and other coastal recreation waters.

25 NACWA, which has represented the interests of the nation’s POTWs and  
26 municipal wastewater treatment agencies since 1970, is comprised of nearly 300  
27 POTW members who collectively serve the majority of this country’s sewered  
28 population and treat over 18 billion gallons of wastewater each day. NACWA

1 strives to maintain a leadership role in the development and implementation of  
2 scientifically-based, technically-sound, and cost-effective environmental programs  
3 for protecting public and ecosystem health. NACWA's members operate municipal  
4 wastewater treatment plants, municipal separate storm sewer systems, and  
5 combined sewer treatment facilities under federal and state laws and regulations in  
6 cities and towns across the United States, including 32 California agencies.

7 NACWA and its members are harmed by EPA's failure to comply with its  
8 nondiscretionary duties under the BEACH Act to perform appropriate studies to  
9 provide additional information for use in developing an assessment of potential  
10 human health risks resulting from exposure to pathogens in coastal recreational  
11 waters; appropriate and effective indicators for improving detection in a timely  
12 manner; appropriate, expeditious and cost-effective test methods; and guidance for  
13 state application of the criteria for pathogens and pathogen indicators published by  
14 the EPA. EPA's failure to comply with the BEACH Act has an immediate and  
15 substantial impact on NACWA's member agencies.

16 Because of EPA's failure to act, NACWA's member agencies are deprived of  
17 information they need to make appropriate planning and budgeting decisions about  
18 future wastewater and stormwater infrastructure investments, and they are currently  
19 subject to effluent discharge limitations for pathogens and pathogen indicators that  
20 have not been sufficiently proven and may not be appropriate for all coastal  
21 environments.

22 Most existing POTWs and combined sewer treatment facilities have been  
23 designed and constructed to demonstrate disinfection effectiveness using a fecal  
24 coliform standard, while EPA's failure to perform the studies and to publish the  
25 new or revised criteria required by the BEACH Act has resulted in the mandatory  
26 imposition of requirements to comply with outdated and unreliable standards for E.  
27 coli and enterococci that may not be appropriate or suitable for use as indicator  
28 mechanisms and may be difficult for many facilities to achieve.



1 NACWA has long advocated that EPA must conduct additional research  
2 using up-to-date methods and experience on the suitability of the indicator  
3 organisms selected for EPA's existing criteria, in compliance with the requirements  
4 explicitly enumerated in the BEACH Act. On May 15, 2000, NACWA submitted  
5 comments on EPA's January 2000 *Draft Implementation Guidance for Ambient*  
6 *Water Quality Criteria for Bacteria – 1986*. NACWA subsequently commented on  
7 two separate EPA actions that discussed issues addressed in the *Draft Guidance*.  
8 On October 1, 2001, NACWA commented on the Agency's *Draft National Beach*  
9 *Guidance and Performance Criteria for Recreation Waters* (66 Fed. Reg. 39510;  
10 July 31, 2001). On October 29, 2001, NACWA commented on EPA's proposal of  
11 test methods for the enumeration of E. coli and enterococci (August 30, 2001; 66  
12 Fed. Reg. 45,811). On August 2, 2002, NACWA submitted comments on EPA's  
13 revised, May 2002 version of the *Draft Implementation Guidance for Ambient*  
14 *Water Quality Criteria for Bacteria* (EPA-823-B-02-003). On August 19, 2004,  
15 NACWA submitted formal comments to the administrative docket (Docket ID OW-  
16 2004-0010) for EPA's proposed *Water Quality Standards for Coastal and Great*  
17 *Lakes Waters* (July 9, 2004; 69 Fed. Reg. 41720).

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

23 Accordingly, NACWA is entitled to intervene as of right pursuant to Rule  
24 24(a)(2) of the Federal Rules of Civil Procedure. EPA's failure to comply with the  
25 BEACH Act has an immediate and substantial impact on NACWA's member  
26 agencies. The existing Plaintiff, NRDC, does not adequately represent the interests  
27 of NACWA's member local governments. As front-line water quality managers,  
28 NACWA's members' foremost goals are to protect public health and our nation's

1 valuable water resources by actually treating and reclaiming wastewater to meet the  
2 CWA's ambitious goals. As such, NACWA supports the development and use of  
3 effective indicator organisms and pathogen criteria, where they are supported by  
4 adequate science and appropriate to protect primary contact recreational uses.

5 Alternatively, the Court should grant permissive intervention. There are  
6 common questions of law and fact between NACWA's claims and the Plaintiff's  
7 action. Moreover, intervention would promote judicial efficiency by reducing the  
8 prospects of future litigation by NACWA and/or its individual members to protect  
9 their interests. As representatives of municipal wastewater treatment agencies  
10 throughout the United States, NACWA will provide the Court with a broader  
11 perspective on the impacts and appropriateness of Plaintiff's claims and the  
12 appropriate form of relief sought from the Defendants.

## 13 **II. ARGUMENT**

### 14 **A. NACWA is Entitled to Intervene As of Right.**

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

16 **(a) Intervention of Right.** Upon timely application  
17 anyone shall be permitted to intervene in an action: . . .  
18 (2) when the applicant claims an interest relating to the  
19 property or transaction which is the subject of the action  
20 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.

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

25 The Ninth Circuit has enumerated four requirements for intervention as of  
26 right under Rule 24(a)(2): "(1) the motion must be timely; (2) the applicant must  
27 assert a 'significantly protectable' interest relating to property or a transaction that  
28 is the subject matter of litigation; (3) the applicant must be situated so that

1 disposition of action may as a practical matter impair or impede the interest; and  
2 (4) the applicant's interest must be inadequately represented by the parties.”  
3 Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1107-08 (9th Cir. 2002)  
4 (citing Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d  
5 1105, 1113-14 (9th Cir. 2000); Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir.  
6 1993)).

7 **1. NACWA's Motion to Intervene is Timely**

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

13 Here, timeliness is not a concern. This action was commenced less than four  
14 months ago, on August 3, 2006, and EPA filed an Answer less than two months  
15 ago, on October 13, 2006. At this very early stage, the litigation has scarcely  
16 progressed and there is no possibility that NACWA's participation will have any  
17 disruptive effect on the proceedings or result in any prejudice to any existing party.  
18 Accordingly, NACWA's motion clearly is timely.

19 **2. NACWA Has a Significant and Recognizable Interest in the**  
20 **Subject Matter of This Action**

21 While Fed. R. Civ. P. 24(a) does not specify the nature of the interest  
22 required for intervention as a matter of right, the Supreme Court held that “what is  
23 obviously meant . . . is a significantly protectable interest.” Donaldson v. United  
24 States, 400 U.S. 517, 531 (1971). Whether an applicant for intervention as of right  
25 demonstrates sufficient interest in an action is a “practical, threshold inquiry,” and  
26 “no specific legal or equitable interest need be established.” Greene v. United  
27 States, 996 F.2d 973, 976 (9th Cir. 1993), *aff'd*, 64 F.3d 1266 (9th Cir. 1995). In  
28 County of Fresno v. Andrus, 622 F.2d 436, 438 (9<sup>th</sup> Cir. 1980), the Court of

1 Appeals “agree[d] with the D.C. Circuit that “the “interest” test is primarily a  
2 practical guide to disposing of lawsuits by involving as many apparently concerned  
3 persons as is compatible with efficiency and due process.” (quoting Nuesse v.  
4 Camp, 385 F.2d 694, 700 (D.C. Cir. 1967)). As such, and in order to further the  
5 intent that Rule 24(a) should be liberally construed, the interest requirement should  
6 be interpreted broadly. *See, e.g.,* Natural Resources Defense Council v. U.S. EPA,  
7 99 F.R.D. 607, 609 (D.D.C. 1983) (stating that the interest prong of Rule 24(a)(2)  
8 “has been interpreted in broad terms”). To demonstrate this interest, a prospective  
9 intervenor must establish only that “the interest is protectable under some law,” and  
10 there is a “relationship between the legally protected interest and the claims at  
11 issue.” Sierra Club v. EPA, 995 F.2d 1478, 1484 (9th Cir. 1993)).

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

16 The state of Arizona was required to submit lists of  
17 impaired waters, point sources discharging pollutants into  
18 them, and control strategies to reduce such discharges  
19 under 33 U.S.C. §1314(i)(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.

20 995 F.2d at 1480. The Sierra Club then sought to require EPA to promulgate water  
21 quality standards for toxic pollutants in Arizona. The City of Phoenix moved to  
22 intervene in the litigation because the case might have resulted in development of a  
23 toxic control strategy for the receiving waters where the City’s two wastewater  
24 treatment plants discharged, thus impacting the City’s NPDES permits. The Ninth  
25 Circuit reversed the district court’s denial of intervention for lack of a “protectable  
26 interest,” holding that the City’s possession of NPDES permits allowing the  
27 discharge of wastewater to impaired waters constituted a sufficient protectable  
28 interest. *Id.* at 1478. The Ninth Circuit characterized the holding of these permits

1 as a real property interest and held that the lawsuit would affect this interest by  
2 requiring EPA to “change the terms of permits it issues to the would be intervenors,  
3 which permits regulate the use of that real property.” *Id.* at 1482. The court  
4 concluded that these interests fall squarely within the class of interests traditionally  
5 protected by law. *Id.*

6 As demonstrated in the accompanying Declaration of Alexandra Dapolito  
7 Dunn, in this case, NACWA’s members have real property interests in their  
8 NPDES permits and the disposition of this action might adversely affect those  
9 property interests. As regulated entities who own and operate wastewater  
10 collection systems and treatment plants that must comply with applicable standards  
11 for pathogens and pathogen indicators, NACWA’s members, and their current and  
12 future operations, budgets, and planning, will inevitably be impacted by any  
13 resolution of this action. NACWA’s members have a need to remain in  
14 compliance with their NPDES permits by providing treatment to meet any new or  
15 revised water quality standards for pathogens and pathogen indicators promulgated  
16 by EPA. As public entities, NACWA’s members represent the interests of their  
17 citizens and ratepayers, who will ultimately bear the increased costs of compliance.  
18 NACWA’s members have a vital interest in being involved at all stages of  
19 regulatory development in order to protect the current and future interests of their  
20 constituents and to appropriately plan for future financial constraints, and any  
21 adjudication or settlement that requires EPA to perform the studies and publish the  
22 criteria required by the BEACH Act will directly impact such interests. Therefore,  
23 NACWA clearly has a significantly protectable interest in the subject matter of this  
24 proceeding for intervention as of right under Rule 24(a)(2).

25 **3. The Disposition of This Action May As a Practical Matter Impair**  
26 **or Impede NACWA’s Ability to Protect Its Members’ Interests**

27 The Ninth Circuit has held that “the relevant inquiry is whether [a resolution  
28 of an action] ‘may’ impair rights ‘as a practical matter’ rather than whether the

1 [resolution] will ‘necessarily’ impair them.” United States v. City of Los Angeles,  
2 288 F.3d 391, 401 (9th Cir. 2002) (quoting Fed. R. Civ. P. 24(a)(2)). A 1966  
3 Supreme Court amendment of Rule 24(a), which added the language authorizing  
4 intervention of right based upon the mere possibility that disposition of the action  
5 *may* as a practical matter impair or impede the applicant’s ability to protect its  
6 interest, was “obviously designed to liberalize the right of intervene in federal  
7 actions” since “an earlier draft would have required that the judgment  
8 ‘substantially’ impair or impede the interest, but that higher barrier was deleted in  
9 the course of approving the amendment.” Nuesse v. Camp, 385 F.2d at 701.

10 In Natural Resources Defense Council v. EPA, 99 F.R.D. 607 (D.D.C. 1983),  
11 the D.C. District Court determined that pesticide manufacturers’ interests might in  
12 fact be practically impaired if they were not permitted to intervene in that action.  
13 Although the plaintiffs argued that they sought to challenge only EPA’s procedures  
14 rather than any substantive standards, and that intervenors would have subsequent  
15 opportunities to comment of EPA actions, the Court nonetheless found that the  
16 intervenors’ interests would be practically impaired if the regulatory procedures  
17 were invalidated. *See* 99 F.R.D. at 609 (citing Natural Resources Defense Council  
18 v. Costle, 561 F.2d 904 (D.C. Cir. 1977), and Environmental Defense Fund, Inc. v.  
19 Costle, 79 F.R.D. 235 (D.D.C. 1978)). Similarly, in Natural Resources Defense  
20 Council v. Costle, the D.C. Circuit held that the manufacturer groups’ interests  
21 might be impaired as a practical matter unless they were permitted to intervene,  
22 even though they would have been able to challenge the CWA regulations to be  
23 promulgated by EPA under the terms of the settlement agreement in a separate  
24 proceeding. The Court of Appeals noted that:

25 [T]his court read Rule 24(a)(2) as looking to the  
26 “practical consequences” of denying intervention, even  
27 where the possibility of future challenge to the regulation  
28 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

1 regulations in the first place, with no need for judicial  
2 review.  
3 561 F.2d at 909 (emphasis in original; footnote omitted). Therefore, the Court  
4 concluded that “it is not enough to deny intervention under [Rule] 24(a)(2) because  
5 applicants may vindicate their interests in some later, albeit more burdensome  
6 litigation.” *Id.* at 910. The Court also noted that involvement of the industry  
7 intervenors “may lessen the need for future litigation to protect their interests.” *Id.*  
8 at 911.

9 Similarly, disposition of this action may as a practical matter impair or  
10 impede NACWA’s ability to protect its interests. Any adjudication or settlement  
11 that requires EPA to perform the studies and publish the new or revised criteria for  
12 pathogens and pathogen indicators (including a list of revised testing methods, as  
13 appropriate) will subject NACWA and its members to additional costs associated  
14 with remaining in compliance with their NPDES permits. The mere fact that  
15 NACWA may have a later opportunity to challenge effluent limitations or permit  
16 conditions based upon those criteria and test methods or to comment on the criteria  
17 or test methods when they are published does not negate the fact that the interests of  
18 NACWA and its members have already been impaired by EPA’s failure to comply  
19 with its statutory deadlines under the BEACH Act, and will be impaired by any  
20 future actions taken by EPA as a result of this litigation. Intervention in this action  
21 is therefore essential to allow an adequate opportunity for NACWA to protect and  
22 prevent impairment of those interests.

23 **4. NACWA’s Interests Are Not Adequately Represented**

24 The Ninth Circuit has stated that in determining adequacy of representation,  
25 the Court considers “whether the interest of a present party is such that it will  
26 undoubtedly make all the intervenor’s arguments; whether the present party is  
27 capable and willing to make such arguments; and whether the intervenor would  
28 offer any necessary elements to the proceedings that other parties would neglect.”

1 California v. Tahoe Regional Planning Agency, 792 F.2d 775, 778 (9th Cir. 1986)  
2 (quoting Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983)).  
3 “The applicant is required only to make a minimal showing that representation of  
4 its interests *may be* inadequate.” Id. (emphasis added); *see also* United States v.  
5 Union Electric Co., et al., 64 F.3d 1152, 1168 (8<sup>th</sup> Cir. 1995); Dimond v. District of  
6 Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) (an intervention applicant’s burden  
7 of showing inadequate representation of his interest “is not onerous. The applicant  
8 need only show that representation of his interest ‘may be’ inadequate, not that  
9 representation will in fact be inadequate.”); Nuesse v. Camp, 385 F.2d at 702  
10 (noting that the adequate representation language in Rule 24(a)(2) “underscores  
11 both the burden on those opposing intervention to show the adequacy of the  
12 existing representation and the need for a liberal application in favor of permitting  
13 intervention”).

14 By itself, the divergent regulatory status of NACWA and NRDC, the original  
15 Plaintiff in this action, more than satisfies the minimal burden of showing that  
16 NRDC will not adequately represent NACWA’s interests. Although NACWA and  
17 its members share NRDC’s concern for the protection and restoration of our  
18 nation’s water resources, NACWA’s members actually own and operate the  
19 wastewater conveyance and treatment systems that must achieve compliance with  
20 any new or revised standards for pathogens and pathogen indicators that are  
21 promulgated by EPA pursuant to the BEACH Act. NACWA’s membership  
22 consists of municipal and regional wastewater authorities who must comply with  
23 the CWA’s water quality standards and effluent limitations as implemented in their  
24 NPDES permits. This distinctive regulatory status alone is sufficient to allow the  
25 Applicant to meet its minimal burden of showing that the Plaintiff will not  
26 adequately represent its interests.

27 Furthermore, Defendant EPA cannot adequately represent NACWA’s  
28 interests because such interests are far narrower and “cannot be subsumed within



1 the shared interest of the citizens” represented by EPA. *See Union Electric Co.*, 64  
2 F.3d at 1169. While NACWA’s members, like EPA, are concerned with  
3 environmental protection, NACWA’s members are also faced with the challenge of  
4 properly operating their utilities while remaining fiscally responsible to their  
5 ratepayers. NACWA therefore has a unique and vital interest in ensuring that  
6 legislation and regulations provide an appropriate benefit to the environment as  
7 well as to their ratepayers. These interests are not shared with the general citizenry  
8 of the United States and EPA would be “shirking its duty” if it were to litigate the  
9 issues involved in this action with NACWA’s unique interests “uppermost in its  
10 mind.” *Union Electric Co.*, 64 F.3d at 1170. Therefore, there is no present party to  
11 this litigation that will undoubtedly make all of NACWA’s arguments, nor will any  
12 party be capable or willing to make such arguments.

13 Furthermore, NACWA will offer insights to the proceedings that other  
14 parties would neglect. Excluding the NACWA from this case would exclude the  
15 voices of those who are most directly impacted by the outcome of this litigation.  
16 NACWA, though its national membership, can speak both to the importance of the  
17 studies EPA is required to perform under the BEACH Act and to the impact of any  
18 new or revised criteria, indicators, test methods and guidance on its members’  
19 ability to comply with their NPDES permits and the impact such changes may have  
20 on basic local government functions and services such as police and fire protection,  
21 health and social services, and infrastructure maintenance. These interests are not  
22 shared by NRDC or the general citizenry, and are unique to the NACWA’s  
23 members. Based on the foregoing, NACWA’s motion to intervene clearly satisfies  
24 the “minimal” burden under Rule 24(a)(2) of showing that representation of  
25 NACWA’s interests by the existing parties “may be” inadequate.

26 **B. Alternatively, NACWA Should Be Permitted To Intervene Under**  
27 **Fed. R. Civ. Proc. 24(b)**

28 Even if NACWA did not meet the criteria for intervention of right, which it

1 does, it would satisfy the requirements for permissive intervention. Under Rule  
2 24(b)(2), permissive intervention is appropriate when “an applicant’s claim or  
3 defense and the main action have a question of law or fact in common.” Fed. R.  
4 Civ. P. 24(b)(2). Rule 24 is construed broadly as a tool to fully litigate the issues  
5 with all interested parties in one proceeding rather than encouraging piecemeal  
6 litigation. *See NRDC v. Costle*, 561 F.2d at 910-11; *see also Feller v. Brock*, 802  
7 F.2d 722, 729 (4<sup>th</sup> Cir. 1986) (“liberal intervention is desirable to dispose of as  
8 much of a controversy involving as many apparently concerned persons as is  
9 compatible with efficiency and due process”). In the Ninth Circuit, permissive  
10 intervention requires “that intervenor’s ‘claim or defense and the main action have  
11 a question of law or fact in common.” *Kootenai Tribe of Idaho v. Veneman*, 313  
12 F.3d 1094, 1108 (9th Cir. 2004) (quoting Fed. R. Civ. P. 24(b)(2)).

13 In this case, NACWA intends to assert several claims that are both legally  
14 and factually related to Plaintiffs’ claims, including that EPA has failed to initiate  
15 and complete the studies and to publish the new or revised water quality criteria in  
16 accordance with the mandatory deadlines set forth in the BEACH Act. These  
17 issues constitute common factual and legal questions sufficient to justify permissive  
18 intervention.

19 Furthermore, intervention in this action at this early stage would not unduly  
20 delay or prejudice the adjudication of the rights of the original parties in any way.  
21 NACWA does not seek to expand the scope of this proceeding by incorporating  
22 new issues that are unrelated to Plaintiffs’ allegations, but only to ensure that its  
23 members’ interests are adequately protected. The participation of NACWA would  
24 not result in an unmanageable number of parties and would be compatible with  
25 efficiency and due process. If anything, intervention would promote judicial  
26 efficiency by diminishing the prospects of future litigation by NACWA or its  
27 members and would ensure the adequate representation of others who have similar  
28 governmental, economic and regulatory interests. Consequently, NACWA should

1 be permitted to intervene under Rule 24(b) in order to facilitate the resolution of its  
2 common claims of law and fact in one proceeding consistent with the principles of  
3 judicial economy.

4 **III. CONCLUSION**

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

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

15 Dated: December 13, 2006 Respectfully submitted,

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15  
16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA

18 19 NATURAL RESOURCES DEFENSE COUNCIL  20 Plaintiff,  21 vs.  22 STEPHEN L. JOHNSON, ADMINISTRATOR, UNITED STATES 23 ENVIRONMENTAL PROTECTION AGENCY, and UNITED 24 STATES ENVIRONMENTAL PROTECTION AGENCY  25 Defendant.	Case No. 2:06-cv-04843-GAF-JTL  COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF
26 27 28	

1 NATIONAL ASSOCIATION OF  
2 CLEAN WATER AGENCIES,

3 Intervenor-Plaintiff,

4 vs.

5 STEPHEN L. JOHNSON,  
6 ADMINISTRATOR, UNITED STATES  
7 ENVIRONMENTAL PROTECTION  
8 AGENCY, and UNITED  
9 STATES ENVIRONMENTAL  
10 PROTECTION AGENCY  
11 Defendant.

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1                    **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

2    **INTRODUCTION**

3            1.        Plaintiff the National Association of Clean Water Agencies  
4 (“NACWA”) seeks declaratory and injunctive relief against defendants, the U.S.  
5 Environmental Protection Agency and Stephen L. Johnson, Administrator of the  
6 U.S. Environmental Protection Agency (collectively “EPA”), for failing to comply  
7 with statutory obligations under the Beaches Environmental Assessment and  
8 Coastal Health Act of 2000 (“BEACH Act”), Pub. L. 106–284, Oct. 10, 2000  
9 (amending the Federal Water Pollution Control Act (“Clean Water Act”), 33 U.S.C.  
10 §§ 1251 *et seq.*), to protect the public from the adverse health effects caused by  
11 contact with contaminated beachwater.

12            2.        In October 2000, Congress enacted the BEACH Act to address the  
13 significant health concerns posed by contaminated water and to improve water  
14 quality protections for the Great Lakes and other coastal recreational waters.  
15 Congress enacted the BEACH Act “to give the public confidence in the quality of  
16 the nation’s coastal water” and to protect “the tourism and recreation industries that  
17 rely on safe and swimmable coastal waters.” H.R. Rep. No. 106-98, at 5 (2000).  
18 Congress further explained that “EPA’s 1986 criteria need to be updated to improve  
19 the scientific basis for identifying pathogens in coastal recreation waters.” *Id.* at 6.

20            3.        The BEACH Act requires EPA, by fixed statutory deadlines, to  
21 conduct studies on the health effects of pathogens in coastal recreational waters and  
22 to protect beachgoers against illnesses caused by these pathogens.

23            4.        EPA has failed to comply with the BEACH Act’s requirements to (i)  
24 initiate and complete appropriate studies to provide additional information for use  
25 in developing an assessment of potential human health risks resulting from  
26 exposure to pathogens in coastal recreational waters and (ii) publish revised water  
27 quality criteria for pathogens and pathogen indicators (including a revised list of  
28

1 appropriate testing methods) based on those studies. These failures violate express  
2 statutory deadlines contained in the BEACH Act.

### 3 **JURISDICTION AND VENUE**

4 5. Subject matter jurisdiction is proper in this court pursuant to federal  
5 question jurisdiction, 28 u.s.c. § 1331, and the citizen suit provision of the Clean  
6 Water Act, 33 U.S.C. § 1365(a), because plaintiff NACWA asserts claims against  
7 defendants under the BEACH Act and the Administrative Procedure Act (“APA”),  
8 5 U.S.C. §§ 551 et seq.

9 6. Venue is proper in this court pursuant to 28 U.S.C. § 1391(e)(3),  
10 because the original plaintiff in this action resides in this judicial district.

### 11 **THE PARTIES**

12 7. Plaintiff NACWA is a national, non-profit trade association, acting on  
13 behalf of its members, which own and operate publicly owned treatment works  
14 (“POTWs”), municipal separate storm sewer systems, and combined sewer  
15 treatment facilities throughout the United States. NACWA’s member agencies hold  
16 National Pollutant Discharge Elimination System (“NPDES”) permits pursuant to  
17 CWA § 402(a), 33 U.S.C. § 1342(a), authorizing the discharge of municipal  
18 wastewater, combined sewer overflows and stormwater to the waters of the United  
19 States, including the Great Lakes and other coastal recreation waters.

20 8. Plaintiff NACWA brings this action on its own behalf and on behalf of  
21 its members. NACWA, which has represented the interests of the nation’s POTWs  
22 and municipal wastewater treatment agencies since 1970, is comprised of nearly  
23 300 POTW members who collectively serve the majority of this country’s sewered  
24 population and treat over 18 billion gallons of wastewater each day. NACWA  
25 strives to maintain a leadership role in the development and implementation of  
26 scientifically-based, technically-sound, and cost-effective environmental programs  
27 for protecting public and ecosystem health. NACWA’s members operate municipal  
28



1 wastewater treatment plants under federal and state laws and regulations in cities  
2 and towns across the United States, including 32 California agencies.

3 9. NACWA and its members are harmed by EPA's failure to comply  
4 with its nondiscretionary duties under the BEACH Act to perform appropriate  
5 studies to provide additional information for use in developing an assessment of  
6 potential human health risks resulting from exposure to pathogens in coastal  
7 recreational waters; appropriate and effective indicators for improving detection in  
8 a timely manner; appropriate, expeditious and cost-effective test methods; and  
9 guidance for state application of the criteria for pathogens and pathogen indicators  
10 published by the EPA. EPA's failure to comply with the BEACH Act has an  
11 immediate and substantial impact on NACWA's member agencies.

12 10. Because of EPA's failure to act, NACWA's member agencies are  
13 deprived of information they need to make appropriate planning and budgeting  
14 decisions about future wastewater and stormwater infrastructure investments, and  
15 they are currently subject to effluent discharge limitations for pathogens and  
16 pathogen indicators that have not been sufficiently proven and may not be  
17 appropriate for all costal environments.

18 11. Most existing POTWs and combined sewer treatment facilities have  
19 been designed and constructed to demonstrate disinfection effectiveness using a  
20 fecal coliform standard, while EPA's failure to perform the studies and to publish  
21 the new or revised criteria required by the BEACH Act has resulted in the  
22 imposition of new requirements to comply with outdated and unreliable standards  
23 for E. coli and enterococci that may not be appropriate or suitable for use as  
24 indicator mechanisms and may be difficult for many facilities to achieve. See  
25 EPA's *Water Quality Standards for Coastal and Great Lakes Waters*, 69 Fed. Reg.  
26 67218 (November 16, 2004).

27 12. EPA's current *Ambient Water Quality Criteria for Bacteria* were  
28 developed 20 years ago, in 1986, and were based upon a limited set of coastal sites

1 as well as highly subjective and potentially biased data. NACWA has long  
2 advocated that EPA must conduct additional research using up-to-date methods and  
3 experience on the suitability of the indicator organisms selected for EPA's existing  
4 criteria, in compliance with the requirements explicitly enumerated in the BEACH  
5 Act.

6 13. The requested declaratory and injunctive relief mandating that EPA  
7 comply with its statutory obligations will redress these harms.

8 14. Defendant EPA, a federal agency of the United States, is charged with  
9 responsibility for the implementation and administration of the relevant provisions  
10 of the BEACH Act.

11 15. Defendant Stephen L. Johnson is the Administrator of EPA. He is  
12 sued in his official capacity.

13 **RELEVANT STATUTORY PROVISIONS**

14 **A. REQUIRED HEALTH PROTECTION STUDIES**

15 16. The BEACH Act requires EPA, "after consultation and in cooperation  
16 with appropriate Federal, State, Tribal and local officials (including local health  
17 officials)," to conduct studies on the health effects of pathogens in coastal  
18 recreational waters to form the basis for updating public health standards and  
19 methods for detecting pathogens.

20 17. Specifically, the BEACH Act requires EPA perform studies to provide  
21 additional information for use in developing "an assessment of potential human  
22 health risks resulting from exposure to pathogens in coastal recreation waters,  
23 including non-gastrointestinal effects." 33 U.S.C. § 1254(v)(1).

24 18. Congress also mandated that EPA perform studies to provide  
25 additional information for use in developing "appropriate and effective indicators  
26 for improving detection in a timely manner in coastal recreation waters of the  
27 presence of pathogens that are harmful to human health." Id. § 1254(v)(2).

28

1 19. Congress also mandated that EPA perform studies to provide  
2 additional information for use in developing “appropriate, accurate, expeditious,  
3 and cost-effective methods (including predictive models) for detecting in a timely  
4 manner in coastal recreation waters the presence of pathogens that are harmful to  
5 human health.” Id. § 1254(v)(3).

6 20. Finally, Congress mandated that EPA perform studies to provide  
7 additional information for use in developing “guidance for State application of the  
8 criteria for pathogens and pathogen indicators to be published under section  
9 304(a)(9) to account for the diversity of geographic and aquatic conditions.” Id. §  
10 1254 (v)(4).

11 B. DEADLINES

12 21. The BEACH Act requires that EPA “shall initiate” the required studies  
13 not later than 18 months after the date of enactment of the BEACH Act (i.e., by  
14 April 2002) and “shall complete” these studies not later than 3 years after the date  
15 of enactment of the BEACH Act (i.e., by October 2003). Id. § 1254.

16 22. The BEACH Act further requires EPA to develop new or revised water  
17 quality criteria for pathogens and pathogen indicators for use in recreational waters,  
18 based on the studies outlined above. Specifically, the law requires that EPA “shall  
19 publish,” not later than 5 years after the date of enactment of BEACH Act (i.e., by  
20 October 10, 2005), “new or revised water quality criteria for pathogens and  
21 pathogen indicators (including a revised list of testing methods, as appropriate),  
22 based on the results of the studies conducted under section 104(a), for the purpose  
23 of protecting human health in coastal recreation waters.” Id. § 1314(a)(9)(A).

24 23. The BEACH Act requires that, not later than 36 months after the date  
25 of publication by the Administrator of new or revised water quality criteria under  
26 section 309(a)(9), each state having coastal recreation waters shall adopt and submit  
27 to the Administrator new or revised water quality standards for all pathogens and  
28

1 pathogen indicators to which the new or revised water quality criteria are  
2 applicable. Id. § 1313(i)(1)(B).

### 3 **THE CHALLENGED AGENCY FAILURE TO ACT**

4 24. The BEACH Act requires EPA to conduct studies to provide  
5 additional information for use in developing an assessment of potential human  
6 health risks, appropriate and effective indicators, appropriate, expeditious and cost-  
7 effective methods, and guidance for state application of criteria for pathogens and  
8 pathogen indicators. The BEACH Act requires that EPA “shall initiate” the  
9 required studies by April 2002, and “shall complete” these studies by October 2003.  
10 The BEACH Act further requires EPA to publish new or revised water quality  
11 criteria based on those studies by October 10, 2005.

12 25. EPA has not initiated or completed studies that satisfy the criteria of  
13 the BEACH Act, and has failed to meet the October 10, 2005 deadline to publish  
14 new or revised water quality criteria.

15 26. By failing to initiate and complete the required studies and to publish  
16 new or revised water quality criteria, EPA is in violation of its statutory mandate.

### 17 **CLAIMS FOR RELIEF**

#### 18 FIRST CLAIM FOR RELIEF

19 27. Plaintiff incorporates by reference all preceding paragraphs as if fully  
20 set forth herein.

21 28. The BEACH Act requires EPA to initiate water quality studies by  
22 April 2002 and complete these studies by October 2003. 33 U.S.C. § 1254(v).

23 29. In failing to initiate studies that satisfy the criteria of the BEACH Act  
24 by April 2002 and complete these studies by October 2003, EPA violated 33 U.S.C.  
25 § 1254(v) and failed to perform a nondiscretionary duty. 33 U.S.C. § 1365(a)(2).

26 30. This violation has harmed and continues to harm plaintiff and  
27 plaintiff’s members in the manner described in paragraphs 9-12 above. EPA should  
28 be compelled to comply with 33 U.S.C. § 1254(v) without further delay.



1 revised list of testing methods) constitutes agency action unlawfully withheld in  
2 violation of the APA, 5 U.S.C. § 706(1), and is arbitrary, capricious, an abuse of  
3 discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

4 40. This violation has harmed and continues to harm plaintiff and  
5 plaintiff's members in the manner described in paragraphs 9-12 above.

#### 6 **REQUEST FOR RELIEF**

7 WHEREFORE, the plaintiff respectfully requests that judgment be entered  
8 against EPA as follows:

9 (1) Declaring that EPA has unlawfully failed to meet statutory deadlines  
10 to initiate and complete appropriate water quality studies and to publish revised  
11 water quality criteria;

12 (2) Compelling EPA to initiate and complete, by a court-ordered deadline,  
13 appropriate studies to provide additional information for use in developing an  
14 assessment of potential human health risks resulting from exposure to pathogens in  
15 coastal recreational waters; appropriate and effective indicators for improving  
16 detection in a timely manner of the presence of pathogens that are harmful to  
17 human health; appropriate, accurate, expeditious and cost-effective methods for  
18 detection in a timely manner of the presence of pathogens that are harmful to  
19 human health; and guidance for state application of the criteria for pathogens and  
20 pathogen indicators to account for the diversity of geographic and aquatic  
21 conditions;

22 (3) Compelling EPA to publish revised water quality criteria (including a  
23 revised list of testing methods, as appropriate) for pathogens and pathogen  
24 indicators for use in coastal recreational waters by a court-ordered deadline;

25 (4) Awarding plaintiff its costs and attorneys' fees; and  
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27  
28

1 (5) Granting such other and further relief as the Court deems just and  
2 proper.

3 Dated: December 13, 2006 Respectfully submitted,

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National Association of Clean Water Agencies

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1 **PROOF OF SERVICE**

2 The undersigned certifies and declares as follows:

3 I am a resident of the State of California and over 18 years of age and am not  
4 a party to this action. My business address is 555 South Flower Street, Suite 3100  
5 Los Angeles, California 90071-2300, which is located in the county where any  
non-personal service described below took place.

6 On December 13, 2006, I served a copy of the following document(s):

7 **NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES'**  
8 **NOTICE OF MOTION AND MOTION TO INTERVENE;**  
**MEMORANDUM OR POINTS AND AUTHORITIES IN SUPPORT**

9 on the persons identified on the attached service list:

10 Service was accomplished as follows.

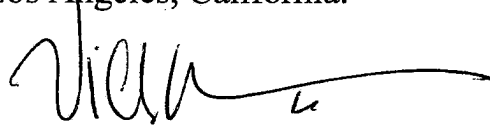
11  **By U.S. Mail, According to Normal Business Practice.** On this date,  
12 I sealed the above document(s) in an envelope addressed to the above, and I placed  
13 that sealed envelope for collection and mailing following ordinary business  
14 practices, for deposit with the U.S. Postal Service. I am readily familiar with the  
15 business practice at my place of business for the collection and processing of  
correspondence for mailing with the U.S. Postal Service. Correspondence so  
collected and processed is deposited the U.S. Postal Service the same day in the  
ordinary course of business, postage fully prepaid.

16  **By Facsimile.** On this date, I transmitted the above-mentioned  
document(s) by facsimile transmission machine to the parties and facsimile number  
set forth above.

17  **By Federal Express Service Carrier.** On this date, I sealed the above  
18 document(s) in an envelope or package designated by Federal Express, an express  
19 service carrier, addressed to the above, and I deposited that sealed envelope or  
20 package in a box or other facility regularly maintained by the express service  
carrier, or delivered that envelope to an authorized courier or driver authorized by  
the express service carrier to receive documents, located in Los Angeles, California  
with delivery fees paid or otherwise provided for.

21  **By Electronic Mail Transmission With Attachment.** On this date, I  
22 transmitted the above-mentioned document(s) by electronic mail transmission with  
attachment to the parties at the electronic mail transmission number set forth below.

23 I declare under penalty of perjury under the laws of the United States of  
24 America that the foregoing is true and correct, and that I am employed in the office  
of a member of the bar of this court at whose direction the service was made.  
25 Executed on December 13, 2006, at Los Angeles, California.

26 

27 Vicki Scott



Service List

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