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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

REPLY OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES IN SUPPORT OF NOTICE OF MOTION AND MOTION TO INTERVENE

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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REPLY IN SUPPORT OF NOTICE OF MOTION AND MOTION TO INTERVENE

Intervenor-Applicant Defendant Association of Metropolitan Sewerage Agencies ("AMSA") hereby submits this Reply in Support of its Notice of Motion and Motion to Intervene to support its application for intervention and to respond to the inaccuracies set forth in Plaintiffs' Memorandum of Points and Authorities in Opposition to Association of Municipal Sewage Agencies' [sic] Motion to Intervene ("Opposition").

STATEMENT OF ISSUES TO BE DECIDED

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).

STATEMENT OF RELEVANT FACTS

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"). On August 20, 2004, AMSA filed a Notice of Motion and Motion to Intervene in this proceeding setting forth AMSA's interest as a party-Defendant in protecting and preserving the interests of its members nationwide. On August 30, 2004, EPA filed a Statement of Non-Opposition to AMSA's Notice and Motion. On September 7, 2004, Plaintiffs filed their Opposition, to which AMSA now responds.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Contrary to Plaintiffs' assertions in their Opposition, AMSA is perfectly familiar with the difference between ELGs applicable to direct and indirect dischargers, but unlike Plaintiffs, AMSA is also aware that the two programs are inextricably intertwined in terms of both their statutory framework and their regulatory implementation by U.S. EPA. Based on the close interrelationship between the programs as described herein, as well as AMSA's direct interest in EPA's review and development of effluent limitations based on best available technologies

economically achievable ("BAT") insofar as those limitations are used to determine, *inter alia*, the need for pretreatment standards and the ability of AMSA's members to obtain removal credits for the removal of toxic pollutants pursuant to § 307(b)(1) of the CWA, AMSA and its members have vital and significantly protectable interests in this litigation so as to satisfy the requirements for intervention as of right under Fed. R. Civ. P. 24(a) and permissive intervention under Fed. R. Civ. P. 24(b).

II. ARGUMENT.

A. AMSA's substantial involvement in the development of ELGs and effluent limitations.

Plaintiffs assert that AMSA confuses industrial point source dischargers and indirect dischargers and does not understand the difference between how industrial point source dischargers and indirect dischargers are regulated under the CWA. To the contrary, AMSA is intimately familiar with these regulations, having been actively involved in the effluent limitations guidelines program, overseeing implementation of EPA's categorical pretreatment standards, and remaining actively engaged in the national dialogue on the development of those standards.

As an association of publicly owned treatment works ("POTWs") AMSA has directly participated in the ELG program for many years by submitting comprehensive comments and participating in other ways to address EPA-proposed ELGs and effluent limitations. As two recent examples, AMSA provided comments in connection with EPA's proposed ELGs, Pretreatment Standards and New Source Performance Standards for the Metal Products and Machinery ("MP&M") Point Source Category and participated in an April 9, 2002, meeting and subsequently submitted comments to EPA in connection with EPA's development of ELGs, Pretreatment Standards and New Source Performance Standards for the Meat and Poultry Products ("MPP") Point Source Category. *See* Declaration of Alexandra Dapolito Dunn. Both sets of ELGs, Pretreatment Standards and New Source Performance Standards have since been finalized. *See* 68 Fed. Reg. 25686 (May 13, 2003) (MP&M); 69 Fed. Reg. 54475 (Sept. 8, 2004) (MPP).

Even more significant than AMSA's participation as a stakeholder in the ELG comment process is AMSA's active involvement in the Effluent Guidelines Task Force established in 1992

as part of the consent decree between the National Resources Defense Council ("NRDC") and EPA in Civ. No. 89-2980 (D.D.C., filed Oct. 30, 1989), attached hereto as Exhibit 1 ("NRDC Consent Decree") to assist EPA in developing and revising guidelines. The NRDC Consent Decree specified that the task force was to include representatives from State and local government, including publicly owned treatment works. *See* NRDC Consent Decree § 8 at 12. Margaret Nellor, from AMSA member the County Sanitation Districts of Los Angeles County, who is on AMSA's Board of Directors, has served as a member and is co-chair of U.S. EPA's Effluent Guidelines Task Force. *See* http://epa.gov/waterscience/guide/taskforce/members.html (Aug. 14, 2003). Ms. Nellor, and AMSA member representative Mr. Guy Aydlett of Hampton Roads Sanitation District, have served on the Effluent Guidelines Task Force since its inception. Other AMSA member representatives also have served on the Effluent Guidelines Task Force in the past – including, Ms. Lori Lynn Sundstrom of the City of Phoenix, and Ms. Bernadette D. Berdes of the Milwaukee Metropolitan Sewerage District. *See id.* As an active participant in the Effluent Guidelines Task Force and a key stakeholder in the ELG development and review process, AMSA is keenly aware of EPA's procedures thereunder and of the practical relationships between ELGs and pretreatment limitations. The input of AMSA member agency representatives has impacted the development of ELGs for indirect dischargers, as well as EPA's approaches to direct dischargers.

B. EPA's practice in reviewing and revising guidelines and limitations is to conduct its review of direct discharge guidelines and limitations concurrently with review of pretreatment (indirect) guidelines and limitations.

In stark contrast to AMSA's comprehensive involvement in the ELG program, Plaintiffs' Opposition betrays the Plaintiffs' unfamiliarity with the details of EPA's assessment and promulgation of effluent limitations for direct and indirect dischargers under the CWA. Regardless of the technical distinctions that Plaintiffs point out between the two programs, as a practical matter, EPA views the programs as interrelated and evaluates, assesses and promulgates pretreatment standards at the same time it evaluates, assesses and promulgates technology-based effluent limitations for direct dischargers.

For example, in connection with EPA's draft Strategy for National Clean Water Industrial

Regulations, EPA explains that under the CWA, "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, 71165 (Nov. 29, 2002) (Notice of Data Availability) (emphasis added). In describing the ELG program, EPA notes that the CWA directs it to promulgate ELGs and standards for point source categories and subcategories that reflect the level of pollutant control attained by BAT, and that EPA does so both for "point sources that introduce pollutants directly into the Nation's waters (*i.e.*, direct dischargers) [and f]or sources that discharge to publicly owned treatment works (POTWs) (*i.e.*, indirect dischargers)." 67 Fed. Reg. at 71167. For indirect dischargers, "EPA promulgates pretreatment standards that apply directly to those sources and are enforced by POTWs, which are backed by State and Federal authorities." *Id.* Based on the history of the ELG program, and information developed by AMSA on the number of industries discharging into POTWs, the preponderance of industrial facilities currently regulated under the ELG program today fall into the indirect discharger classification. As such, when developing or revising ELGs, it is evident that EPA must address appropriate standards for indirect dischargers as well as for direct dischargers. Thus, real world practice and EPA's own statements unequivocally demonstrate that EPA approaches ELGs and limitations for direct and indirect dischargers as one program with two elements contributing to the implementation of a single CWA strategy to control the discharge of industrial pollutants and protect water quality.

Additionally, EPA's NRDC Consent Decree underscores EPA's practice of tackling direct and indirect guidelines and limitations together. In the NRDC Consent Decree, attached hereto as Exhibit 1, EPA stated that it "wishe[d] to take advantage of the best opportunities for reducing risk to human health and the environment across all environmental media," and that the parties "agree[d] that recommendations from a special task force may be helpful to EPA in developing and revising effluent guidelines on a more expedited basis." NRDC Consent Decree at 2-3. EPA defined "effluent guidelines" broadly as including, "(i) for existing direct dischargers, the guidelines described in section 304(b) of the Clean Water Act, 33 U.S.C. § 1314(b), (ii) for new direct dischargers, the standards described in section 306 of the Clean Water Act, 33 U.S.C.

§ 1316, ***and (iii) for new and existing indirect dischargers, the pretreatment standards described in section 307 of the Clean Water Act, 33 U.S.C. § 1317***." NRDC Consent Decree § 1(b), at 4 (emphasis added). In order to meet the goals set forth in the Consent Decree, EPA "establish[ed] a special task force to assist the Agency in discharging its responsibilities to implement the Clean Water Act," which included "representatives to serve on the task force from EPA regions, State and local government (***including publicly owned treatment works***), industry, citizens groups, and the scientific community," NRDC Consent Decree § 8 at 12 (emphasis added). EPA then charged the Effluent Guidelines Task Force, among other things, with providing recommendations on "a process for deciding which additional point source categories to regulate by means of effluent guidelines, based on potential risk reduction, the utility of regulations and the schedule for promulgation of such rules [and] a process and schedule for reviewing and determining whether to revise additional existing effluent guidelines . . . ." NRDC Consent Decree § 8(a)-(b) at 13. Based on EPA's inclusion of indirect discharges in the definition of "effluent guidelines," and because EPA expressly enlisted the assistance of POTWs to advise EPA on the development and timing of effluent guidelines, it is clear that EPA views the development of indirect discharge guidelines and limitations as part of EPA's effluent guideline obligations under CWA § 304(m).

The structure and the text of the CWA, as well as its legislative history, further demonstrate that the effluent limitation programs for direct and indirect dischargers are intertwined and support EPA's longstanding practice of reviewing and revising guidelines and limitations related to direct and indirect dischargers concurrently. For example, Plaintiffs erroneously state that EPA is not required to review guidelines or standards for the pretreatment of pollutants annually, but rather is only required to review them "from time to time." *See* Opposition at 9. However, Plaintiffs fail to address the requirements of CWA § 304(g), which compels EPA to annually review and revise guidelines for pretreatment of pollutants. *See* 33 U.S.C. 1314(g). This mirrors the timeframe under which EPA is required to review and revise direct discharge guidelines under CWA § 304(m)(1)(A).

Similarly, EPA is expressly required to review pretreatment limitations every five years, as is required for BAT-based and BCT-based limitations under CWA § 301(d). Section 301(d) of the

CWA mandates a five-year review and revision period to "[a]ny effluent limitation required by paragraph (2) of subsection (b) of this section." 33 U.S.C. § 1311(d). In addition to requiring direct-discharge effluent limitations, subsection (b)(2) also requires the promulgation of effluent limitations for source categories that discharge pollutants into POTWs,[1] which limitations "shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title." 33 U.S.C. § 1311(b)(2)(A)(ii). Although Plaintiffs note in their Complaint that CWA § 301(d) requires a five-year review of BAT- and BCT-based direct discharge effluent limitations, they fail to acknowledge in their Opposition that the scope of CWA § 301(d) extends to pretreatment standards as well. Because CWA § 301(d) requires five-year review of pretreatment standards as well as a five-year review of BAT-based effluent limitations, EPA's practice has always been to conduct those reviews concurrently.

Finally, the CWA confirms a connection between new source performance standards (NSPS) for the direct discharge of pollutants, promulgated under CWA § 306, 33 U.S.C. § 1316, and pretreatment standards for new sources (PSNS), promulgated under CWA § 307(c), 33 U.S.C. § 1317(c). Section 307(c) requires that the Administrator "promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources." 33 U.S.C. § 1317(c); *see also* 52 Fed. Reg. 42522 ("PSNS are to be issued at the same time as NSPS. . . . The Agency considers the same factors in promulgating PSNS as it considers in promulgating NSPS"). The purpose of this language is "to assure that any new source industrial user of municipal waste treatment plants achieve the highest degree of internal effluent controls necessary to assure that such users' contribution to the publicly owned treatment works will not cause a violation of the permit and to eliminate from such contribution any pollutants which might pass through, interfere with or otherwise be incompatible with the functioning of the municipal plant." *Amendment of the*

[1] Section 301(b)(2)(A)(ii) states that the POTW must "meet[] the requirements of subparagraph (B)," which was repealed in 1981 under Pub. L. 97-117 as one of a number of revisions deleting or extending July 1, 1983, municipal compliance deadlines set forth in the statute. *See* Pub. L. 97-117, 95 Stat. 1631-32 (1981). Prior to its repeal, subparagraph (B) merely required that not later than July 1, 1983, POTWs would comply with the requirements set forth in § 201(g)(2)(A) of the CWA, *see id.*, and therefore, the deletion of that section did not affect EPA's mandatory five-year review of pretreatment standards set forth in CWA § 301(d).

Federal Water Pollution Control Act, Senate Consideration of the Report of the Conference Committee, October 4, 1972, 93d Cong. 92-500 (1972) (Exhibit 1 to statement of Edmund S. Muskie, Chairman, Subcommittee on Air and Water Pollution). Thus, the CWA and its legislative history support EPA's practice of reviewing guidelines and limitations for direct and indirect dischargers concurrently.

Indeed, EPA has consistently recognized the need to maintain a close relationship between direct discharge and pretreatment limitations. In the preamble to EPA's final rulemaking for ELGs, pretreatment standards and new source performance standards for the organic chemicals and plastics and synthetic fibers source category, EPA observed that "[t]he legislative history of the 1977 Act indicated that pretreatment standards are to be technology-based and analogous to the BAT effluent limitations guidelines for removal of toxic pollutants." 52 Fed. Reg. 42522 (Nov. 5, 1987). EPA took this one step further, stating that "[f]or the purpose of determining whether to promulgate national category-wide pretreatment standards, EPA generally determines that there is a pass through of a pollutant and thus a need for categorical standards if the nation-wide average percentage of a pollutant removed by well-operated POTWs achieving secondary treatment is less than the percent removed by the BAT model treatment system." *Id.* Thus, EPA has stated that it not only views the concurrent review as appropriate, but as necessary for the agency to determine whether national category-wide pretreatment standards are needed.

For these reasons, EPA has historically evaluated guidelines and limitations for direct and indirect dischargers concomitantly. For example, in its proposed rulemaking on the MPP ELG, EPA informed its stakeholders that it was "soliciting comment on whether pretreatment standards are necessary for this industry and how EPA should model these potential benefits from controls on MPP indirect dischargers." 67 Fed. Reg. 8582, 8625 (Feb. 25, 2002) (stating that "pretreatment standards are designed to ensure that wastewaters from direct and indirect industrial dischargers are subject to similar levels of treatment"). EPA then proceeded to detail its findings with respect to pretreatment standards in connection with MPP sources. *See* 67 Fed. Reg. at 8633-37. AMSA met with key EPA officials and submitted data that EPA subsequently used to determine that regulation of indirect dischargers in this industrial category was not warranted. Similarly, EPA

evaluated ELGs and pretreatment standards concurrently in connection with the MP&M Point Source Category. *See* 66 Fed. Reg. 424 (January 3, 2001) (proposed rulemaking) (comprehensively evaluating whether pretreatment standards are necessary for various subcategories as part of its effluent guidelines proposal for MP&M point sources). AMSA itself undertook a survey of the POTWs that the Agency surveyed for the MP&M proposed rule, and provided data which demonstrated to EPA that regulation of indirect dischargers in this industrial category also was unwarranted.

EPA's activities, and AMSA's key input to, the ELG processes for the MPP and MP&M Point Source Categories are not unique; they are typical of the standard procedure whereby EPA analyzes and revises guidelines and limitations for direct and indirect dischargers concurrently, and whereby AMSA historically has provided critical information and data to the Agency. Thus the ELG rulemakings that EPA might undertake as a result of the outcome of this litigation are reasonably expected to involve Agency decisions with regard to ***direct and indirect dischargers***.

As a further example, in one instance, EPA has included an industry on its list of industries for promulgation and review of new and revised guidelines under CWA § 304(m) even though the category did not include a single direct discharger. In the case of industrial laundries, EPA listed the category for promulgation and review of new and revised guidelines under CWA § 304(m) despite the fact that AMSA provided the Agency with data showing that the category was comprised exclusively of indirect dischargers. As Plaintiffs point out in Paragraph 35 of their Complaint, CWA § 304(m) requires EPA to establish schedules for (i) reviewing and revising existing effluent limitations guidelines and standards and (ii) promulgating new effluent limitations. On January 2, 1990, EPA published an Effluent Guidelines Plan, in which schedules were established for developing new and revised guidelines for several industry categories, including the industrial laundries point source category. *See* 55 Fed. Reg. 80 (Jan. 2, 1990). After Natural Resources Defense Council, Inc., challenged the Effluent Guidelines Plan, on January 31, 1992, the U.S. District Court for the District of Columbia entered a consent decree that established schedules for, among other things, EPA's proposal and promulgation of effluent guidelines for a number of point source categories. *See* 62 Fed. Reg. 66182, 66185 (Dec. 17, 1997) (Proposed

Rule: Effluent Limitations Guidelines and Pretreatment Standards for the Industrial Laundries Point Source Category). The terms of the consent decree were reflected in the Effluent Guidelines Plan published by EPA on September 4, 1998, *see* 63 Fed. Reg. 47285 (Sept. 4, 1998), which stated, among other things, that EPA proposed effluent limitations guidelines and standards for the industrial laundries point source category in November 1997 and would finalize those guidelines and standards on or before June 1999.

However, when EPA proposed the ELG and standards for the industrial laundries industry, EPA acknowledged that the industry was comprised of only indirect dischargers: "EPA is not developing effluent limitations guidelines and New Source Performance Standards for direct dischargers because EPA has identified no direct dischargers and there is no available information with which to accurately determine 'Best Available Technology Economically Achievable' (BAT) or 'Best Available Demonstrated Control Technology' (BADCT) performance for direct dischargers." 62 Fed. Reg. at 66184. EPA later determined that there was no need to take action with respect to the industrial laundries category, *see* 64 Fed. Reg. 45072 (Aug. 18, 1999), but it is clear from EPA's inclusion of the industrial laundry point source category on its CWA § 304(m) list, despite knowing that the category included no direct dischargers, that EPA views and treats the direct and indirect discharge programs as parts of a single procedural structure.

Based on the foregoing, EPA's adopted practice, as supported by its rationale set forth above and as encouraged by the language and structure of the CWA itself, has been to conduct its annual review of ELGs related to direct and indirect discharges concurrently, and to conduct its five-year review of BAT-based and pretreatment limitations concurrently. Any changes to EPA's schedule in reviewing non-pretreatment ELGs and limitations will inevitably affect EPA's review of pretreatment ELGs and limitations. Therefore, given that AMSA member agencies are directly responsible for implementation and enforcement of all ELGs applicable to indirect dischargers, AMSA has a direct and significantly protectable interest in the subject matter of this litigation and our intervention is appropriate.

C. AMSA and its members have direct and significantly protectable interests in the subject matter of this litigation as it pertains to guidelines and limitations related to removal credits for toxic pollutants.

In addition to the foregoing, the interests of AMSA's members' in discharging toxic pollutants under the NPDES permits and in regulating discharges of toxic pollutants into their POTWs by industrial users will be directly affected by any revision to EPA's practice of reviewing and revising ELGs and resulting effluent limitations. Under CWA § 307(b)(1), for any toxic pollutant listed in § 307(a) introduced by an industrial source into a POTW, if the treatment by the POTW removes all or any part of such toxic pollutant and the resulting discharge from the POTW "does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works" (and does not prevent sludge use or disposal by the POTW), then the POTW may revise the pretreatment requirements for the sources discharging such toxic pollutants into the POTW to reflect the treatment by the POTW. 33 U.S.C. § 1217(b)(1). In other words, if the POTW treats a toxic pollutant discharged by an industrial user to the POTW to such a level that the resulting discharge from the POTW complies with the applicable ***direct*** discharge effluent limitation for the toxic pollutant by the industrial user, then the POTW may revise the pretreatment requirements applicable to the industrial user's toxic discharge in the form of a removal credit pursuant to 40 C.F.R. §§ 403.7(d). The legislative history of the Clean Water Act of 1977, which added this language to § 307(b)(1), explains:

> [T]he Administrator would establish national pretreatment standards for toxic pollutants based on the best available technology economically achievable, or any more stringent effluent standards under section 307(a). Then in applying these pretreatment standards through its pretreatment program, the owner or operator of the municipal treatment works could modify the requirements applicable to the individual classes of sources introducing that pollutant into the treatment works to reflect the degree of reduction of that pollutant achieved by the treatment works. ***The combination of pretreatment and treatment by the municipal treatment works shall achieve at least that level of treatment which would be required if the individual source were making a direct discharge.***

Conference Report 95-830; House Debate, December 15, 1977, Senate Debate, December 15, 1977, at 87-88 (emphasis added).

Under CWA § 307(a)(2), effluent limitations for toxic pollutants listed under § 307(a)(1)

are based on effluent limitations resulting from BAT for the applicable category of point sources established in accordance with CWA § 301(b)(2)(A) or 304(b)(2). *See* 33 U.S.C. § 1317(a)(2). Section 301(b)(2)(A) of the CWA expressly requires EPA to develop BAT-based effluent limitations for toxic pollutants listed under § 307(a)(1). *See* CWA § 301(b)(2)(A), (D), 33 U.S.C. § 1311(b)(2)(A), (D). Therefore, the BAT-based effluent limitations for toxic pollutants listed in § 307(a) and expressly referenced in the removal credit rule in CWA § 307(b)(1) are required under § 301(b)(2)(A).

Plaintiffs recognize in their Complaint that BAT-based effluent limitations required under § 301(b)(2)(A) are intimately involved in Plaintiffs' First and Second Claims for Relief in their Complaint. Plaintiffs' First Claim alleges that EPA failed under § 304(m)(1)(A) to properly review ELGs developed under § 304(b). Since BAT-based effluent limitations promulgated under § 301(b)(2)(A) are "closely interrelated" with ELGs, *see* Complaint ¶ 19, the ELG review that Plaintiffs seek in Claim One would necessarily impact the review of toxic pollutant direct discharge guidelines relevant to POTW removal credits.

Similarly, in Claim Two, Plaintiffs allege that EPA failed to review BAT-based effluent limitations required by § 301(b)(2) at least every five years, as set forth in CWA § 301(d). *See* Complaint ¶¶ 47-48. Since BAT-based effluent limitations for toxic pollutants are required by § 301(b)(2)(A), any resolution of Claim Two would necessarily impact the review of BAT-based limitations referenced in the removal credit language of CWA § 307(b)(1).

Based on the foregoing, annual reviews of ELGs and five-year reviews of BAT-based effluent limitations, as requested by Plaintiffs, will impact the BAT-based limitations applicable to toxic pollutants and will adversely affect the ability of POTWs that desire to in the future or have in the past availed themselves of removal credits under 40 C.F.R. § 403.7(d) and established revised pretreatment standards for dischargers of those toxic pollutants to those POTWs. For this additional reason, therefore, AMSA and its members have direct, substantial and significantly protectable interests in the outcome of this litigation.

III. CONCLUSION.

The CWA's programs involving guidelines and limitations applicable to direct and indirect dischargers are unquestionably intertwined in terms of both their statutory framework and their regulatory implementation by EPA. As illustrated by the outcome of NRDC's 1989 litigation involving EPA's obligations under CWA § 304(m), which resulted in the NRDC Consent Decree, the outcome of this proceeding has the potential to affect the direction of EPA's ELG program for many years to come. As a result of the NRDC settlement, EPA was forced to convene the Effluent Guidelines Task Force, in which AMSA has been a participant for twelve years, and which has consumed the resources of numerous POTW officials throughout that period. Therefore, and for the reasons set forth herein, as well as those set forth in AMSA's Notice of Motion and Motion to Intervene, AMSA clearly has a significantly protectable interest in the subject matter of this litigation and 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: September 15, 2004

Respectfully submitted,

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

/s/ David W. Burchmore

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