IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

GULF RESTORATION NETWORK, et al., Plaintiffs, - v. - LISA P. JACKSON, Administrator of the United States Environmental Protection Agency, and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants. and NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, Proposed Intervenor/Defendant.	Civil Action No.: 2:12-cv-00677 Hon. Jay C. Zainey Magistrate Daniel E. Knowles, III

PROPOSED INTERVENOR/DEFENDANT NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION TO INTERVENE

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I. INTRODUCTION

On July 30, 2008, plaintiffs in this action ("Plaintiffs") petitioned the U.S. Environmental Protection Agency ("EPA" or the "Agency") to establish numeric criteria under the Clean Water Act ("CWA") limiting nitrogen and phosphorus ("nutrients") in waters in all states where those criteria did not already exist, including states with waters that are included in the Mississippi River Basin and the Northern Gulf of Mexico. *See* Dckt. No. 1, Ex. A. Plaintiffs also petitioned EPA to establish Total Maximum Daily Loads ("TMDLs") under the CWA for nitrogen and phosphorus discharges into waterways for the Mississippi River Basin and the Northern Gulf of Mexico.

EPA denied Plaintiffs' Petition on July 29, 2011. *See* Dckt. No. 1, Ex. B. Subsequently, Plaintiffs filed a Complaint with this Court, followed by an Amended Complaint, asserting that EPA's denial of the Petition was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"), because EPA failed "to provide reasons for the denial that conform to the relevant statutory factors in [CWA] section 303(c)(4)(B)"[1] and because EPA's denial was "contrary to the undisputed evidence in the Petition." *See* Dckt. No. 1, ¶ 4.

Proposed intervenor/defendant, the National Association of Clean Water Agencies ("NACWA"), submits this memorandum in support its accompanying Motion to Intervene as defendant. NACWA is a voluntary, non-profit national trade association representing the interests of the nation's publicly owned wastewater and stormwater utilities. NACWA's members include nearly 300 of the nation's municipal clean water agencies, which collectively

[1] Section 303(c)(4)(B) of the CWA, 33 U.S.C. § 1251 et seq. provides that "the Administrator [of EPA] shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard…in any case where [she] determines that a revised or new standard is necessary to meet the requirements of this Act." 33 U.S.C. § 1314 (c)(4)(B).

serve the majority of the sewered population of the United States. (*See Decl. of Christopher Hornback* at ¶ 2)(attached hereto as Exhibit 1). For over 40 years, NACWA has maintained a leadership role in legal and policy issues affecting the public authorities responsible for cleaning the nation's wastewater and stormwater. NACWA is at the forefront of the development and implementation of scientifically-based, technically-sound, and cost-effective environmental programs for protecting public and ecosystem health. NACWA has nearly 100 publicly owned treatment works ("POTW") members within the Mississippi River basin, collectively serving a population of nearly 30 million Americans and treating approximately 3 billion gallons of wastewater each day. (*See Hornback Decl.* at ¶ 3).

The interest of NACWA's members in this case is immediate and direct. Each of those members holds and is required to comply with the terms of one or more discharge authorization permits issued under the federal Clean Water Act's National Pollutant Discharge Elimination System ("NPDES"). (*See Hornback Decl.* at ¶ 4). NPDES permits are required by law to ensure compliance with all applicable water quality standards and to establish conditions consistent with the terms of any applicable TMDL.[2] As a result, all of NACWA's clean water agency members would be directly affected by any EPA action to develop new water quality standards (of which the nitrogen and phosphorous criteria demanded by Plaintiffs are an element)[3] or by the establishment of the new TMDLs for those parameters as demanded by Plaintiffs. (*See Hornback Decl.* at ¶ 6)

Plaintiffs' Amended Complaint states their position well. They contend that their petition was so perfectly reasoned and so exhaustively documented that no response other than the grant of that petition would satisfy the requirements of the APA. That is, they contend not

[2] *See* 33 U.S.C. 1342(a)(1)(A) and 40 C.F.R. 122.44(d).
[3] "Water quality standards" are regulations comprised of: 1) a description of the designated use or uses of a water body; 2) the criteria necessary to protect the use or uses; and 3) a statement by the applicable state that the standard will maintain and protect the existing use and the water quality of the water body. *See* 40 C.F.R. § 131.6.

simply that EPA gave an inadequate response, but that the only adequate response would be a granted petition. Thus, Plaintiffs improperly seek to place the merits of their petition before this Court for decision.

Plaintiffs' position is contrary to law and NACWA will argue that EPA properly denied the petition because, among other reasons, the many technical and legal predicates for issuance of numeric criteria for nutrients and TMDLs in state waters have not been met. Because the stakes are so high, and because the interests of NACWA's members in the evolution of a sound policy for the proper, most effective control of nutrients in the nation's waterways is so fundamental to their missions, NACWA's intervention is critical to protect its members and their ratepayers and to provide the Court the perspective of wastewater utilities that will be most directly affected by the relief sought in the Petition.

In addition to the obvious concern that new water quality criteria and TMDLs would impose massive new costs on its member agencies, NACWA is concerned that EPA may not present critical arguments demonstrating that, even if it had wanted to, it was not legally empowered to grant the relief requested in Plaintiffs' petition. In order to develop water quality criteria for a state, certain actions must first occur that have not occurred here.[4] Similarly, in order to take a state's place and develop a TMDL itself, certain predicate actions and inactions by the state are required to trigger EPA's authority to develop a federal TMDL.[5] Those actions and inactions are not present here. Thus, EPA is not and never has been legally empowered to grant Plaintiffs' petition. NACWA has a critical interest in assuring that this issue, which was not a part of EPA's letter of denial, is not overlooked here.

Moreover, NACWA has long been an active advocate for a fair and balanced program

[4] *See* 33 U.S.C. 1313(b)(1)(B) and (c)(3) and (4).
[5] *See* 33 U.S.C. 1313(d)(2).

to control nutrients in the nation's waters. By far the greatest contribution to those nutrient loadings is runoff from so-called "non-point" sources, including agriculture, that typically are not regulated under NPDES permits. NACWA's members, all "point sources," would be among the primary targets of the new water quality criteria and TMDLs that Plaintiffs would have EPA issue. Thus, any resolution of this case that adopts or supports Plaintiffs' position that federal criteria and TMDLs are required brings the nation a step closer to a regulatory regime that demands nutrient control exclusively of point sources, while allowing non-point sources to continue their discharges unabated. EPA has made some steps in the direction of balancing these burdens under existing law and NACWA applauds the Agency for those innovative actions. It is NACWA's particular and unique interest, however, to assure that those innovative and flexible approaches do not meet a premature end in this lawsuit. Simply stated, what Plaintiffs seek to place at issue is whether EPA can be compelled to choose a policy that targets only point sources of nutrients while the Agency is deep into the process of developing collaborative programs that will spread control obligations to all sources. NACWA has vital interests in defending EPA's continued development of these innovative programs, both because of the crushing cost of having all regulatory control focused on its point-source members, and because it is demonstrably impossible to solve the nation's nutrient enrichment problem by targeting point sources alone. (*See Hornback Decl.* at ¶¶ 10, 11).

As further explained below, NACWA meets the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure for intervention as of right or, in the alternative, should be permitted to intervene pursuant to Rule 24(b)(1). Finally, Plaintiffs do not object to, and EPA takes no position regarding, NACWA's intervention in this action.

II. ARGUMENT

A. NACWA Meets Requirements for Intervention as of Right

NACWA submits that the magnitude of the relief sought by Plaintiffs – federal imposition of nutrient criteria and TMDLs for much of the country – by itself renders NACWA's right to intervention obvious and necessary. As explained below, NACWA readily satisfies the criteria for intervention as interpreted in this Circuit. NACWA meets Fed. R. Civ. P. 24(a)(2)'s four criteria: "(1) the applicant must file a timely application; (2) the applicant must claim an interest in the subject matter of the action; 3) the…disposition of the action may impair or impede the applicant's ability to protect that interest; and 4) the applicant's interest [is] not adequately represented by existing parties to the litigation." *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 422 (5th Cir. 2002)(citations omitted). Under this test, NACWA has been granted intervention as of right in federal district courts around the country in the past concerning critical CWA issues that may impact its members.

1. NACWA's Motion is Timely

The timeliness requirement is not at issue here because NACWA's intervention comes within weeks of the filing of the action. In determining whether an intervenor's motion is timely, the Court must consider "all the circumstances," including, "(1) the length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned to intervene…. (2) the extent of prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case…. (3) the extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied…. (4) the existence of unusual circumstances

militating either for or against a determination that the application is timely." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977); *Ross v. Marshall*, 426 F.3d 745, 754 (5th Cir. 2005).

This motion is being made promptly at the inception of this lawsuit. Plaintiffs filed their Amended Complaint on April 3, 2012 (their original Complaint having been filed on March 13, 2012), and EPA has not yet filed its Answer. Thus, intervention here plainly is timely and will not prejudice the interests of the existing parties. *See Edwards v. City of Houston*, 78 F.3d 983, 1001 (5th Cir. 1996) ("that…motions were filed prior to entry of judgment favors timeliness, as most of our case law rejecting petitions for intervention as untimely concern motions filed after judgment was entered in the litigation.")

2. NACWA Has a Sufficient Interest

NACWA clearly has a sufficient interest in the regulation of sources of nutrients in waters in the Mississippi River basin to support mandatory intervention. Under Rule 24(a)(2), "a potential intervenor asserts an interest that is related to the property or transaction that forms the basis of the controversy… if the potential intervener has a 'direct, substantial, [and] legally protectable' interest in the property" *Doe #1 v. Glickman*, 256 F.3d 371, 379 (5th Cir. 2001) (*citing Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994). This interest requirement "is a practical guide to disposing of lawsuits 'by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Id.* at 379 (*citing Espy*, 18 F.3d at 1207).

Here, NACWA's interests are in the property rights and financial interests conferred by their state- and federally-issued NPDES permits. These include the ability of NACWA's members to continue their lawful discharge of nutrients pursuant to existing NPDES permits,

their financial well-being in the face of the additional compliance costs that will result if Plaintiffs' claims are granted, and their financial capability to satisfy such additional requirements when they become binding legal obligations. These interests would be directly impaired by any adjudication or settlement of this action that requires EPA to establish new numeric criteria for nutrients for the Mississippi River Basin and the Northern Gulf of Mexico or to establish nutrient TMDLs for those and other water bodies.

NACWA also asserts a sufficient and protectable interest in ensuring that the CWA, which governs its members' discharges, is administered in strict adherence to its terms. Specifically, proceeding directly to the development of federal water quality criteria or of TMDLs as Plaintiffs demand would short-circuit the procedural protections established by the CWA. Indeed, such direct action would be beyond the Agency's current authority and would constitute an *ultra vires* act. NACWA and its members claim a direct and protectable interest in preventing any such distortion of the statute's water quality and permitting programs as applied to its members.

Finally, proceeding as Plaintiffs demand poses a risk in this watershed of imposing nutrient management obligations on point sources alone. While EPA has developed, and NACWA supports, a TMDL for the Chesapeake Bay that allocates nutrient load reductions to both point and non-point sources through a holistic watershed approach, that TMDL was established in a watershed where there was a decades-long history of watershed-based collaboration with the states involved, where there was a legally binding Interstate Compact, and where EPA was implementing a federal consent order. Because those conditions either do not exist or are not as well established in the Mississippi River Basin or with respect to the Northern Gulf of Mexico, there is a genuine risk that adoption of numeric nutrient criteria and/or development of nutrient TMDLs for these waters will follow the historically more

common path -- which NACWA does not support -- of imposing load reductions solely on point sources such as NACWA's members. This not only will impose disproportionately large burdens on NACWA's members, but it will prejudice if not outright end NACWA's advocacy for EPA to utilize its existing authority to allocate that responsibility fairly among all relevant sources: industrial, municipal and agricultural. Protection of NACWA and its members' right to bear only their fair share of the nation's nutrient burden constitutes an independent interest that supports intervention.

The Fifth Circuit has previously recognized the interests of parties similar to NACWA in allowing intervention as of right by trade associations in actions against government agencies. In *Espy*, the Fifth Circuit reversed the district court's denial of motions to intervene brought by two trade associations, the Texas Forestry Association (the "TFA") and the Southern Timber Purchasers Council (the "STPA"). *Espy* 18 F.3d at 1203. The plaintiffs in *Espy* were environmentalist groups that sought an injunction barring the United States Forest Service from proceeding with timber sales in various parts of the Texas national forests. *Id.* at 1204. After the district court granted plaintiffs' motion and issued a preliminary injunction against a logging process known as "even-aged logging," the TFA and STPA, which represented purchasers and processors of Texas timber, moved to intervene. *Id*. The district court denied the TFA and STPA's motion but the Fifth Circuit reversed, holding that "[t]he movants have a financial interest in the ability to use the less expensive even-aged harvesting methods, and they have prospect of injury if the Forest Service cannot deliver constant volumes of timber." *Id*. at 1207. The court further explained that the TFA and STPA's "member companies have legally protectable property interests in existing timber contracts that are threatened by the potential bar on even-aged management." *Id*.

Federal district courts have also found that NACWA has a protectable interest in lawsuits challenging the EPA's actions on nutrient standards. *See Am. Farm Bureau Fedn v. United States EPA*, 278 F.R.D. 98 (M.D. Pa. 2011). In *Farm Bureau*, the court granted NACWAs' motion to intervene as of right in a lawsuit in which plaintiffs sought to enjoin the EPA's establishment of a TMDL for nutrients and sediments in the Chesapeake Bay. *Id*. at 100, 111. In analyzing the second prong of 24(a)(2), the court employed a standard similar to that used in the Fifth Circuit. *Id*. at 104. ("intervenors should have an interest that is specific to them…and will be directly affected in a substantial concrete fashion.") (citation omitted). The court found that (1) NACWA's "interest in the amount of nutrients and sediment their members are authorized to discharge… constitutes a legally protectable interest," and (2) NACWA's "economic interests of preserving their capital investments in treatment upgrades [are] more than mere attenuated economic interests because they may be directly affected by the outcome of [the] litigation." *Id*. at 105 (citations omitted). NACWA's interests in this lawsuit are the same as its interests in *Farm Bureau* since, as in *Farm Bureau*, the disposition of this case will affect both the amount of nutrients NACWA's members are allowed to discharge and their financial expenditures on treatment upgrades. Hence, like the *Farm Bureau* court, this Court should find that NACWA's "interests are sufficiently related to the property and transaction that are the subject of this action to support intervention as of right." Id.

Consistent with *Farm Bureau,* other federal courts have found a protectable POTW interest in nutrient litigation against the EPA. In another recent CWA case concerning nutrients, the U.S. District Court for the District of Columbia granted a motion to intervene as defendants as a matter of right to other municipal wastewater organizations with concerns similar to NACWA. Order Granting Motion to Intervene, *Fowler v. EPA*, No. 09-005-CKK (D.D.C. Sept. 29, 2009) (attached hereto as Exhibit 2). As point source dischargers to the Bay watershed, the

movants had an interest in the amount of nutrients and sediment their members were authorized to discharge. *See id*. at 2. As is the case here, the *Fowler* court explained, "If Plaintiffs are ultimately successful and the Court orders such relief, the interests of point source dischargers such as Movants' members would clearly be affected because they would be required to comply with any new restrictions that would arise following the Court's order." *Id.* at 6. Thus, the court found that the wastewater utility intervenors "satisfied all of the elements necessary to intervene in this case as Defendants as a matter of right." *Id*. at 7.

Courts have also recognized the protectable interests of POTWs in litigation, the effect of which was contingent on future EPA actions. *See Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993). In *Sierra Club*, the Ninth Circuit ruled that the City of Phoenix, which held permits issued under the CWA for POTW discharges, had a protectable interest in a lawsuit brought by environmental organizations against the EPA seeking a declaratory judgment that would require EPA to, inter alia, "promulgate regulations establishing water quality standards for toxic pollutants for the state of Arizona under 33 U.S.C. § 1313(c)(4)." *Id*. at 1480. NACWA's interests in the present litigation are comparable to those of the City of Phoenix in *Sierra Club* since, just as City of Phoenix, NACWA's members are NPDES permit holders that would be affected if, in response to plaintiffs' complaint, EPA were to establish "under 33 U.S.C. § 1313, revised or new state water quality standards." Compl. ¶ 1. In *Sierra Club*, the Ninth Circuit found a clear protectable interest by the City of Phoenix in the outcome of the litigation, holding that:

> The legitimate interests of persons discharging permissible quantities of pollutants pursuant to NPDES permits are explicitly protected by the [Clean Water] Act. 33 U.S.C. § 1342. *Because the Act protects the interest of a person who discharges pollutants pursuant to a permit, and the City of Phoenix owns such permits, the City has a 'protectable' interest.* These permits may be modified by control strategies issued as a result of this litigation, so the City's protectable interest relates to this litigation.

Id. at 1485-86 (emphasis added). This analysis is directly applicable to the present circumstances; like the Ninth Circuit for the City of Phoenix, this Court should find that NACWA's members' ownership of NPDES permits gives them a protectable interest in litigation that may result in modified control strategies.

For these reasons, NACWA has a significant protectable interest to support intervention as of right under Fed. R. Civ. P. 24(a)(2).

3. NACWA's Interest Will Be Prejudiced by an Adverse Decision

Proposed intervenors as of right must "be situated so that the disposition of the case into which she seeks to intervene may impair or impede her ability to protect her interest." *Glickman*, 256 F.3d at 380 (*citing Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001)). The prejudice to NACWA if they are denied intervention is manifest. If Plaintiffs successfully reverse EPA's denial of their petition, the Agency effectively will have determined that numeric nutrient criteria are required of all states under all circumstances and, further, that all states are delinquent in the development of TMDLs to address those criteria, thus leading EPA to take action in the states' stead. This sweeping action would result in CWA-mandated load reductions that would likely impose draconian new treatment obligations on NACWA's members even where such treatment upgrades are not needed based on local water quality conditions.[6] Not only will such reductions be extraordinarily expensive to implement, even where technically feasible (which for many POTWs will not be the case), they will fail to address the underlying nutrient problem because implementing nutrient controls on POTWs without a commensurate level of reduction by other sources of nutrients will not improve water

[6] NACWA's members are not averse to enhanced nutrient reduction where such measures are necessary. Indeed, many POTWs and NACWA members have already installed nutrient controls and adopted targeted measures that go beyond secondary treatment in areas where local water quality needs so require. This tailored approach, which NACWA members continue to support in locations with a demonstrable need for additional treatment, is superior to the impracticable and scientifically unsupported approach that would be used if plaintiffs prevail.

quality uniformly.

Moreover, reversal of the Agency's denial of Plaintiffs' petition would commit the Agency to a course of action – supplanting state water quality criteria with federal criteria, and developing TMDLs in lieu of TMDLs developed by the states -- that it does not currently have the legal authority to pursue. Finally, any reversal of EPA's denial would effectively mandate that EPA focus all nutrient reduction obligations on NACWA's members and other point source discharges while insulating the nation's major contributors of nutrients, including nonpoint agricultural sources, from assuming their fair share of those obligations.

4. EPA Cannot Adequately Represent NACWA's Interests

To meet the fourth Rule 24(a)(2) requirement, the proposed intervenor need only show that "the representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). A proposed intervenor can meet this burden by showing that its objectives and interests are different from those of an existing party. *See Espy*, 18 F.3d at 1207 (finding that existing party inadequately represented proposed intervenor's interests because their interests were not "essentially identical") ; *Aransas Project v. Shaw*, 404 Fed. Appx. 937 (5th Cir. 2010) (finding that the fourth prong of 24(a)(2) was satisfied as to one proposed intervenor because the concerns of existing parties were "not similar enough to protect" the proposed intervenor's interests).

EPA clearly has interests and objectives that are materially different from NACWA's. EPA, for example, has no stake in a continuing right to discharge pursuant to the terms of existing NPDES permits. NACWA's members rely directly on that right and have an immediate interest in defending it. Similarly, EPA has no direct concern or accountability for

the costs of treatment obligations that it imposes under the statute. NACWA's members have direct interest in and accountability for such costs. More generally, EPA advocates for the public interest but does not take into account the various financial considerations of NACWA's member agencies in complying with regulatory mandates.

This divergence of interests between government agencies and trade associations is not a novel distinction and the Fifth Circuit has recognized this as adequate for intervention. Because "federal defendant[s] broadly [represent] the federal interest and could not advocate for commerce," the Fifth Circuit has frequently allowed trade associations to intervene in matters in which the associations' interests overlapped with the government's. *Id*. at 941; *see e.g. Glickman*, 256 F.3d at 381 ("[t]he USDA is a governmental agency that must represent the broad public interest, not just the Institute's concerns. Given the Institute's minimal burden and USDA's duty to represent the broad public interest, not just the Institute's, we conclude that USDA's representation of the Institute may be inadequate")(citations omitted); *Espy*, 18 F.3d at 1208 ("[t]he government must represent the broad public interest, not just the economic concerns of the timber industry. Given the minimal burden on the movants to satisfy this requirement, we conclude that the government's representation of the intervenors' interest is inadequate.") Here, as with *Glickman* and *Espy*, the EPA does not have an interest in NACWA's financial and regulatory concerns related to the Plaintiff's claims, and therefore cannot adequately represent NACWA's interest. *See Farm Bureau*, 278 F.R.D. at 111 (holding that NACWA and other wastewater treatment plant trade groups had "satisfied their comparatively light burden of showing the possibility of [EPA's] inadequate representation" by arguing that they had "specific economic interests related to capital upgrade costs and corresponding rate increases, as well as specific operational interests related to the possibility of more stringent discharge restrictions," which interests "may conflict with EPA's broader

interest of protecting the public welfare.")

Moreover, NACWA intends to raise specific legal positions that may not square completely with those of the Agency. For example, NACWA intends to argue that the predicate events that would be necessary to empower EPA to grant Plaintiffs' petition simply have not occurred. In their absence, EPA would act *ultra vires* if it were to grant, or be obligated by this court or in settlement to grant, any part of Plaintiffs' petition. Because the Agency did not make this argument in its denial of that petition, it is uncertain whether this issue, which NACWA intends to pursue, would be raised in its absence.

Similarly, NACWA believes that, as evidenced by EPA's Chesapeake Bay TMDL, there are multiple lawful and appropriate paths that EPA can take to control nutrients from a wide source of dischargers under the Act. NACWA has consistently advocated for adoption of an approach that spreads the burden to all responsible parties, whether they are point or non-point sources of nutrients. *See e.g. Farm Bureau*, 278 F.R.D. at 107-8 (NACWA "believe[s] that if Plaintiffs succeed in this litigation, resulting in lax or no standards for non-point sources, then a greater burden will fall on WWTPs to meet the TMDL total allocations…. they argue that TMDLs are a 'zero sum game' and that any relaxing of one sector's assigned allocations will necessarily result in more stringent allocations by the remaining source sectors….") This is critical both because elimination of point source contributions of nutrients will not solve nutrient over-enrichment of many of the nation's streams, but also because NACWA believes that the statute was not designed to impose punitive requirements on point sources simply because they are readily-regulated. As the representative of a major sector of the community of point source dischargers, including a sector that provides fundamental public health and environmental protections and critical support to the national economy, NACWA has an obligation to ensure adoption of a fair policy that spreads the costs of nutrient control among all

dischargers.

B. Alternatively, Permissive Intervention Should Be Granted

NACWA also satisfies the requirements for permissive intervention. Under Rule 24(b)(1), permissive intervention is appropriate if the movant's claim or defense and the main action share a common question of law or fact. *See McKay v. Heyison*, 614 F.2d 899, 906 (3d Cir. 1980). Clearly, NACWA and its members are among the main target for the policy advocated by Plaintiffs and NACWA's defenses are central to the factual and legal issues here. NACWA contests Plaintiffs' allegations that EPA failed to adequately explain its denial of Plaintiff's petition, and further contends that any grant of that petition would require the Agency to engage in *ultra vires* actions.

Moreover, Plaintiffs' petition creates a direct risk to NACWA's members of reductions of nutrients that are expensive, technically infeasible and inappropriate on the uniform basis sought by the petition. These matters are central to the Plaintiffs' petition and, thus, raise common questions of law and fact, requiring judicial interpretation of the CWA and its implementing regulations. In light of these common questions of law and fact, and the fact that NACWA's intervention in this case would not unduly delay or prejudice the adjudication of the original parties' rights, the requirements for permissive intervention are met.

Other courts have allowed trade associations to intervene in TMDL and other CWA litigation, including litigation over EPA's programs for nutrient control. *See, e.g.*, *Fla. Wildlife Fed'n, Inc. v. Jackson*, 2012 U.S. Dist. LEXIS 21778 (N.D. Fla. Feb. 18, 2012) (trade associations were permitted to intervene in numeric nutrient lawsuit brought by environmental groups against EPA); *Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962 (W.D. Wash. 1996) (intervention of industrial association permissible in citizen suit to require EPA to

develop TMDLs for Idaho water quality limited segments); *Idaho Conservation League, Inc. v. Russell*, 946 F.2d 717 (9th Cir. 1991) (trade associations were permitted to intervene as defendants in CWA suit brought by environmental groups against EPA).

Finally, "the decision to allow permissive intervention is entirely within the discretion of the district court, which must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Shaw*, 404 Fed. Appx. at 941-42 (citation omitted); *see also Staley v. Harris County Tex.*, 160 Fed. Appx. 410, 414 (5th Cir. 2005) ("[p]ermissive intervention is a matter wholly discretionary with the district court")(citation omitted). Allowing NACWA to intervene would promote judicial efficiency by reducing the prospects of future litigation by NACWA or their members to protect their interests related to nutrient discharges and Plaintiffs' petition. In addition, on account of its members' expertise in the field, NACWA could play an important role in clarifying some of the technical aspects of the litigation. *See Farm Bureau*, 278 F.R.D. at 111 (holding, with respect to the permissive intervention of NACWA and other movants, "[t]he court does not find that intervention will unduly delay the proceedings or prejudice the adjudication of the original parties' rights. In fact, given the complexity and voluminous size of the administrative record, which includes scientific models, the court finds that the presence of the intervenors may serve to clarify issues and, perhaps, contribute to resolution of this matter.") Thus, as an alternative to intervention as of right, the Court should grant this motion to intervene permissively to facilitate resolution of common claims of law and fact in one proceeding consistent with principles of judicial economy.

C. NACWA Has Standing To Intervene

Though the Court should not require NACWA to independently demonstrate standing, if the Court does so require, NACWA clearly has standing to intervene.

1. Intervenors Should Not Be Required To Show Standing

The Fifth Circuit has determined that "there is no Article III requirement that intervenors have standing in a pending case," as "Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so." *Newby v. Enron Corp.*, 443 F.3d 416, 422 (5th Cir. 2006) (*citing Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998)). In this case, a live controversy remains and the ultimate relief being sought by NACWA (the affirmation of the EPA's denial of plaintiffs' July 30, 2008 petition) is also being sought by the EPA. In view of this, pursuant to the rule described in *Newby* and adopted by this Court, NACWA should not be required to independently possess standing to intervene. *See Weiss v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 59963 at *8 (E.D. La. Aug. 16, 2007)(citing to *Newby*, 443 F.3d at 422).

2. NACWA Satisfies Elements of Representational Standing

Article III standing requires injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An organization, such as NACWA, has representational standing to sue on its members' behalf if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*,

432 U.S. 333, 343 (1977).

Here, NACWA's members could easily meet the standing requirement in their own right. As explained above, many of them own and operate POTWs that would be substantially affected by any modification of the current secondary treatment standards. They would suffer a concrete injury-in-fact if EPA granted, was ordered to grant, or upon reconsideration agreed to grant Plaintiff's petition, in whole or in part.

The interests NACWA seeks to protect are germane to its members' purposes, specifically in sound technical and financial management of wastewater treatment infrastructure, in the observance of the limits of EPA's legal authority over state water quality criteria and the issuance of TMDLs, and in the Agency's reliance on sound science and good policy in developing requirements applicable its members' facilities. Finally, there is no need for any individual member of NACWA to participate in this lawsuit. Members of NACWA have an aligned interest that has been and can continue here to be effectively and efficiently represented by their national trade association.

III. CONCLUSION

NACWA has satisfied the four criteria for intervention as of right under Rule 24(a)(2). NACWA also has satisfied the requirements for permissive intervention under Rule 24(b)(1). Accordingly, NACWA respectfully requests that this Court allow it to intervene as a party defendant as a matter of right or, in the alternative, permissively.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2012, a true and correct copy of the foregoing document was electronically filed and served on the following in accordance with the Rules of the United States District Court for the Eastern District of Louisiana:

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