UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN PETROLEUM INSTITUTE, Plaintiff, v. CHRISTINE TODD WHITMAN, Administrator, United States Environmental Protection Agency, et al., Defendants, and NATURAL RESOURCES DEFENSE COUNCIL 40 West 20th Street New York, NY 10010, SIERRA CLUB 85 Second Street, Second Floor San Francisco, CA 94105-3441, Proposed Intervenor-Defendants.	)	Civil Action No. 02-2247 (PLF)

PETROLEUM MARKETERS ASSOCIATION OF AMERICA, et al., Plaintiffs, v. CHRISTINE TODD WHITMAN, Administrator, United States Environmental Protection Agency, et al., Defendants.	)	Civil Action No. 02-2249 (PLF)

MARATHON OIL CO.,

Plaintiff,

v.

CHRISTINE TODD WHITMAN,
Administrator, United States Environmental Protection Agency, et al.,

Defendants, and

NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB,

Proposed Intervenor-Defendants.

Civil Action No. 02-2254 (PLF)

MOTION OF NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB TO INTERVENE AS DEFENDANTS IN NOS. 02-2247 AND 02-2254

Pursuant to Federal Rules of Civil Procedure 24(a) and (b) and LCvR 7.1(j) of this Court, Natural Resources Defense Council and Sierra Club (collectively, "Movants") hereby move the Court for leave to intervene in this proceeding as defendants. Counsel for Movants has telephoned counsel for all parties to Civil Actions Nos. 02-2247 and 02-2254 to determine their position on this motion. Counsel for plaintiff American Petroleum Institute has authorized the undersigned to represent that API has not yet reached a position on this motion. Counsel for plaintiff Marathon Oil and defendant Environmental Protection Agency have not yet communicated a position on this motion.

Movants seek intervention of right under Fed. R. Civ. P. 24(a)(2). Movants claim an interest relating to the subject of this action; they are so situated that the disposition of this action may, as a practical matter, impair or impede their ability to protect that interest; their interest

may not be adequately represented by existing parties to the case; and their motion to intervene is timely.

In the alternative, Movants seek permissive intervention under Fed. R. Civ. P. 24(b)(2). Movants' defenses and the main action share common questions of law and fact; their participation will not delay or prejudice the adjudication of the rights of the parties; and their motion to intervene is timely.

In support of this motion, Movants rely on the accompanying memorandum and exhibits.

DATED: June 11, 2003

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB

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The Natural Resources Defense Council and Sierra Club (collectively, "Movants") respectfully submit this memorandum in support of their motion to intervene as party defendants in Civil Actions Nos. 02-2247 and 02-2249. In those cases, plaintiffs American Petroleum Institute ("API") and Marathon Oil Company ("Marathon") seek to exclude a wide range of waters – including tributary streams and wetlands – from key protections of the Clean Water Act.

INTRODUCTION

The Act's enactment in 1972

> constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U.S.C. § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' … refers to a condition in which the natural structure and function of ecosystems [are] maintained." H. R. Rep. No. 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[water] moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972).

United States v. Riverside Bayview Homes, 474 U. S. 121, 132-33 (1985).

Integral to the Act is a broad prohibition on "the discharge of any pollutant by any person." § 301(a), 33 USC § 1311(a).[1] Would-be dischargers can avoid this prohibition only by applying for and obtaining a discharge permit – either from EPA or a delegated state under § 402, or (in the case of discharges of dredged or fill material) from the Corps of Engineers under § 404. 33 U.S.C. §§ 1342, 1344. In addition to the § 301 discharge prohibition and accompanying permit programs, Congress enacted a special program designed to protect against petroleum discharges and contain such discharges when they occur. § 311, 33 U.S.C. § 1321.

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[1] See S. Rep. No. 414, 92d Cong., 2d Sess. 42 (1972) (§ 301 "clearly establishes that the discharge of pollutants is unlawful;" "no one has the right to pollute"). Accord id. 43.

The § 311 program and its accompanying regulations require industries that store large amounts of oil to adopt comprehensive spill prevention strategies, such as secondary containment, inspection, and employee training. 40 CFR § 112.

The above safeguards apply to "navigable waters," § 502(12),[2] defined statutorily as "the waters of the United States, including the territorial seas." § 502(7). This definition originated in the seminal 1972 amendments, whose authors emphasized their intent "that the term 'navigable waters' be given the broadest possible interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. 1236, 92d Cong., 2d Sess. 144 (1972).

A lawsuit filed by NRDC led to a seminal decision by this Court construing that definition: "Congress by defining the term 'navigable waters' in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1251 et seq. (the "[Clean] Water Act") to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability." NRDC v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975). Because the Corps of Engineers' regulations were drawn too narrowly to effectuate the Act,[3] the Court directed the Corps to "[r]evoke and rescind" those regulations and

[2] Section 502(12) defines the phrase "discharge of a pollutant" and "discharge of pollutants" to encompass "any addition of any pollutant to navigable waters from any point source." (Emphasis added). See also § 502(16) ("The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.").

[3] The original regulation provided: "The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/ or are presently or have been in the past, or may be in the future

(... footnote continued next page)

promulgate new regulations "recognizing the full regulatory mandate of the [Clean] Water Act." Id.

EPA and the Corps subsequently promulgated regulations under §§ 402 and 404 that define "navigable waters" broadly, including many kinds of waters – such as tributary streams, wetlands, and others – not susceptible to boating use. 40 CFR §§ 122.2, 230.3(s) (EPA regulations); 33 CFR § 328.3(a) (Corps regulations). Last year, EPA amended its § 311 regulations to incorporate a similar definition. 67 Fed. Reg. 47042, 47142 (July 17, 2002).[4]

(... footnote continued from previous page)
susceptible for use for purposes of interstate or foreign commerce." 39 Fed. Reg. 12119 (April 3, 1974).

[4] The July 2002 rule provides:

> Navigable waters means the waters of the United States, including the territorial seas.
> (1) The term includes:
> (i) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;
> (ii) All interstate waters, including interstate wetlands;
> (iii) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters:
> (A) That are or could be used by interstate or foreign travelers for recreational or other purposes; or
> (B) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or,
> (C) That are or could be used for industrial purposes by industries in interstate commerce;
> (iv) All impoundments of waters otherwise defined as waters of the United States under this section;
> (v) Tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;
> (vi) The territorial sea; and
> (vii) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (1) of this definition.

Now, however, API and Marathon have filed lawsuits asking this Court to construe § 502(7) narrowly. Specifically, they assert that the key statutory phrase "navigable waters" "extends only to waters that are, have been, or could reasonably be made, navigable in fact ('traditional navigable waters') and wetlands adjacent to traditional navigable waters." API Complaint at 5 ¶ 19; Marathon Complaint at 5 ¶ 15. API and Marathon ask this Court to overturn the July 2002 rule's definition of "navigable waters." API Complaint at 17 ¶ 1; Marathon Complaint at 17 ¶ 1.

Acceptance of these arguments would precipitate the most dramatic rollback of Clean Water Act safeguards in the Act's history. Indeed, comments submitted by scientists in a pending rulemaking indicate that limiting the Act's coverage to navigable-in-fact waters and adjacent wetlands could exclude from the Act's protections the majority of the streams currently covered by EPA implementing regulations. Exh. 1 ¶ 5 (comments from 85 stream scientists). In addition to being numerous, the waters excluded by such an approach are also of crucial ecological importance. First, they provide key benefits in the form of flood control, sediment retention, nutrient delivery, and wildlife habitat. Id. Second, because they are hydrologically connected to waters that are navigable-in-fact, pollutants discharged into these excluded waters would flow into – and pollute – our major navigable streams, rivers, lakes and estuaries. Id. Indeed, the implications of limiting Clean Water Act protections to navigable-in-fact waters and adjacent wetlands are so dramatic that such an approach has met vocal opposition – not only from concerned organizations and citizens, but also from 37 states. See http://www.earthjustice.org/backgrounder/display.html?ID=68 (link to state comment letters).

In the present litigation, this Court will – as matters currently stand – hear from industry and the federal government. For reasons that follow, Movants respectfully submit that leading nongovernmental advocates of strong Clean Water Act protections should also be heard.

ARGUMENT

I. MOVANTS ARE ENTITLED TO INTERVENE OF RIGHT.

Federal Rule of Civil Procedure 24(a) provides that, "[u]pon timely application," a court shall permit intervention of right where

> the applicant claims an interest relating to the property or transaction which is the subject of the action 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.

FED. R. CIV. P. 24(a)(2). See Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003). As demonstrated below, Movants readily satisfy this test.

A. Movants Claim an Interest Relating To the Subject of this Action.

Rule 24(a)(2)'s "interest" requirement is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Foster v. Gueory, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (citation omitted). Accord NRDC v. Costle, 561 F.2d 904, 910-11 (D.C. Cir. 1977). As the D.C. Circuit has observed, "[t]he right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." Hodgson v. United Mine Workers, 473 F.2d 118, 130 (D.C. Cir. 1972). Thus, Rule 24(a)'s "interest" test "has been interpreted in broad terms." NRDC v. EPA, 99 F.R.D. 607, 609 (D.D.C. 1983).

Movants – nonprofit organizations whose primary missions encompass the preservation of valuable water resources, including waters of the United States – satisfy the interest test for at least three reasons. First, members of NRDC and Sierra Club reside in every state, and use and enjoy United States waters for a variety of recreational, scientific, and professional purposes – among them wildlife observation, boating, fishing, swimming, nature study, photography, scientific research, and aesthetic appreciation. Exhs. 1-12 (declarations from NRDC and Sierra Club staff and members). If this Court were to adopt plaintiffs' contentions concerning the scope of waters protected by the Act, numerous waters where movants' members live, study, and recreate would no longer be safeguarded by the Act's broad prohibition against discharges of pollutants without a Clean Water Act permit. § 301(a). Likewise, facilities affecting those excluded waters would no longer be subject to the § 311 federal Spill Prevention Control and Countermeasure regulations, thus removing a key Clean Water Act safeguard against oil spills into waters of the United States, including waters used by Movants and their members.

Second, one of Movants – NRDC – was the plaintiff in the seminal case that led EPA and the Corps to broaden their regulatory definitions of CWA § 502(7)'s key phrase "waters of the United States." See p. 3-4, supra (quoting NRDC v. Callaway). NRDC has a cognizable interest in protecting that victory from being undermined by the narrow interpretation of § 502(7) that API and Marathon are advocating in the present case. See e.g., Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397-98 (9th Cir. 1995) ("A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported"; holding that intervening environmental groups had sufficient interest in third-party challenge to an endangered species listing decision because they had participated in the administrative process that led to the listing and had previously sued the agency to compel a final decision on the

listing); see also NRDC v. EPA, 99 F.R.D. at 609 (would-be intervenors had sufficient interest where they benefited from a government decision that would be set aside if plaintiffs were successful).

Third, Movants are participating actively in a recently initiated rulemaking addressing the Clean Water Act definition of navigable waters. On January 15, 2003, the EPA and Army Corps of Engineers published an advance notice of proposed rulemaking addressing the § 502(7) phrase "waters of the United States." 68 Fed. Reg. at 1991. In that notice, the agencies announced an intent to undertake a broad-ranging inquiry into the scope of waters covered by the Act, and expressly indicated that the rulemaking would consider the discharge permit programs under §§ 402 and 404 as well as the oil spill prevention program under § 311. Id. 1993. Pursuant to that notice, Movants submitted detailed comments advocating an inclusive definition of "navigable waters." Exh. 13. Were the Court to adopt the approach advocated by API and Marathon, it would essentially be predetermining the outcome of that agency proceeding, and prejudicing or precluding Movants' ability to persuade the agencies to adopt the position espoused in Movants' comments.

The foregoing interests amply suffice to establish Movants' standing. If this Court were to grant plaintiffs' request to set aside the July 2002 rule – especially based on the narrow statutory interpretation espoused by plaintiffs – Movants would suffer injury to all three of the above interests. Movants and their members' use of United States waters would be impaired, Exhs. 1 through 12; NRDC's victory in NRDC v. Callaway would be narrowed or undone; and Movants' ability to participate meaningfully in the ongoing rulemaking on the scope of covered waters would be impaired. Because these injuries would be caused by the Court's decision, they would

be traceable to that decision, and would be redressed if this Court were to decline to issue such a decision.

Likewise, Movants' interest falls well within the zone of interests of the statutory provisions at issue. Preserving recreational and aesthetic use of United States waters is among the core purposes of the Act, § 101(a)(2) (establishing national goal of attaining water quality "which provides for … recreation in and on the water"), and the safeguards at issue here are key mechanisms by which the Act protects and fosters those uses. Moreover, Movants' interest in being meaningfully heard concerning the appropriate regulatory definition of "waters of the United States" is likewise well within the zone of interests protected by the Act. See e.g., § 101(e) ("Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.").

Given that Movants' interest is sufficient to confer standing, it is necessarily also sufficient to warrant intervention. Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1076 (D.C. Cir. 1998) ("Upjohn need not show anything more than that it has standing to sue in order to demonstrate the existence of a legally protected interest for purposes of Rule 24(a)."). Accord Fund for Animals, 322 F.3d at 735.

Courts have frequently granted environmental groups intervention to oppose industry challenges to government actions. See e.g., National Ass'n of Home Builders v. U.S. Army Corps of Engineers, D.D.C. Civ. 00-0379 TPJ (Aug. 29, 2000) (NRDC and Sierra Club granted intervention in industry challenge to Clean Water Act protections for streams and wetlands), Exh. 14; National Ass'n of Home Builders v. U.S. Army Corps of Engineers, D.D.C. Civ. 01-

0274 JR (Mar. 15, 2002) (Sierra Club granted intervention in another industry Clean Water Act challenge), Exh. 15.[5] Here too, the Court should recognize Movants' interest and allow intervention.

B. Movants' Interests May Be Impaired If They Are Not Permitted to Intervene in this Action.

Concerning Rule 24(a)(2)'s impairment prong, the D.C. Circuit recently observed:

> Prior to 1966, Rule 24(a)(2) required the applicant to show that it "may be bound by a judgment in the action." Fed. R. Civ. P. 24(a)(2) (1966); see Fed. R. Civ. P. 24(a)(2) advisory committee's note on 1966 amendment; Nuesse v. Camp, 128 U.S. App. D.C. 172, 385 F.2d 694, 701 (D.C. Cir. 1967). But the 1966 amendments to Rule 24 eliminated that requirement and substituted the present language, which we have read "as looking to the 'practical consequences' of denying intervention, even where the possibility of future challenge to the regulation remains available." Natural Res. Def. Council, 561 F.2d at 909 (quoting Nuesse, 385 F.2d at 702). Regardless of whether [movant] could reverse

[5] See also Building Indus. Ass'n v. Babbitt, 979 F. Supp. 893, 896 (D.D.C. 1997) (environmental groups participated as defendant-intervenors in a challenge by landowners to a Fish and Wildlife Service listing decision under the Endangered Species Act); California Forestry Ass'n v. Thomas, 936 F. Supp. 13, 15 (D.D.C. 1996) (NRDC participated as defendant-intervenor in an action brought by timber companies, a trade association, and a local county to challenge a Forest Service decision under the National Environmental Policy Act and the National Forest Management Act); Newport Galleria Group v. Deland, 618 F. Supp. 1179, 1180 (D.D.C. 1985) (environmental groups participated as defendant-intervenors in developer's action to prevent EPA from holding public hearings under the Clean Water Act regarding proposed construction in wetlands area); Peabody Coal Co. v. Watt, 553 F. Supp. 1201, 1202 & n.1 (D.D.C. 1982) (environmental groups participated as defendant-intervenors in an action by coal companies and industry associations challenging Interior Department regulations for surface coal mining on prime farmlands).

In addition to these District Court cases, the D.C. Circuit also commonly allows environmental organizations to intervene as respondents in industry challenges to agency regulations. See, e.g., Nat'l. Petrochemical & Refiners Assn. v. EPA, 287 F.3d 1130, 1133 (D.C. Cir. 2002) (NRDC and Sierra Club participated as intervenors in industry petitions challenging EPA air pollution control regulations); Virginia v. EPA, 108 F.3d 1397, 1399 (D.C. Cir. 1997) (public health and environmental organizations, including NRDC, participated as respondent-intervenors in an industry petition challenging an EPA action under the Clean Air Act); American Paper Inst. v. U.S. EPA, 996 F.2d 346, 348, 354 n.8 (D.C. Cir. 1993) (NRDC participated as respondent-intervenor in an industry petition challenging an EPA regulation under the Clean Water Act); Shell Oil Co. v. EPA, 950 F.2d 741, 743 (D.C. Cir. 1991) (an environmental group participated as respondent-intervenor in an industry petition challenging an EPA decision under the Resource Conservation and Recovery Act).

> an unfavorable ruling by bringing a separate lawsuit, there is no question that the task of reestablishing the status quo if [plaintiff] succeeds in this case will be difficult and burdensome. See id. at 910 ("It is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation.").

Fund for Animals, 322 F.3d at 735.

Movants readily satisfy the impairment test. Were API and Marathon Oil Company to succeed in persuading this Court to adopt the narrow definition of navigable waters advocated in their complaint, and thereby to strike down the July 2002 rule, numerous valuable waterbodies would be deprived of key Clean Water Act safeguards against contamination and alteration, thus impairing Movants' use and enjoyment of those waters.

Moreover, victory by API and Marathon in this litigation would narrow or undo NRDC's victory in NRDC v. Callaway, and would impair Movants' ability to meaningfully participate in the ongoing rulemaking concerning the scope of waters protected by the Act. Indeed, victory by API and Marathon would heavily influence – or predetermine outright – the results of subsequent administrative and court proceedings. See International Union v. Scofield, 382 U.S. 205, 213 (1965) (allowing intervention in petition for review: "Permitting intervention...insures fairness to the would-be intervenor. If intervention is permitted, the parties to the Board proceedings are able to present their arguments on the issues to a reviewing court which has not crystallized its views. To be sure, if intervention is denied in the initial review proceeding, the charged party would not be bound by the decision under technical *res judicata* rules. Still, the salient facts having been resolved and the legal problems answered in this initial review, subsequent litigation serves little practical value to the potential intervenor. In the second appellate proceeding, the Court of Appeals would almost invariably defer to the initial decision as a matter of *stare decisis* or of comity.") (footnote omitted); Sierra Club v. U.S. EPA, 995 F.2d 1478, 1486 (9th Cir. 1993)

(holding that impairment existed where "the relief sought by the [plaintiffs] would constrain the [agency], which would not then be free to violate the terms of the declaratory and injunctive relief in later administrative proceedings").

C. Movants' Interests May Not Be Adequately Represented By Existing Parties to this Action.

Concerning the inadequate representation prong of Rule 24(a)(2), the D.C. Circuit recently observed:

> The Supreme Court has held that this "requirement of the Rule is satisfied if the applicant shows that 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, 30 L. Ed. 2d 686, 92 S. Ct. 630 (1972). Citing Trbovich, we have described this requirement as "not onerous." Dimond v. District of Columbia, 253 U.S. App. D.C. 111, 792 F.2d 179, 192 (D.C. Cir. 1986); see also Foster, 655 F.2d at 1325; American Tel. & Tel. Co., 642 F.2d at 1293 (stating that a petitioner "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee'" (quoting 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909 (1st ed. 1972))).

Fund for Animals, 322 F.3d at 735-36.

In particular, representation may be inadequate where the interests of the party seeking intervention and an existing party are "different," even if they are not "wholly 'adverse,'" Nuesse, 385 F.2d at 703, or where they are "similar but not identical," United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1293 (D.C. Cir. 1980) ("AT&T"). Indeed, even where parties share broad strategic objectives, they may have differing interests and goals with respect to particular issues at stake in a given case, and those differences may support intervention. See AT&T, 642 F.2d at 1293; NRDC v. Costle, 561 F.2d at 912.

Under this approach, Movants amply satisfy the inadequate representation prong. First, API's and Marathon's position is plainly in conflict with that of Movants. API and Marathon are attempting to reverse the July 2002 regulation and to persuade the Court to adopt their

interpretation of the Act, thereby directly threatening Movants' interests by excluding numerous waters from the Act's safeguards.

Second, EPA's representation is likewise inadequate. The D.C. Circuit recently emphasized that "we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." Fund for Animals, 322 F.3d at 736. Thus the Fund for Animals court found representation inadequate, even though both the federal defendants and the would-be intervenor "agree that the FWS's current rules and practices are lawful." Id. 736. Recognizing that the federal defendants would not give the movant's concerns "the kind of primacy" that movant would give them, the D.C. Circuit concluded that "[i]t is ... not hard to imagine how the interests of the [movant] and those of the [federal defendants] might diverge during the course of litigation." Id.

Here too, EPA's broader interests prevent the agency from adequately representing Movants' specific interests, which encompass matters such as recreational use of waters, protecting a court victory won by NRDC in litigation against the federal government (see p. 3-4, supra, discussing NRDC v. Callaway), and preserving Movants' opportunity to meaningfully participate in an ongoing rulemaking proceeding.

Indeed, EPA has apparently begun to retreat from the position advanced in the July 2002 rulemaking. On January 15, 2003, EPA published an Advanced Notice of Proposed Rulemaking suggesting that the agency itself no longer supports a broad definition of waters of the United States. 68 Fed. Reg. at 1992 (requesting comment concerning which waters are protected by the Clean Water Act). In an attached Guidance document, EPA suggests that Clean Water Act jurisdiction no longer extends to specified categories of waters. 68 Fed. Reg. at 1995. Movants

submitted extensive comments on the proposed rulemaking, strongly opposing exclusion of waters from the Act's safeguards. Exh. 13.

Moreover, in the present litigation, rather than answering and vigorously defending against plaintiffs' claims, EPA has embarked on settlement discussions with plaintiff. See Jt. Mot. to Stay the Litigation (Apr. 14, 2003); Jt. Mot. to Stay the Litigation (Jan. 15, 2003).

In short, EPA will not adequately represent Movants' interests in this litigation.

D. Movants' Motion To Intervene Is Timely.

The timeliness of a motion to intervene "is to be determined from all the circumstances," NAACP v. New York, 413 U.S. 345, 366 (1973), including "time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case," AT&T, 642 F.2d at 1295; see also NRDC v. Costle, 561 F.2d at 907. The determination of timeliness is within "the sound discretion" of the District Court, "but a court should be more reluctant to refuse when," as here, "intervention is sought of right." Williams & Humbert, Ltd. V. W. & H. Trademarks, Ltd., 840 F.2d 72, 74-75 (D.C. Cir. 1988).

Movants' motion for intervention is plainly timely. As of the date of this motion, the agencies have not yet even answered the complaint, no party has filed a dispositive motion, and the Court has issued no substantive rulings. Cf. Admiral Ins. Co. v. National Casualty Co., 137 F.R.D. 176, 177 (D.D.C. 1991) (finding intervention timely where the "major substantive issues in th[e] case ha[d] not yet been argued or resolved"). In light of the Court's order staying the litigation pending further settlement discussions, EPA is not required to answer the complaints until July 21, 2003. Consequently, Movants' intervention cannot be considered untimely.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT MOVANTS PERMISSIVE INTERVENTION.

Federal Rule of Civil Procedure 24(b) provides for permissive intervention, upon timely motion, "when an applicant's claim or defense and the main action have a question of law or fact in common." FED. R. CIV. P. 24(b)(2). In exercising its discretion to consider a motion for permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id.

Movants meet the prerequisites for permissive intervention. First, as demonstrated above, their motion is timely, coming before any significant action has been taken in the case. Second, the arguments that Movants intend to raise share common questions of law and fact with the claims and defenses that will be asserted by industry and the EPA – in particular, the legality of the July 2002 rule and the scope of EPA's jurisdiction over waters of the United States. Finally, allowing intervention will not unduly delay the litigation or prejudice the rights of existing parties, because this action has yet to progress beyond the filing of initial pleadings, and Movants stand ready to cooperate in the efficient adjudication of the case.

Moreover, in view of Movants' substantial interest and experience in the subject of this case, allowing Movants to intervene would ensure that Movants' positions are aired on critical issues within their expertise, thereby offering the Court a perspective that it would not otherwise hear, and that may assist in the Court's resolution of this matter. Indeed, as noted above, this Court has previously embraced Movants' arguments for a broad definition of waters of the United States. See p. 3-4 (discussing NRDC v. Callaway). See also NRDC v. Costle, 561 F.2d at 913 (observing that a prospective intervenor's experience and expertise can contribute significantly to the "informed resolution[ ]" of questions before the court, and "serve as a vigorous and helpful supplement to [the government's] defense"); Hodgson, 473 F.2d at 130

(recognizing that "the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard"). Thus, if the Court does not grant Movants intervention of right, Movants respectfully request that the Court exercise its discretion to grant them permissive intervention.

CONCLUSION

For all of the above reasons, Movants respectfully request that this Court grant them intervention of right or, in the alternative, permissive intervention.

DATED: June 11, 2003.

Respectfully submitted,

__/s/________________________

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* Application to D.C. Bar pending.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN PETROLEUM INSTITUTE, Plaintiff, v. CHRISTINE TODD WHITMAN, Administrator, United States Environmental Protection Agency, et al., Defendants, NATURAL RESOURCES DEFENSE COUNCIL, et al., Proposed Intervenor-Defendants.	)	Civil Action No. 02-2247 (PLF)
PETROLEUM MARKETERS ASSOCIATION OF AMERICA, et al., Plaintiffs, v. CHRISTINE TODD WHITMAN, Administrator, United States Environmental Protection Agency, et al., Defendants.	)	Civil Action No. 02-2249 (PLF)
MARATHON OIL CO., Plaintiff, v. CHRISTINE TODD WHITMAN, Administrator, United States Environmental Protection Agency, et al., Defendants. NATURAL RESOURCES DEFENSE COUNCIL, et al., Proposed Intervenor-Defendants.	)	Civil Action No. 02-2254 (PLF)

ORDER

Upon consideration of the "Motion of Natural Resources Defense Council and Sierra Club to Intervene as Defendants in Nos. 02-2247 and 02-2254," the Court being advised in the premises, it is hereby

ORDERED that said motion to intervene is GRANTED. Natural Resources Defense Council and Sierra Club are hereby admitted to Civil Action Nos. 02-2247 and 02-2254 as intervenor-defendants.

DATED this __ day of ______ 2003.

____
PAUL L. FRIEDMAN
United States District Judge

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UNITED STATES DISTRICT COURT
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RULE LCvR 26.1 CERTIFICATE OF
NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB

I, the undersigned, counsel of record for Natural Resources Defense Council and Sierra Club ("Proposed Intervenor-Defendants"), certify that to the best of my knowledge, there are no parent companies, subsidiaries or affiliates of the above non-profit organizations that have any outstanding securities in the hands of the public.

DATED: June 11, 2003.

Respectfully submitted,

/s/

Howard I. Fox (D.C. Bar #322198)
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Attorneys for Natural Resources Defense Counsel and Sierra Club

* Application to D.C. Bar pending.

INDEX OF EXHIBITS

Exhibit 1 – Declaration of Daniel Rosenberg, Natural Resources Defense Council
Attachment A – Letter from 85 Stream Scientists

Exhibit 2 – Declaration of Robin Mann, Sierra Club
Attachment A – Sierra Club Chapters in the United States

Exhibit 3 – Declaration of Francis J. Welsh, Sierra Club

Exhibit 4 – Declaration of James W. Woodworth, Natural Resources Defense Council

Exhibit 5 – Declaration of Marchant Wentworth, Sierra Club

Exhibit 6 – Declaration of Cynthia L. Rank, Natural Resources Defense Council & Sierra Club

Exhibit 7 – Declaration of Regina M. Hendrix, Sierra Club

Exhibit 8 – Declaration of William B. McCabe, Natural Resources Defense Council & Sierra Club

Exhibit 9 – Declaration of Julian W. Martin, Natural Resources Defense Council & Sierra Club

Exhibit 10 – Declaration of Michael Welch, Sierra Club

Exhibit 11 – Declaration of Carolyn Patricia Merrill, Sierra Club

Exhibit 12 – Declaration of Linda Modica, Sierra Club

Exhibit 13 – Environmental Organization Comments on the Regulatory Definition of "Waters of the United States" for the EPA Water Docket

Exhibit 14 – Order entered on August 29, 2000 in National Ass'n of Home Builders v. U.S. Army Corps of Engineers, D.D.C. Civ. 00-0379 TPJ

Exhibit 15 – Order entered on March 15, 2002 in National Ass'n of Home Builders v. U.S. Army Corps of Engineers, D.D.C. Civ. 01-0274 JR