ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5122

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE and SIERRA CLUB,
*Plaintiffs-Appellees,*

UTILITY WATER ACT GROUP,
*Appellant,*

v.

LISA PEREZ JACKSON, in her official capacity as Administrator, United States Environmental Protection Agency,
*Defendant-Appellee*.

Appeal from the United States District Court for the District of Columbia,
No. 10-1915 (Hon. Richard W. Roberts)

# BRIEF OF DEFENDANT-APPELLEE

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

**A. Parties and *Amici*.** The parties and *amici* who appeared before the district court and are parties in this Court are:

1. Plaintiffs-Appellees: Defenders of Wildlife and Sierra Club.

2. Defendant-Appellee: Lisa Perez Jackson, in her official capacity as Administrator, United States Environmental Protection Agency.

3. Movant-Appellant: Utility Water Act Group.

4. No amici appeared in district court. National Association of Home Builders and National Federation of Independent Business Small Business Legal Center have appeared in this Court as *amici* supporting movant-appellant.

**B. Ruling Under Review**

The ruling under review was rendered in a memorandum opinion and an order both filed on March 18, 2012, in case number 1:10-cv-01915-RWR (Docket Nos. 13, 14). In the opinion and order, the district court (Hon. Richard W. Roberts) denied Utility Water Act Group's motion to intervene. The citation to the opinion is *Defenders of Wildlife v. Jackson*, __ F.R.D. ___, 2012 WL 896141 (D.D.C. March 18, 2012).

**C. Related Cases**

This case has not been previously on appeal before this Court of any other court. I am not aware of any other related cases.

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# TABLE OF AUTHORITIES

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## GLOSSARY

| | |
|---|---|
| EPA | Environmental Protection Agency |
| JA | Joint Appendix |
| Steam electric | Steam electric power generating |
| UWAG | Utility Water Act Group |

## INTRODUCTION

The district court did not err in denying appellant Utility Water Act Group's (UWAG's) motion to intervene to challenge the consent decree. The consent decree establishes only a schedule for the Environmental Protection Agency (EPA) to complete a rulemaking. The decree in no way binds EPA to any particular rule or outcome; EPA remains free to choose any rule that it sees fit or to conclude that no new rule is necessary. Because the schedule does not concretely injure UWAG, UWAG lacks both standing and the required interest to intervene, as the district court concluded.

## JURISDICTIONAL STATEMENT

Jurisdiction in the district court was proper under 28 U.S.C. § 1331 because the claims arose under the laws of the United States. JA 1-15; *see also infra* 35 (addressing jurisdiction under 33 U.S.C. § 1365(a)(2)). This Court has jurisdiction under 28 U.S.C. § 1291: "The denial of a motion for intervention as of right is an appealable final order 'because it is conclusive with respect to the distinct interest asserted by the movant.'" *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (quoting *Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001)). While the denial of a motion of permissive intervention "is not normally appealable in itself," the Court of Appeals may choose to exercise its pendent appellate jurisdiction over the denial of permissive intervention where the

permissive intervention issue is "inextricably intertwined" with the issue of intervention as of right. *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000). The appeal is timely because the district court denied intervention on March 18, 2012, JA 72, and UWAG filed a timely notice of appeal on April 17, 2012, JA 104-05. *See* Fed. R. App. P. 4(a)(1)(B).

## STATEMENT OF THE ISSUES

1. Whether the district court properly denied UWAG's motion to intervene because the schedule in the consent decree does not injure UWAG.

2. Whether this Court should entertain UWAG's arguments about subject matter jurisdiction on appeal even though the district court denied intervention.

## STATUTES AND REGULATIONS

Pertinent statutes and rules are set forth in an addendum to this brief.

## STATEMENT OF THE CASE

EPA and plaintiffs Defenders of Wildlife and Sierra Club agreed to a consent decree governing only the schedule for a rulemaking under the Clean Water Act. UWAG moved to intervene. The district court denied UWAG's motion, holding that UWAG lacked the concrete interest in the schedule necessary to support intervention and that the complaint pled sufficient facts to establish the court's jurisdiction. The district court then entered the consent decree. UWAG has appealed from the denial of intervention.

## STATEMENT OF FACTS

### A. Statutory Background: the Clean Water Act and Effluent Limitations

Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Clean Water Act prohibits the "discharge of any pollutant" by "any person" except as authorized by the Act. 33 U.S.C. § 1311(a). The Act gives EPA or authorized state or tribal agencies authority to issue National Pollutant Discharge Elimination System permits for the discharge, from point sources, of any pollutant. 33 U.S.C. § 1342. These permits require the permittee to comply with certain requirements and conditions established under other provisions of the Clean Water Act. 33 U.S.C. § 1342(a).

These requirements include, among other things, technology-based effluent limits and any more stringent limits necessary to meet water quality standards. 33 U.S.C. §§ 1311(b), 1342(a). Section 301(b)(2) of the Act requires EPA to promulgate effluent limitations and pretreatment standards for categories of point sources that govern the sources' discharge of pollutants. 33 U.S.C. § 1311(b). Effluent limitations are prepared together with new source performance standards for new sources, which are technology-based standards that EPA establishes pursuant to Section 306. 33 U.S.C. § 1316. Section 304(b) of the Act directs EPA to develop effluent limitations guidelines that identify certain technologies and

control measures available to achieve effluent reductions for each point source category, specifying factors to be taken into account in identifying those technologies and control measures. 33 U.S.C. § 1314(b).

Sections 301(b) and 304(b) direct EPA to promulgate "guidelines" and then effluent limitations based on the guidelines. *See E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 122, 124 (1977). The Supreme Court has approved of EPA's practice of implementing Section 301 and Section 304 by promulgating consolidated regulations that contain both the Section 304(b) effluent limitations guidelines and the Section 301 effluent limitations. *Id.* at 128.

The Clean Water Act also addresses revision of the effluent limitations and effluent limitations guidelines. Section 301(d) provides that the effluent limitations "shall be reviewed at least every five years and, if appropriate, revised . . . ." 33 U.S.C. § 1311(d). Section 304(b) states that, once EPA has published effluent limitations guidelines for a given category of sources, it must "at least annually thereafter, revise, if appropriate, such regulations." 33 U.S.C. § 1314(b). And Section 304(m) requires EPA to publish a plan every two years that, among other things, "establish[es] a schedule for the annual review and revision of promulgated effluent guidelines . . . ." 33 U.S.C. § 1314(m) (added to the Clean Water Act by the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, § 308).

The Clean Water Act authorizes citizen suits against EPA for failure to perform a nondiscretionary duty. 33 U.S.C. § 1365(a)(2). The nondiscretionary duty must be "clear-cut"; for there to be such a clear-cut duty with respect to deadline, the statute must "'categorically mandat[e]' that all specified action be taken by a date-certain deadline." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (addressing analogous citizen suit provision in the Clean Air Act; alteration in original and quoting *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1975)); *see also, e.g., Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004). If the statute does not impose a nondiscretionary duty, a district court lacks jurisdiction over the citizen suit. *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997) (affirming dismissal of Clean Water Act citizen suit for lack of subject matter jurisdiction where neither the statute nor the regulations imposed a nondiscretionary duty).

### B. Effluent Limitations Guidelines for the Steam Electric Power Generating Category

The effluent limitations guidelines at issue in this case implicate the "steam electric power generating industry" (steam electric), which consists of fossil-fuel fired and nuclear power plants that use steam to generate electricity. 47 Fed. Reg. 52, 290, 52,290 (Nov. 19, 1982). The complaint in this case includes background information on the industry at issue. It alleges that "[c]oal-fired power plants are the nation's biggest water polluters." JA 1. The complaint also alleges that in

2008, "more than 650 power plants in the United States discharged more than two million pounds of toxic metals and metal compounds such as arsenic, boron, cadmium, chromium, lead, mercury, and selenium." JA 1. The complaint states that the problem of discharges of pollutants into water from the steam electric industry has worsened, largely because, as the industry has installed more "scrubbers" to reduce air pollution, water pollution has increased. JA 1-2.

EPA first promulgated effluent limitations guidelines and standards for the steam electric industry in 1974. 39 Fed. Reg. 36,186 (Oct. 8, 1974); *see also* 40 Fed. Reg. 7,095 (Feb. 19, 1975) (amending 1974 guidelines); 40 Fed. Reg. 23,987 (June 4, 1975) (same). EPA then revised the guidelines in 1982. 47 Fed. Reg. 52,290, 52,292 (Nov. 19, 1982). EPA has not revised the effluent limitations guidelines for the steam electric industry since 1982. JA 10-11.

On September 14, 2009, plaintiffs wrote to EPA stating their intent to sue EPA for its "failure to conduct and complete a review of the effluent limitations guidelines (ELGs) annually and effluent limitations at least once every five year for the Steam Electric Power Generating category." JA 22. On September 15, 2009, EPA issued a press release stating that it intended to revise the steam electric effluent limitations guidelines based on a detailed study of the industry conducted over the previous several years. JA 12; *see also* EPA, Steam Electric Power Generating Point Source Category: Final Detailed Study Report (Oct. 2009),

available at http://water.epa.gov/scitech/wastetech/guide/steam_index.cfm. Then on, November 6, 2009, plaintiffs wrote to EPA to clarify their original notice-of-intent-to-sue letter, stating that "EPA's mandatory review duties under section 304(b) and 301(d) of the Clean Water Act include a duty to revise the [effluent limitation guidelines] annually and effluent limitations once every five years if EPA finds that revision is appropriate." JA 17.

EPA confirmed its announcement that it would revise the steam electric effluent limitations guidelines in its preliminary Section 304(m) plan for 2010. 74 Fed. Reg. 68,599, 68,608 (Dec. 28, 2009). Subsequently, in its spring 2010 regulatory agenda, EPA included a projected timetable for the revision of the guidelines. In the agenda, EPA proposed to issue a notice of proposed rulemaking in July 2012 and to take final action in March 2014. EPA, Spring 2010 Semiannual Regulatory Agenda at 148 (2010), available at http://www.epa.gov/lawsregs/documents/regagendabook-spring10.pdf.

**C. The Consent Decree**

In the meantime, plaintiffs and EPA discussed settlement, and those talks proved fruitful. On November 8, 2010, plaintiffs filed their complaint, and plaintiffs and EPA filed a joint motion to enter a consent decree. JA 1-42. The complaint alleged that EPA has, in the years since the 1982 revision, failed to

fulfill its obligations under CWA Sections 301(d) and 304(b) to review the steam electric effluent guidelines and revise them where appropriate. JA 13-14.

The consent decree, both as initially filed and ultimately approved by the district court, provides dates for EPA to issue a notice of proposed rulemaking and to take final action on a rulemaking:

> 3. No later than July 23, 2012, the EPA Administrator shall sign (and promptly thereafter transmit to the Office of the Federal Register) a notice of proposed rulemaking pertaining to revisions to the Steam Electric Effluent Guidelines under the Clean Water Act. . . .
>
> 4. No later than January 31, 2014, the EPA Administrator shall sign (and promptly thereafter transmit to the Office of the Federal Register) a decision taking final action following notice and comment rulemaking pertaining to revisions to the Steam Electric Effluent Guidelines under the Clean Water Act. . . .

JA 35-36, 92-93. The dates can be modified by "by written agreement of the parties and notice to the Court." JA 36, 93; *see also* JA 100-01(modifying deadlines, discussed below at p. 12); District Court Docket No. 21 (same).

The consent decree contains no provisions governing the substance of EPA's decision. In fact, the consent decree makes clear that it does not limit EPA's discretion, except as to timing. Paragraphs 14 and 15 affirm that the consent decree shall not be construed to limit EPA's discretion to "alter, amend, or revise the actions taken pursuant to Paragraphs 3 and 4 of this Consent Decree" or otherwise modify "the discretion accorded EPA by the Clean Water Act or by general principles of administrative law" in taking the actions agreed to by the

Agency in signing the consent decree. JA 95. And Paragraph 12 provides that the consent decree "shall not constitute or be construed as an admission or adjudication by any party of any question of fact or law with respect to claims raised in this action." JA 94-95.

### D. The District Court's Denial of Intervention and Entry of the Consent Decree

On November 16, 2010, UWAG moved to intervene as a defendant as of right pursuant to Federal Rule of Civil Procedure 24(a) or, alternatively, to intervene permissively pursuant to Federal Rule of Civil Procedure 24(b). JA 43-44. UWAG sought leave to move to dismiss the complaint for lack of jurisdiction and for failure to state a claim, as well as to express its views on the rulemaking schedule set forth in the proposed consent decree. JA 44.

The district court denied UWAG's motion to intervene. JA 72-90. The court first addressed its subject matter jurisdiction over the complaint. JA 77-80. It found that the EPA has a mandatory obligation to review effluent guidelines annually and effluent limitations guidelines every five years for possible revision. JA 78 (citing *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 849 (9th Cir. 2008)). While the court noted that the "ultimate decision whether to revise the guidelines and limitations is discretionary," JA 79 (quoting *Our Children's Earth*, 527 F.3d at 849), in light of the 28 years that had passed since EPA last revised the steam electric guidelines, and the fact that plaintiffs had alleged that EPA has not

"completed the requisite review of effluent limitations and [effluent limitation guidelines] for over a quarter-century," the court concluded that it had subject matter jurisdiction. JA 78-79.

The district court next addressed UWAG's request to intervene as of right, starting with the issue of whether UWAG had standing. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003). The court held that UWAG lacked standing because "UWAG has not articulated any concrete, particularized, actual, and imminent injury it or its members will suffer upon entry of the consent decree." JA 83. The court explained that the consent decree does not preclude UWAG from either participating in the rulemaking or challenging the final action that emerges. JA 82. As to the schedule, the court determined that UWAG had not demonstrated that its "interests will be prejudiced as a result of the timetable . . . contained in the Consent Decree." JA 82 (alteration in original, quoting *Cronin v. Browner*, 898 F. Supp. 1052, 1063 (S.D.N.Y. 1995)).

The district court then addressed whether UWAG had demonstrated the legally protectable interest in the subject of the action required for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). JA 83-87. The court concluded that "UWAG has not articulated a legally protectable interest in the proposed rulemaking schedule." JA 84. The court noted that "[s]hould haste make waste, the resulting regulations will be subject to successful challenge." JA 85

(quoting *Am. Nurses Ass'n v. Jackson*, 2010 WL 1506913, at *2 (D.D.C. Apr. 15, 2010)). And, "[i]f EPA has correctly estimated the speed with which it can do the necessary data gathering and analyses, harmful emissions will be sooner reduced. If EPA needs more time to get it right, it can seek more time." JA 85 (quoting *Am. Nurses*, 2010 WL 1506913, at *2). The court concluded that UWAG had not demonstrated that the suggested timetable was inadequate, explaining that "UWAG's scheduling concerns appear to be both unsupported and premature." JA 86. Furthermore, "[t]he risk of rushing seems diminished since the data gathering has already begun, and the proposed schedule is subject to easy modification[] and is only two months shorter than a schedule the EPA previously and voluntarily announced." JA 86-87 (footnote and internal quotation omitted).

The court next determined that "UWAG's alleged injury does not meet Rule 24(a)'s impairment-of-interest requirement." JA 87. The court noted that UWAG may challenge the revised effluent limitations guidelines, if any, and that the rulemaking is likely to continue, independent of this litigation, with UWAG's continued participation. JA 88. "UWAG therefore has not demonstrated any impairment of interest warranting intervention." JA 88.

Finally, the court rejected UWAG's request for permissive intervention under Federal Rule of Civil Procedure 24(b). JA 88-90. It explained that UWAG sought to intervene to challenge the district court's subject matter jurisdiction, but

the court had already confirmed its subject matter jurisdiction. JA 89-90. Allowing intervention would accomplish "nothing but more delay in bringing closure to an overdue rulemaking process." JA 90.

After intervention was denied, the district court granted the motion to enter the consent decree and signed and entered the consent decree on March 19, 2012. JA 91-99; District Ct. Doc. Mar. 18, 2012 (minute order).

**E. Stipulated Modifications of Consent Decree Dates**

On April 2, 2012, plaintiffs and EPA filed a stipulation extending the dates in the consent decree by several months. JA 100-03. The parties extended the date in Paragraph 3 of the Consent Decree for EPA to sign a notice of proposed rulemaking pertaining to revisions to the effluent limitations guidelines from July 23, 2012, to November 20, 2012. JA 100-01. The parties extended the date in Paragraph 4 for EPA to sign a decision taking final action following notice and comment rulemaking pertaining to revisions to the effluent limitations guidelines from January 31, 2014, to April 28, 2014. JA 100-01.

The parties have recently extended the dates again. On September 20, 2012, the parties filed a stipulation in the district court that extended the dates in Paragraphs 3 and 4 of the Consent Decree to December 14, 2012, and May 22, 2014, respectively. District Court Docket No. 21.

## SUMMARY OF ARGUMENT

UWAG lacks standing to intervene because it has not demonstrated and injury in fact from the consent decree. The consent decree does not govern the substance of EPA's rulemaking, only its timing. So UWAG cannot base its claim of injury on the substance of any rule that EPA may ultimately promulgate, as that rule does not yet exist and any harm from that rule is not "actual or imminent."

The only thing the consent decree actually does is provide an adjustable schedule for the rulemaking. And the schedule does not concretely injure UWAG because it is not an invasion of UWAG's legally protected interest. UWAG has no protected interest in the pace at which EPA issues its rules. UWAG's interest is in additional delay of the rulemaking process. *See* UWAG Br. at 32. But UWAG has no legally protected interest in that delay. The Clean Water Act, in fact, expressly provides for the review and revision of the guidelines in order to avoid delay and to prevent the effluent limitations guidelines from becoming stale. The courts that have addressed arguments like UWAG's have concluded that a proposed intervenor does not have a legally protected interest in either freeing EPA from any court-ordered schedule at all or the timing of agency rulemaking. Finally, UWAG has not offered anything concrete indicating that the schedule here – which provides EPA with more than three-and-one-half years to complete its rulemaking – is so rushed that the process itself injures UWAG.

For essentially the same reasons, UWAG has not demonstrated the interest in the consent decree schedule required for intervention under Federal Rule of Civil Procedure 24(a)(2). Because UWAG has no legally protected interest in the schedule set forth in the consent decree, it lacks the interest required to intervene. Its general interest in delay is not enough.

Nor can UWAG show that it is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect its interest, as it must to intervene under Rule 24(a)(2). There is no practical consequence to UWAG from the denial of intervention to challenge the schedule in the consent decree. While the final action might have a practical consequence for UWAG (and its members), EPA's schedule does not. And UWAG will be able to challenge the final action, if it decides to do so.

The district court did not abuse its discretion in denying permissive intervention under Rule 24(b). The insubstantiality of UWAG's asserted interest in the schedule weighs against permissive intervention. And, as the district court explained when it denied intervention, there was no good reason to delay resolution of this case merely so that UWAG can have its say in a matter that does not tangibly affect its interests.

Because the district court did not err in denying UWAG's motion to intervene, the Court need not consider UWAG's jurisdictional argument. UWAG

is not a party that can present arguments or defenses to this Court or the district court.

## STANDARD OF REVIEW

This Court set forth the standards of review that govern the determinations relevant to intervention in *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003). Pure issues of law are reviewed de novo. *Id.* Findings of fact are reviewed for clear error. *Id.* Determinations involving "a measure of judicial discretion" are "reviewed for abuse of that discretion." *Id.*

## ARGUMENT

### I. Because UWAG lacks a concrete interest in and is not injured by the rulemaking schedule in the consent decree, the district court properly denied intervention.

In this Circuit, in order to intervene as of right under Federal Rule of Civil Procedure 24(a)(2), UWAG must first establish that it has standing to intervene. *Fund for Animals*, 322 F.3d at 731-32 ("[I]n addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution.") The Court has explained that "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties." *Id.* at 732 (quoting *City of Cleveland v. NRC*, 17 F.3d 1515, 1517 (D.C. Cir. 1994)); *see also, e.g.*,

*United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009); *cf. Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (noting that "[r]equiring standing of someone who seeks to intervene as a defendant runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction"). We address UWAG's lack of standing first in Part A below.

In addition to standing, UWAG must also satisfy the requirements of Federal Rule of Civil Procedure 24(a)(2). Rule 24(a)(2) provides that a movant may intervene as of right in an ongoing action where the party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). This Court has explained that the Rule 24(a)(2) analysis rests on four factors:

> (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether 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; and (4) whether the applicant's interest is adequately represented by existing parties.

*Fund for Animals*, 322 F.3d at 731; *see also, e.g.*, *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998). As we explain below in Part B, UWAG established neither the required legally protectable interest nor that the consent

decree impairs such an interest. Both of these considerations overlap with the standing analysis as well.

Finally, Part C explains why the district court did not abuse its discretion in denying permissive intervention pursuant to Rule 24(b).

### A. UWAG lacks standing because the schedule in the consent decree does not concretely injure UWAG.

To establish standing under Article III, prospective intervenor UWAG "must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Fund for Animals*, 322 F.3d at 733 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). To establish the required injury in fact, UWAG must establish "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560 (internal citations and quotations omitted). To establish causation, UWAG must show "a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* at 560 (alterations in original, quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). To establish redressability, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43). In the context of motions to intervene as a defendant, those courts

that require such a movant to establish standing examine whether the relief sought by a plaintiff, or a ruling in the plaintiff's favor, threatens the would-be-intervenor with injury. *See, e.g.*, *Fund for Animals*, 322 F.3d at 732-33; *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1024-25 (8th Cir. 2003). UWAG has failed to establish any of these three elements.

**1. UWAG has not demonstrated the required concrete injury.**

UWAG has not demonstrated that the consent decree concretely injures UWAG. As an initial matter, understanding what the consent decree does *not* do is critical. The consent decree does not govern the substance of EPA's rulemaking. EPA remains free to issue any rule revising the effluent limitations guidelines that it sees fit – or no rule at all – after completing the rulemaking process. The consent decree does not bind the agency in any way to a particular substantive outcome. Paragraphs 14 and 15 affirm that the consent decree shall not be construed to limit EPA's discretion to "alter, amend, or revise the actions taken pursuant to Paragraphs 3 and 4 of this Consent Decree" or otherwise modify "the discretion accorded EPA by the Clean Water Act or by general principles of administrative law" in taking the actions agreed to by the Agency in signing the consent decree. JA 95-96. So UWAG cannot base any injury on the substance of any rule that EPA may ultimately promulgate, as that rule does not yet exist and any harm from that rule is not "actual or imminent."

UWAG argues that the consent decree "compels EPA to hold a rulemaking in the first place," and the rulemaking process injures UWAG. UWAG Br. at 27. It does not for two reasons. First, EPA had already exercised its own discretion to start a rulemaking process before plaintiffs filed suit. *Supra* at 6-7; *see also* 33 U.S.C. §§ 1311(d), 1314(b) & (m) (providing for review of effluent limitations and effluent limitations guidelines).

Second, the process itself cannot injure UWAG – if anything, only the result might affect it. UWAG cannot base its harm on a rulemaking that is not pre-determined and is far from final. *See, e.g., Florida Power & Light Co. v. EPA*, 145 F.3d 1414 (D.C. Cir. 1998) (holding that rulemaking is not final and thus not challengeable, and identifying three factors for assessing finality: (1) the agency's characterization of the action, (2) whether the agency published the action in the Federal Register or Code of Federal Regulations, and (3) whether the action has binding effects on either private parties or the agency).

The only thing the consent decree actually does is provide an adjustable schedule for completing a rulemaking. The original consent decree filed with the Court in November 2010 included a schedule with two dates: (1) a date of July 23, 2012, for EPA to sign a notice of proposed rulemaking pertaining to revisions to the Steam Electric Effluent Guidelines, JA 35, and (2) a date of January 31, 2014, for EPA to sign "a decision taking final action following notice and comment

rulemaking pertaining to revisions to the Steam Electric Effluent Guidelines under the Clean Water Act," JA 36. The dates can be modified by "by written agreement of the parties and notice to the Court," JA 36, 93, and they have been twice. Plaintiffs and EPA first extended the proposed rulemaking date from July 23, 2012, to November 20, 2012, and they extended the final action date from January 31, 2014, to April 28, 2014. JA 100-01. On September 20, 2012, the parties extended the proposed rulemaking date to December 14, 2012, and they extended the final action date to May 22, 2014. District Court Docket No. 21.

This adjustable schedule does not concretely injure UWAG because a schedule is not an "invasion of [UWAG's] legally protected interest." *Defenders of Wildlife*, 504 U.S. at 560. UWAG has no protected interest in the pace at which EPA issues its rules. To be sure, if UWAG is right that the rulemaking will result in more guidelines that are more onerous to industry, then UWAG's members benefit from any additional delay in the review process. *See* UWAG Br. at 32. But UWAG has no legally protected interest in that delay. The Clean Water Act, in fact, contains express provisions for the review and revision of the guidelines as appropriate to avoid delay and to prevent the effluent guidelines from becoming stale. *Supra* at 4; 33 U.S.C. §§ 1311(d), 1314(b) & (m).

Put another way, because the consent decree establishes only a schedule for the rulemaking, UWAG and its members are not the "object of the action" at issue.

*Fund for Animals*, 322 F.3d at 733-34 (quoting *Sierra Club*, 292 F.3d at 900); *Defenders of Wildlife*, 504 U.S. at 561-62. The schedule governs only EPA. UWAG and its members may be the "object of" the Agency's final action, but that final action is scheduled for 2014, and UWAG still retains every opportunity to challenge the substance of that final action in court.

The courts that have addressed arguments like UWAG's have concluded that a proposed intervenor does not have a legally protected interest in either freeing EPA from any court-ordered schedule at all or the timing of agency rulemaking. For example, the Second Circuit has held that a group of proposed intervenors had no legally protectable interest in having "an opportunity to help shape the schedule for [a] . . . judicially-compelled rulemaking." *American Lung Association v. Reilly*, 962 F.2d 258, 261 (1992). The Second Circuit concluded that the proposed intervenors had not offered any "reason to believe that EPA will shirk its statutory duty to solicit and consider such [relevant] information, or that the [proposed intervenors] . . . will not have adequate opportunity to present their views." *Id.* at 262.[1]

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[1] The Eleventh Circuit rejected a similar attempt to intervene in a case because the harm to the proposed intervenor (a group of electric utilities) was too speculative in *ManaSota-88, Inc. v. Tidwell*, 896 F.2d 1318 (11th Cir. 1990). There, plaintiffs sought to compel EPA to identify certain polluted waterways (those that were in noncompliance with water quality standards) and to set pollution limits (total maximum daily loads) for them. *Id.* at 1322. The proposed

The district court in *Environmental Defense v. Leavitt*, 329 F. Supp. 2d 55 (D.D.C. 2004), rejected the same argument made by UWAG here for the same reason the district court did here – because the proposed intervenors lack any protected interest in either avoiding the rulemaking entirely or the schedule of a rulemaking. In that case, just as here, an industry group sought to intervene in a case where the parties had proposed a consent decree containing a schedule for promulgation of a rule to which the members of the industry group would be subject. *Id.* at 329. The court rejected the industry group's argument that its interest in ensuring the rule was adopted "after due deliberation and is not artificially expedited" could serve as a legally protected interest for purposes of Article III standing and intervention as of right. *Id.* at 68. Because nothing in the consent decree would prevent the industry group "from participating in the rulemaking or from challenging the final rule that emerges," the group's interest in the outcome of the rulemaking process could not be impaired by entry of the

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intervenor's interest was based on the claim that if the EPA review identified polluted or noncompliant waterways, then that would trigger the need for new pollution limits that would cause the proposed intervenor to incur higher costs. The Court held that "whether [the proposed intervenor's] members discharge into a water body eventually specified as noncompliance is purely a matter of speculation at this time." *Id.* The Court rejected the argument that "the relief requested could have a profound impact upon the environmental obligations of its member electric utilities" because "such a generalized grievance does not impart to [the proposed intervenor] the kind of legally protectable interest in the . . . litigation necessary to support intervention as of right." *Id.* (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989)).

decree. *Id.* Just so here: nothing in the consent decree affects UWAG's ability to participate in EPA's revision of the steam electric effluent guidelines and to challenge any resulting revision.[2] Indeed, UWAG has been involved in EPA's rulemaking since 2009, including in development of the industry survey used to inform the rulemaking. EPA, Steam Electric Power Generating Point Source Category: Final Detailed Study Report, at 2-18 to 2-20 (Oct. 2009), available at http://water.epa.gov/scitech/wastetech/guide/steam_index.cfm.

UWAG relies on *NRDC v. Costle*, 561 F.2d 904 (D.C. Cir. 1977), to argue that one can be injured by a consent decree setting a rulemaking schedule. UWAG Br. at 49. But the consent decree in *Costle* went well beyond setting a rulemaking schedule; it established grounds on which EPA might make substantive decisions as to the content of its regulations, and the decree required EPA to provide certain

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[2] *See also, e.g., In re Endangered Species Act Section 4 Deadline Litig.*, 270 F.R.D. 1, 6-7 (D.D.C. 2010); *Am. Nurses Ass'n v. Jackson*, 2010 WL 1506913, at *2 (D.D.C. Apr. 15, 2010); *Cronin v. Browner*, 898 F. Supp. 1052, 1061-63 (S.D.N.Y. 1995); *Riverkeeper, Inc. v. Whitman*, 2001 WL 1505497, at *2-*6 (S.D.N.Y. Nov. 27, 2001) (again denying intervention in later phase of *Cronin v. Browner*); *Our Children's Earth Foundation v. EPA*, 2006 WL 1305223 (N.D. Cal. May 11, 2006) (denying intervention to challenge consent decree establishing timeline for revisions of Clean Air Act emission standards). UWAG cites to a handful of District of Columbia district court decisions (Br. at 51), but they do not permit intervention to challenge a rulemaking schedule. *See, e.g., Huron Envtl. Activist League v. EPA*, 917 F. Supp. 34, 42-43 (D.D.C. 1996); *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 69-71 (D.D.C. 2006); *Hardin v. Jackson*, 600 F. Supp. 2d 13 (D.D.C. 2009).

information to the parties to the litigation and to give them quarterly oral briefings. *Id.* at 908-09. Thus, the parties to the consent decree in *Costle* may indeed have been in a more advantageous position than non-parties to participate in the rulemaking. *Id.* at 909-10. In stark contrast, the consent decree here does nothing but set a schedule.[3]

Some courts have suggested that it might be possible for a proposed intervenor to show the required injury where the schedule for the rulemaking is plainly inadequate. *See Envtl. Def.*, 329 F. Supp. 2d at 68 (noting that intervention might be warranted if the proposed intervenor can show that "the suggested timetable is inadequate or that modifications to the timetable are likely to be necessary, and that any such inadequacies or modifications would result in injury or impairment to" the proposed intervenor). As an initial matter, it is not at all clear that a proposed intervenor could show the required injury even in those

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[3] In *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984), the district court permitted an industry group to intervene in a case regarding the timing for setting standards for radionuclide emissions. None of the parties to the case opposed intervention, however. In its short analysis of the motion to intervene, the court noted that the industry group "is arguably more concerned with the content of the regulations, a matter not before this Court, than with when they are issued, and would have the opportunity to litigate the merits of the regulations at a later date . . . ." *Id.* at 896. But the court allowed intervention on the theory that the court's decision might somehow impair the proposed intervenor's interests in a way that could not be satisfactorily addressed by subsequent opportunities for judicial review. *Id.* The court, however, failed to identify any concrete injury, and this sort of speculation is not sufficient to support intervention.

circumstances. Finding an injury based on such a theory would depend on speculation and a number of assumptions: that a faster schedule will skew the substance of the rule in a way that harms the proposed intervenor, that there will not be extensions of time that mitigate any supposed rush, and that filing suit to challenge the result of the rulemaking will not be fully protective of the proposed intervenor's legally protected interest. Such a chain of speculation is not enough to establish the requisite concrete injury. *See Fund for Animals*, 322 F.3d at 733 (identifying relevant issue as whether proposed intervenor "would suffer concrete injury if the court were to grant the relief the plaintiffs seek").

But even assuming there could be a case where the rulemaking schedule is so rushed that the process itself injures the proposed intervenor, that is plainly not the situation here. On its face, the schedule is reasonable: as amended, EPA has two years to sign a notice of proposed rulemaking pertaining to revisions of the effluent guidelines (from November 2010, when the consent decree was filed, to December 2012). JA 92-93, 100-01; District Court Docket No. 21. Then EPA has another year and a half (from November 2012 to May 2014) to complete the rulemaking. JA 92-93, 100-01; District Court Docket No. 21. The Act anticipates that EPA will endeavor to keep its guidelines up to date – that is why it provides, for example, for review of the effluent limitations "at least every five years." 33 U.S.C. § 1311(d); *see also* 33 U.S.C. § 1314(b), (m). Plus, EPA did not start from

scratch in November 2010. EPA had already published a 200-page, detailed study of the steam electric industry in 2009 based on analysis started in 2005. EPA, Steam Electric Power Generating Point Source Category: Final Detailed Study Report (Oct. 2009), available at http://water.epa.gov/scitech/wastetech/guide/steam_index.cfm. And EPA had issued its first information collection request, or industry survey, to the steam electric industry (after receiving input from and meeting with many of UWAG's members) – intended to gather data to assist in the development of effluent limitation guidelines – in the summer of 2010. *See generally* EPA, Steam Electric Power Generating Industry Effluent Guidelines, available at http://water.epa.gov/scitech/wastetech/guide/steam_index.cfm#quest1.

UWAG has failed to offer a concrete reason why the schedule is unworkable. While UWAG lists eleven interests that it claims are being injured, UWAG Br. at 33-34, the entire list boils down to the claim that EPA does not have enough time to properly conduct the rulemaking. But nowhere does UWAG actually explain what part of the process, or how the total process, must take more time than EPA has. Listing the steps of the rulemaking process does not establish that the more than three-and-one-half years, from November 2010 to May 2014, are necessarily insufficient for completing those tasks.

UWAG cites to other rulemakings that have lasted longer (Br. at 34-35), but makes no effort to explain either why that time was necessary or why it would be

necessary in this rulemaking. These comparisons do not establish that "the suggested timetable is inadequate." *Envtl. Def.*, 329 F. Supp. 2d at 68.

Nor does UWAG's speculation about the rulemaking process – for example, that UWAG might not be "given enough time (by, say, a 90-day comment period) to collect samples with appropriate quality control and present the data to EPA" (Br. at 44) – provide an injury now. UWAG will be able to challenge both the rulemaking process and the substantive result of the rulemaking, if and when EPA takes a final action (assuming UWAG clears the required jurisdictional thresholds). If the final action suffers from a procedural defect, then UWAG can make that argument in a challenge to that action. *See, e.g.*, *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (considering but rejecting argument based on shortened notice-and-comment period).

Finally, as the district court noted (JA 86), the consent decree provides a process for adjustment. Plaintiffs and EPA can file stipulations with the court that automatically extend the dates. JA 93. They did so twice –once in April 2012 and again in September 2012. JA 100-03; District Court Docket No. 21.

**2. UWAG has not demonstrated the causation and redressability prongs of standing.**

UWAG also cannot demonstrate either "a causal connection between the injury and the conduct complained of" or that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

*Defenders of Wildlife*, 504 U.S. at 560-61 (quoting *Simon*, 426 U.S. at 38, 43). While we think the fact that the schedule does not injure UWAG is best viewed as a failure to establish the required concrete injury, one can also view it as a failure to establish causation and redressability.

Because UWAG's real harm, if any, will result from the final action that might impose more onerous requirements on UWAG's members and not the schedule set forth in the consent decree, UWAG has failed to establish causation and redressability. *See Emergency Coal. to Defend Educ. Travel v. U.S. Dept. of the Treasury*, 545 F.3d 4, 11 (D.C. Cir. 2008) ("Normally, causation and redressability are overlapping inquiries in standing cases: there is generally no real analytic difference between the two concepts."). The schedule itself does not cause UWAG any injury. And adjusting the schedule will not redress any injury. Any injury to UWAG's members will result from a final action that imposes more onerous substantive requirements on them, not from the schedule. UWAG Br. at 27 (claiming that it will be harmed by the final action); *cf. Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 663 F.3d 470, 474-75 (holding that industry group had failed to establish causation and redressability necessary for standing where the agency action, among other things, "compels no additional action (or inaction) by [the group's] members to limit their exposure to penalties"). As the district court held in *In re Endangered Species Act Section 4 Deadline*

*Litig.*, 270 F.R.D. 1 (D.D.C. 2010), where the proposed intervenor's "alleged injury is based entirely on the potential substantive outcome of the [agency determination], which is not before this Court," the proposed intervenor "has failed to satisfy the causation and redressability prongs of the Article III standing test." *Id.* at 5.

### B. Because UWAG did not establish either an interest in the consent decree schedule or that the schedule impairs UWAG's interest, the district court properly denied intervention as of right.

UWAG also must satisfy the factors for intervention as of right pursuant to Federal Rule of Civil Procedure 24(a)(2). Relevant here are "whether the applicant claims an interest relating to the property or transaction which is the subject of the action" and "whether 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." *Fund for Animals*, 322 F.3d at 731; *see also, e.g.*, *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998); *Roeder*, 333 F.3d at 233-34. The other factors – the timeliness of the motion and whether the applicant's interest is adequately represented by existing parties – are not at issue.

UWAG lacks "an interest relating to the property or transaction which is the subject of the action" for the same reason that it lacks standing: UWAG has no legally protected interest in the schedule set forth in the consent decree. *Cf.*, *e.g.*, *Philip Morris*, 566 F.3d at 1146 ("[B]y demonstrating Article III standing, the

intervenors adduce a sufficient interest" under Rule 24(a)(2).); *Fund for Animals*, 322 F.3d at 735 (same). As explained in detail above, UWAG lacks a concrete, protectable interest in EPA's schedule. Its general interest in delay is not enough. And, as the district court explained, "[s]hould haste make waste, the resulting regulations will be subject to successful challenge." JA 85 (quoting *Am. Nurses Ass'n v. Jackson*, 2010 WL 1506913, at *2 (D.D.C. Apr. 15, 2010)).

UWAG also is not "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." *Fund for Animals*, 322 F.3d at 731; *see* Fed. R. Civ. P. 24(a)(2). In analyzing this factor, this Court focuses on the "'practical consequences' of denying intervention." *Fund for Animals*, 322 F.3d at 735 (quoting *NRDC*, 561 F.2d at 909). Here, as explained above (pp. 18-27), there is no practical consequence to UWAG from the denial of intervention to challenge the schedule in the consent decree. While the final action might have a practical consequence for UWAG (and its members), EPA's schedule does not. UWAG will be able to challenge the final action, if it decides to do so.

If UWAG has concerns about when the final action may begin to impose requirements, it can raise those concerns during the rulemaking process, and they are irrelevant to the current dispute about the timing of agency action. EPA has the authority to allow time for industry to meet any changed requirements. *See, e.g.*,

74 Fed. Reg. 62,996, 63,058 (Dec. 1, 2009) (prescribing a phase-in date for numeric turbidity limit for active construction sites as part of construction and development site effluent limitations guidelines); 65 Fed. Reg. 81,964, 82,021-22 (Dec. 27, 2000) (discussing proposal to phase in technology standards promulgated as part of the effluent guidelines for the iron and steel manufacturing industry). The substantive subject of implementation periods is subject to notice and comment during the rulemaking process.

### C. The district court did not abuse its discretion in denying permissive intervention.

The district court did not abuse its discretion in denying permissive intervention under Rule 24(b). JA 88-90; *Fund for Animals*, 332 F.3d at 732.

As an initial matter, we note that this Court has not made clear whether a prospective permissive intervenor under Rule 24(b) must establish its standing. *See In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31-32 (D.C. Cir. 2000) (noting that "there is uncertainty over whether standing is necessary for permissive intervention," and citing cases). UWAG does not have standing, as explained above in part A. The Court need not resolve this issue because here, as in *In re Vitamins*, "the basis for appellants' motion for permissive intervention is the same as the basis for its quest for intervention as of right. The two are in that respect inextricably intertwined." *Id.* at 31; *see* UWAG Br. at 52-55 (with respect to permissive intervention, arguing only that the district court failed to properly

consider the issue of delay). Rather than resolving whether standing is required for permissive intervention, the Court can decline to exercise its pendent jurisdiction over permissive intervention, exactly as it did in *In re Vitamins*. 215 F.3d at 32.

Even if this Court addresses the issue, the district court did not abuse its discretion in denying permissive intervention. In relevant part, Rule 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Rule 24 further provides that "[i]n exercising its discretion [to grant permissive intervention], the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Because permissive intervention is discretionary, a court may deny intervention under Rule 24(b)(1) even where all of the above criteria have been met. *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1048 (D.C. Cir. 1998).

The district court's denial of permissive intervention was warranted because UWAG has failed to identify an interest in the schedule that justifies intervention. The insubstantiality of UWAG's asserted interest in the schedule weighs against permissive intervention. *See, e.g., Cronin*, 898 F. Supp. at 1063 (holding that the same reasons warranting denial of intervention as of right provided a basis for denial of permissive intervention, especially taking into account the delay that

would result in a suit "seek[ing] to enforce environmental regulations in the public interest"). As the district court explained when it denied intervention, there was no good reason to delay resolution of this case merely so that UWAG can have its say in a matter that does not tangibly affect its interests. JA 87-90.

Moreover, allowing intervention in this case would prejudice EPA's ability to control when and how it chooses to litigate issues, with significant consequences for the Agency. EPA decided to settle plaintiffs' claims here, rather than litigate them. UWAG seeks to undo that decision. Allowing intervenors to inject issues in cases where they have at most an attenuated interest in the outcome would be contrary to the judicial interest in voluntary settlement of civil controversies. "[I]t is precisely the desire to avoid a protracted examination of the parties' legal rights which underlies consent decrees." *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983).

That policy interest applies even where the intervenor seeks to challenge subject matter jurisdiction. A court has jurisdiction for purposes of entering a consent decree based on the allegations in the complaint unless the claim of jurisdiction is "'so insubstantial, implausible, foreclosed by prior decisions of th[e] Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666

(1974)); *see also, e.g.*, *Citizens for a Better Env't*, 718 F.2d at 1125-26. And, even if UWAG has a cognizable interest in this summary inquiry, it is duplicative of EPA's interest. The Agency certainly has an interest in challenging jurisdiction where appropriate.

Finally, the district court and this Court can "assure itself of its own jurisdiction," *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004), as the district court did here (JA 77-80), and as we discuss below. There is no reason to add UWAG as a party to the case in order for the Court to confirm its jurisdiction. *See Cronin*, 898 F. Supp. at 1057. Once the district court had assured itself of jurisdiction, allowing UWAG to intervene to press its no-jurisdiction argument would accomplish "nothing but more delay in bringing closure to an overdue rulemaking process." JA 90.

## II. Because the district court properly denied intervention to UWAG, UWAG is not in position to bring its jurisdictional argument to this Court.

As explained above, the district court denied UWAG's motion to intervene, and the court did not err in denying intervention as of right or permissively. Despite this, UWAG begins its brief with the issue that it sought intervention to argue – whether the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365(a)(2), provided subject matter jurisdiction over plaintiffs' claims. UWAG Br. at 13-26. But until UWAG is granted intervention, it is not a party that can

present arguments or defenses to this Court or the district court, even if they are jurisdictional. *See Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001) (noting that a "[a would-be intervenor as of right] cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene"; alteration in original, quoting *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524 (1947)).

The district court did confirm its subject matter jurisdiction over the suit, and this Court could do so as well, but it is not required to do so. While the Supreme Court in *Steel Company* instructed federal courts to decide threshold jurisdictional questions before the merits, 523 U.S. at 94-102, nothing mandates that a court decide those threshold jurisdictional questions in any particular order. The Court can reject UWAG's intervention arguments on threshold, jurisdictional grounds as well. As to intervention as of right, UWAG lacks standing. As to permissive intervention, the Court can in its discretion decide not to exercise pendent jurisdiction over the appeal of the denial of permissive intervention. *Supra* at 31-32 (discussing *In re Vitamins*, 215 F.3d at 31).[4]

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[4] In any event, if the Court reaches the issue of subject matter jurisdiction, the Court should conclude that jurisdiction exists here, as the district court concluded. JA 5-8. A court has jurisdiction for purposes of entering a consent decree based solely on the allegations in the complaint unless the claim of jurisdiction is "so insubstantial, implausible, foreclosed by prior decisions of th[e] Court, or otherwise completely devoid of merit as not to involve a federal controversy."

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court.

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*Steel Co*, 523 U.S. at 89 (quoting *Oneida Indian Nation*, 414 U.S. at 666 (1974)); *see also Citizens for a Better Env't*, 718 F.2d at 1125-26; *Ord v. District of Columbia*, 587 F.3d 1136, 1144 (D.C. Cir. 2009). Here, the Clean Water Act imposes an obligation to review effluent limitations guidelines annually and to review effluent limitations for possible revision every five years. 33 U.S.C. §§ 1311(d), 1314(b). Plaintiffs' complaint alleged that EPA had failed to perform and complete the required "reviews." JA 13. Those allegations are enough to establish jurisdiction under 33 U.S.C. § 1365(a)(2) to enter the consent decree, as plaintiffs' allegations are not "so insubstantial, implausible, foreclosed by prior decisions of th[e] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co.*, 523 U.S. at 89. UWAG argues strenuously that there is no mandatory duty here, including an argument that EPA actually had reviewed the steam electric effluent limitations guidelines and effluent limitations. UWAG Br. at 14-26. But those arguments are premature: this appeal is only about whether UWAG should have been entitled to intervene and not the merits of the arguments that UWAG would raise *if* it were allowed to intervene.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION**

I certify that this brief complies with the type volume limitation set forth in Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a). The brief contains 8992 words.

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## CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2012, I caused the foregoing brief to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served the following counsel of record:

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# ADDENDUM OF STATUTES AND REGULATIONS

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## ADDENDUM:

### Clean Air Act, Section 301(d), 33 U.S.C. § 1311, Effluent limitations

. . .

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

. . .

### Clean Air Act, Section 304(b) & (m), 33 U.S.C. § 1314, Information and guidelines

. . .

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

. . .

(m) Schedule for review of Guidelines

(1) Publication

Within 12 months after February 4, 1987, and biennially thereafter, the Administrator shall publish in the Federal Register a plan which shall--

(A) establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section;

(B) identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under subsection (b)(2) of this section and section 1316 of this title have not previously been published; and

(C) establish a schedule for promulgation of effluent guidelines for categories identified in subparagraph (B), under which promulgation of such guidelines shall be no later than 4 years after February 4, 1987, for categories identified in the first published plan or 3 years after the publication of the plan for categories identified in later published plans.

(2) Public review

The Administrator shall provide for public review and comment on the plan prior to final publication.

**Clean Air Act, Section 505(a), 33 U.S.C. § 1365(a), Citizen suits**

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order

issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.
. . .

**Fed. R. Civ. P. 24, Intervention**

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.