

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, Plaintiff, v. CATERPILLAR, INC., Defendant.	Civil Action 98-2544 (HHK)
<hr/> UNITED STATES OF AMERICA, Plaintiff, v. CUMMINS ENGINE CO., Defendant.	Civil Action 98-2546 (HHK)
<hr/> UNITED STATES OF AMERICA, Plaintiff, v. DETROIT DIESEL CORP., Defendant.	Civil Action 98-2548 (HHK)

OPINION AND ORDER

The Truck Manufacturers' Association ("TMA"), a trade association representing manufacturers of heavy-duty trucks,¹ seeks to intervene in these enforcement actions brought by

¹TMA has eight members: Ford Motor Company, Freightliner LLC ("Freightliner"), General Motors Corporation ("GM"), International Truck and Engine Corporation, Isuzu Motors America, Inc. ("Isuzu"), Mack Trucks, Inc., PACCAR Inc., and Volvo Trucks North America, Inc. Only three members, however, are participating in TMA's motion to intervene: Freightliner, GM, and Isuzu.

the Environmental Protection Agency (“EPA”) against three manufacturers of heavy-duty diesel engines. EPA claimed in these actions that defendants violated the Clean Air Act, 42 U.S.C. §§ 7401, *et seq.*, and its implementing regulations by selling engines that emitted excess pollution and by failing to disclose how the engines operated in real world conditions. This court approved consent decrees settling all of EPA’s claims against defendants on July 1, 1999. The decrees require defendants to make changes to their new engine models by October 1, 2002, in order to reduce the emissions from those engines. In its motion to intervene, filed March 9, 2001, TMA argues that defendants have not made sufficient progress toward completing the new engines to ensure that the truck manufacturers represented by TMA will have adequate time to integrate the engines into new trucks by October 2002. TMA contends that this delay will cause a nationwide shutdown of truck manufacturing and a reduction in the number of new trucks available for purchase in fall 2002. TMA seeks to intervene in the decrees in order to postpone the October 2002 deadline or, in the alternative, challenge the validity of the decrees. Upon consideration of the motion, the opposition thereto, and the record of the case, the court concludes that TMA's motion to intervene must be denied.

I. FACTUAL BACKGROUND

These cases involve federal regulation of emissions of nitrogen oxides (“NO_x”) from heavy duty diesel engines. NO_x is a pollutant that contributes to smog and airborne particles that adversely affect human health. The Clean Air Act (the “Act”) sets standards for NO_x emissions from heavy duty diesel engines and requires engine manufacturers to obtain a “Certificate of Conformity” with the standards for each engine family and each model year of engines they produce. An application for a Certificate of Conformity must be supported with data showing

that a representative engine tested on EPA's Federal Test Procedure for Heavy Duty Engines ("FTP") complies with the Act's emissions standards. The application must also include a description of any "auxiliary emission control device" ("AECD")² installed on the engine that changes the engine's emissions when operated in real world as opposed to laboratory conditions. EPA uses the engine manufacturers' disclosure of AECDs in the application for certification to screen for "defeat devices," which are prohibited by Section 203(a)(3)(B) of the Act. Defeat devices are defined under the regulations implementing the Act as AECDs that "reduce the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use" 40 C.F.R. § 86.094-2. The purpose of the AECD reporting requirement and the defeat device prohibition is to ensure that an engine's emission performance in normal operating conditions is consistent with the test results used to support the certificate application.

In these enforcement actions EPA alleged that from 1987 to 1998 defendants sold heavy duty diesel engines equipped with defeat devices that increased NO_x emissions in on-highway truck operation by two to three times the 4.0 gram per brake horsepower hour ("g/bhp-hr.") regulatory standard (the "4.0 gram requirement"). Defendants argued that EPA's regulations during this period did not clearly prohibit the specific types of emission control strategies they were using. Defendants also contended that EPA had known about these strategies since 1991, but had not claimed prior to commencing these actions in 1998 that an engine's emission control

² Under the Act's regulations, an "AECD" is defined as any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of modulating, delaying, or deactivating the operation of any part of the emission control system. *See* 40 C.F.R. § 86.082-2. EPA contends that a computer algorithm that modulates how the engine operates, such as the algorithms used by defendants, is such an AECD.

system must “function the same under all normal operating conditions.” *United States v. Cummins Engine Co.*, U.S. Memo. in Support of Consent Decree at 97-98. Following a year of negotiations between the parties, during which time EPA met with TMA several times to hear the concerns of truck manufacturers, the parties reached a settlement by agreeing to be bound by the consent decrees. After a period of public comment, including comments filed by TMA, the court approved the decrees on July 1, 1999, finding that the decrees would serve the public interest. Defendants thus avoided, without admitting liability, the possibility that their existing engines would fail to receive EPA certification, causing an immediate shutdown of their assembly lines.

The decrees required the phased-in manufacture by defendants of lower-emission engines without defeat devices. As of October 1, 2002, all new on-road heavy duty diesel engines manufactured and sold by defendants must meet an emission standard of 2.5 g/bhp-hr NO_x (the “2.5 gram requirement”).³ Under otherwise applicable law, engine manufacturers would not be subject to this standard until model year 2004. *See* 40 C.F.R. § 86.004-11(a)(1)(I). The “pull ahead” the 2.5 gram requirement thus entails was intended to partially offset the alleged excess emissions from the engines defendants sold in the years prior to the decrees.

The decrees have a “Force Majeure” provision, under which neither “technological infeasibility” nor financial inability excuse a failure to meet the 2.5 gram requirement. To ensure that the 2.5 gram requirement is met under a broad range of operating conditions, the decrees provide that defendants must demonstrate compliance with the requirement not only on the FTP but on the “EURO III” test, which EPA claims measures emissions under conditions that are

³ This standard applies where NMHC (nonmethane hydrocarbon) emissions do not exceed 0.5 g/bhp-hr. If this NMHC standard is not met, the NO_x standard is 2.4 g/bhp-hr.

more representative of highway driving than the FTP. In addition, defendants must demonstrate that they meet a “Not-to-Exceed Limit,” which means that at any operating point within a specified area an engine cannot exceed a certain emission level.

II. THE POSITION OF THE PARTIES

TMA moved to intervene on March 9, 2001, as a defendant in three of the six enforcement actions settled under the decrees, those against Caterpillar, Cummins, and Detroit Diesel. Three out of the eight truck manufacturers represented by TMA, GM, Isuzu, and Freightliner, have joined in the motion. In its motion, TMA contends that the October 1, 2002, deadline set in the decrees will harm its economic interests because defendants will not have solved the engineering challenges posed by the decrees’ requirements in time for TMA’s members to integrate defendants’ new engines into new trucks prior to the deadline.

In declarations accompanying its motion, TMA asserts that major changes in a heavy duty engine require at least two years of redesigning and testing of the truck in which the engine will be used to ensure safety and reliability. At the time TMA filed its motion to intervene, 18 months prior to the October 2002 deadline, two of the defendants, Caterpillar and Cummins, claimed that they would complete their new engines by the deadline, but neither had obtained final EPA approval for the engines or submitted a compliant prototype engine to TMA’s members for integration. Caterpillar had also informed GM that it would be deleting one engine model from its product line because of the challenges posed by the decrees’ requirements. In addition, on February 5, 2001, the Chairman of Detroit Diesel wrote a letter to EPA stating that the October 2002 deadline was “now in serious jeopardy, due to the manufacturers’ problems in testing the engines Failure to resolve this problem will have major impacts on the engine manufacturers, related suppliers and industries, and the economy generally.” The letter included

an offer by Detroit Diesel “to consider committing to substantial additional emissions reduction measures, beyond what [Detroit Diesel] believes are needed to make a delay of the October 1, 2002 date emissions neutral”

TMA argues that these developments show that its members will not have the two years lead time they require to integrate defendants’ new engines into their new trucks prior to October 2002. TMA further argues that even if that much lead time were not required and Caterpillar and Cummins were able to complete their new engines and obtain EPA approval for them by the deadline, Caterpillar and Cummins alone could not supply the entire truck manufacturing industry with engines should Detroit Diesel fail to meet the deadline.⁴ In addition, according to TMA, the decrees make it illegal for defendants to supply non-compliant engines to truck manufacturers after the deadline, so TMA’s members cannot make up for delays or shortages in new engines by continuing to buy old ones. Therefore TMA contends that the only way to avert a shutdown of truck assembly lines across the nation and a reduction in new trucks on the market in fall 2002 is to modify the decrees to postpone the October 2002 deadline.

TMA also seeks to challenge the validity of the decrees on due process and statutory grounds. First, TMA contends that the October 2002 requirements violate the provision of the Clean Air Act providing that emission standards applicable to “heavy duty vehicles or engines” may not take effect prior to four model years after EPA promulgates the standards, and must remain in place for at least three model years. 42 U.S.C. § 7521(a)(3)(C). TMA argues that this provision guarantees truck manufacturers four years lead time to integrate new engines into their trucks, while the decrees do not guarantee any lead time. Under the decrees, as long as an engine

⁴ According to TMA, Cummins produced less than thirty percent of the engines used in the heavy duty truck manufacturing industry in 1999.

manufacturer completes the required changes to its engines by October 2002, it has complied with the decree, regardless of the lead time remaining. Second, TMA contends that the decrees constitute an attempt by EPA to establish emission standards through adjudication, thus circumventing the notice-and-comment rulemaking required under Section 553 of the Administrative Procedure Act, *see* 5 U.S.C. § 553, and Section 307(d) of the Clean Air Act, *see* 42 U.S.C. § 7607(d). Finally, TMA contends that the decrees violate due process because they apply retroactive standards without fair notice.

According to TMA, the parties did not anticipate these problems with the decrees and have not brought them to the court's attention, thus necessitating TMA's intervention. In its briefings to the court, TMA proposes specific modifications to the decrees which it claims would keep the truck manufacturing industry in operation and comply with statutory and due process requirements, while still preserving the legitimate expectations of the parties to the decrees and the decrees' environmental benefits. TMA proposes that the decrees be modified to allow defendants an alternative means of compliance: rather than meeting the 2.5 gram requirement by the current October 2002 deadline, defendants would have the option of extending the deadline in exchange for paying for emission reduction programs that offset the increase in emissions caused by the extension. The extension could not go beyond January 2004 and would be limited to two years from the time defendants supply a prototype engine complying with the current October 2002 requirements to the truck manufacturers (thus providing the two years lead time needed for integration).

EPA, Cummins, and Caterpillar oppose TMA's intervention in these actions. These parties argue that the harm TMA alleges its members will suffer under the decrees is speculative, because even if defendants cannot complete the required changes to their engines in time for the

truck manufacturers to integrate them into new trucks, the decrees allows defendants to continue selling non-compliant engines after October 2002 through paying Non-Compliance Penalties (“NCPs”) or utilizing emissions averaging, banking, or trading (“ABT”)⁵. Thus, the parties opposing TMA’s intervention contend that they anticipated the possibility that some defendants would not meet the deadline and provided an alternative means of compliance so that those defendants could continue operating—i.e., keep selling engines to their customers, the truck manufacturers. Because these mechanisms for avoiding shutdowns in both engine and truck manufacturing are already built-in to the decrees, these parties contend that TMA’s proposed modifications are unnecessary. These parties also point out that if defendants desire modifications to the decrees, they may seek the modifications themselves (one defendant, Detroit Diesel, has already approached EPA for this purpose). Thus, these parties contend that several paths remain available to defendants for achieving compliance with the decrees—meeting the October 2002 deadline, paying NCPs, utilizing ABT, or seeking modifications—and each defendant must choose its own path according to its needs. In seeking to intervene, these parties allege, TMA is simply trying to constrain defendants’ choices in order to enhance its members’ leverage in negotiations with defendants over engine prices.

The parties opposing TMA’s intervention also contest TMA’s claims that the decrees violate due process and statutory rights. They argue that the decrees do not violate the lead time requirements in Section 202(a)(3)(C) of the Clean Air Act because this provision only governs EPA rulemaking that promulgates new industry-wide standards, not actions brought by EPA against particular manufacturers to enforce an existing standard (the 4.0 gram requirement in

⁵Under ABT, defendants generate emission credits by reducing emissions in other areas. These credits then count towards compliance with the October 2002 requirements.

effect at the time of defendants' alleged violations). Furthermore, these parties argue, Section 202(a)(3)(C) applies only to heavy duty vehicles or engines for which EPA has adopted emission standards and which therefore must demonstrate compliance with those standards. Because EPA has not adopted any emission standards applicable to heavy duty vehicles—only standards applicable to heavy duty engines—these parties contend that EPA is not required to provide the manufacturers of such vehicles with the lead time required under 202(a)(3)(C).

Similarly, the parties opposing intervention contend that the decrees do not violate statutory or due process fair notice requirements because these requirements only apply to actual EPA rulemaking, not to enforcement actions. Moreover, these parties assert that even if there is merit to TMA's claims that the decrees violate statutory and due process rights, these rights belong to defendants, not TMA, and therefore TMA does not have standing to raise them.

III. ANALYSIS

TMA moves to intervene as of right as a defendant in these actions under Federal Rule of Civil Procedure 24(a) ("Rule 24(a)" or "24(a)"). In the alternative, TMA moves for permissive intervention under Federal Rule of Civil Procedure 24(b) ("Rule 24(b)" or "24(b)").

A. Intervention Standards

Rule 24(a)(1) permits intervention "upon timely application" where a federal statute "confers an unconditional right to intervene." Fed. R. Civ. P. 24(a)(1). Rule 24(a)(2) permits intervention where the applicant demonstrates: 1) a timely application; 2) a cognizable interest in the action; 3) an impairment of its ability to protect its interest if intervention is not granted; and 4) that the existing parties will not adequately protect its interest. *See Mova Pharm. Corp. v.*

Shalala, 140 F.3d 1060, 1074 (D.C. Cir. 1998).⁶ To meet the cognizable interest requirement of this test, the applicant must demonstrate that it has standing. *See Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984); *Stewart v. Rubin*, 948 F. Supp. 1077, 1105 (D.D.C. 1996).

Rule 24(b)(1) permits intervention “upon timely application” where a federal statute “confers a conditional right to intervene.” Fed. R. Civ. P. 24(b)(1). Rule 24(b)(2) permits intervention where 1) the application for intervention is timely; 2) the applicant’s claim or defense shares a common question of law or fact with the main action; and 3) intervention would not unduly delay the proceedings or prejudice the parties. *See* Fed. R. Civ. P. 24(b)(2).⁷

Because we find that TMA’s did not make a “timely application” for intervention as required under both 24(a) and 24(b), we do not consider whether TMA satisfied the other requirements for intervention under these rules.

B. Timeliness

⁶ The text of Rule 24(a) reads:

Upon timely application anyone shall be permitted to intervene in an action (1) when a statute of the United States confers an unconditional right to intervene; or (2) when 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).

⁷ The text of Rule 24(b) reads:

Upon timely application anyone may be permitted to intervene in an action (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicants claim or defense and the main action have a question of law or fact in common In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b).

If an application for intervention is untimely, “intervention must be denied.” *NAACP v. New York*, 413 U.S. 345, 365-66. Because a timely application is required for both intervention as of right and permissive intervention, a court should determine timeliness before moving on to the other intervention requirements. *See id.* at 365; *U.S. v. Prof. Air Traffic Controllers Org.*, 1982 U.S. Dist. LEXIS 14171 at 11 (D.D.C. 1982).

The timeliness of a motion to intervene is determined in light of all the circumstances. *NAACP v. New York*, 413 U.S. at 365-66. The length of time since the litigation was commenced is one factor to be considered in assessing timeliness, but is not by itself dispositive. *See id.* at 366; *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 129 (D.C. Cir. 1972). However, there is a presumption against post-judgment motions to intervene, *see Assoc. Builders and Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999), and motions to intervene after entry of a consent decree should be denied as untimely except in extraordinary circumstances, *see Delaware Valley Citizens Council for Clean Air v. Commonwealth of Pennsylvania*, 674 F.2d 970, 974 (3rd Cir. 1982). Other factors to be considered in assessing timeliness include: 1) the length of time the intervenor knew or should have known of its interest in the case; 2) any prejudice to the original parties caused by the intervenor’s delay in moving to intervene; 3) any prejudice to the intervenor if the motion is denied; and 4) any unusual circumstances that favor or disfavor intervention. *See Hodgson*, 473 F.2d at 129; *Stewart*, 948 F. Supp. at 1103.

TMA filed its motion to intervene on March 9, 2001, over two years after the action commenced and over a year and a half after the court approved the consent decrees settling the action. Despite this considerable delay, TMA contends that its motion to intervene is timely because it could not have anticipated the harm to its members from the decrees any earlier. TMA

argues that it only “recently” became clear that defendants would not complete a full product line of engines complying with the decrees’ requirements in time for TMA’s members to integrate the engines into new trucks prior to October 2002. According to TMA, it did not become aware that major engine changes would be required to comply with the decrees until between December 1999 and April 2000, and the public record did not reveal the technical difficulties defendants were experiencing in completing the required changes until February 2001, when Detroit Diesel wrote a letter to EPA requesting a deferral of the October 2002 deadline.

However, the fact that TMA met with EPA several times during the negotiations leading up to the decrees and filed extensive comments during the public comment period after the decrees were proposed indicates that it was aware of the requirements in the decrees, including the “pull ahead” standards that it now challenges. This knowledge was sufficient to alert TMA of the potential harm to its members’ interests under the decrees. *See Hirshon v. Bolivia*, 979 F. Supp. 908, 913 n.5 (D.D.C. 1997) (denying intervention in part because movants waited until five months after they learned of the terms of the settlement and its potential effect on their interests to intervene); *Mapco Int’l, Inc. v. U.S. Dep’t of Energy*, 1992 U.S. Dist. LEXIS 12108 at 3 (D.D.C. 1992) (denying intervention despite the movants’ “genuine and important interest” in the case on the grounds that they had “the same general interest since the case’s inception” but had waited over a year to intervene).

In addition, the letter from Detroit Diesel does not distinguish this case from *Delaware Valley*, where intervention in a consent decree was denied in part because “none of the circumstances or facts upon which appellants base their claim for relief have changed since the consent decree was entered.” 674 F.2d at 975. Even if defendants’ own concerns that they might not meet the October 2002 deadline did not appear in the public record until February 2001,

TMA expressed *its* concern that they might not meet the deadline long before, in its comments on the decrees. The fact that the Detroit Diesel letter might have heightened TMA's existing interest in the decrees does not justify its delay in intervening. *See Stewart*, 948 F. Supp. at 1104 (denying intervention to movants who failed to "appreciate the *extent* to which their rights would ultimately ... be affected") (emphasis added); *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978) (denying intervention to appellants who argued that they "did not know the settlement would be to their detriment," on the grounds that they "surely ... knew the risks" and therefore "should have joined the negotiations before the suit was settled" to protect their interests). Moreover, given that TMA's claimed interest in these actions is not so much that defendants won't meet the October 2002 deadline as it is that TMA's members will not have the two years lead time they claim they require for integrating new engines into their trucks, TMA should have been aware of the threat to its interest in October 2000 when the clock began ticking on those two years. Instead, it waited to intervene until five months later. TMA's excuses for its delay do not constitute "extraordinary circumstances" that justify post-judgment intervention. *Delaware Valley*, 674 F.2d at 974.⁸

TMA also contends that it justifiably relied on a promise made by EPA at the time the decrees were entered not to oppose on timeliness grounds the later intervention of a party seeking to address an implementation issue "when that issue arises." *See United States v. Cummins Engine Co.*, U.S. Memo. in Support of Consent Decree at 39-40. TMA argues that it waited until

⁸ The only higher authority TMA cites in which intervention was permitted after a settlement does not suggest otherwise. In *Arizona v. California*, 460 U.S. 605 (1983), the Supreme Court allowed Indian tribes to intervene in litigation dating back many years, but did not allow the tribes to reopen issues already settled. TMA also cites *NRDC v. Costle*, 561 F.2d 904 (D.C. Cir. 1977), but in that case the D.C. Circuit permitted intervention two months *before* the settlement was approved, and only to allow the intervenors to participate in implementing the rulemaking ordered by the settlement, not to reopen settled issues. *Id.* at 907-908.

the problems with the October 2002 requirements arose (presumably meaning until Detroit Diesel wrote the letter to EPA) to intervene in reliance on this promise, and that EPA is now renegeing. EPA contends, however, that its promise was meant to extend only to implementation issues that were not foreseen at the time the decrees were entered. As noted above, TMA was aware of the possibility that defendants might not meet the deadline long before it moved to intervene, as this possibility was provided for in the decrees and was the subject of TMA's comments on the decrees. TMA cannot claim, therefore, that it did not foresee this "implementation issue." *See U.S. v. U.S. Steel*, 548 F.2d 1232, 1236 (5th Cir. 1977) (finding that appellant's reliance on EPA's promise to "entertain information and requests ... concerning modification or extension of the consent decree" did not excuse its failure to intervene until a year after the consent decree was entered).

A second consideration in assessing the timeliness of a motion to intervene is the prejudice caused to the original parties. Courts regard the potential for prejudice as particularly severe where, as in this case, the original parties have reached a settlement. *See Moten v. Bricklayers, Masons and Plasterers Int'l Union of America*, 543 F.2d 224, 228 (D.C. Cir. 1976) (noting the appropriateness of denying intervention in order "to avoid risk of a hard-won settlement package becoming undone"); *U.S. Steel*, 548 F.2d at 1235 (stating that "[i]nterventions after judgment have a strong tendency to prejudice existing parties ... or to interfere substantially with the orderly process of the court"). TMA contends that permitting it to intervene would not prejudice the original parties because it seeks only a minor modification to the consent decrees which would give the defendants an additional means of complying with the decrees, without jeopardizing the parties' expectations or the environment. EPA and two of the defendants disagree, however, noting that it took a year of intense negotiations for them to reach

a settlement. These parties persuasively assert that the October 2002 requirements TMA seeks to modify are the heart of their bargain, the main concession defendants made in exchange for EPA foregoing an immediate recall of defendants' engines. In addition, two of the defendants maintain that they can meet the October 2002 deadline, and therefore deferral of the deadline will cause their efforts towards timely compliance to be wasted. *See Stewart*, 948 F. Supp. at 1104 (finding that intervention would cause undue delay where the parties were prepared to implement the settlement agreement).

Moreover, in seeking to intervene TMA not only seeks to defer the deadline but alternatively to challenge the decrees' overall validity. Therefore, allowing TMA to intervene could undo the decrees entirely. *See Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980) (denying intervention three months after entry of consent decree on the grounds that it could "destroy the decree and force a trial"). Were this to come about, not only would the parties' settled expectations be upset, but the public interest would not be served. The resolution of this litigation would be delayed, during which time the air pollution caused by emissions from heavy duty engines would remain unabated. *See id.* at 22 (stating that "[a]s long as this suit remains unresolved, the public and private resources invested in it lie fallow and opportunities to rectify the wrongs of which the plaintiffs complain are unrealized.") *Alaniz*, 572 F.2d at 659 (emphasizing the "seriousness" of the prejudice resulting when "relief from long-standing inequities is delayed").

The prejudice caused to the party seeking intervention should its motion be denied is also a factor in determining timeliness. While TMA contends that the original parties will not adequately protect its members' interest in ensuring sufficient lead time for integrating defendants' new engines into their trucks, it has not demonstrated that defendants are not

adequately representing this interest. Caterpillar points out in its opposition to TMA's intervention that it has recently alerted the court of potential problems in meeting the October 2002 deadline and the consequences these may have for truck manufacturers. TMA also had an opportunity to voice its concerns in its comments on the consent decrees. *See Stewart*, 948 F. Supp. at 1104-1105 (holding that the movant had no need to intervene when it had other "reasonable means to voice [its] concerns about the Settlement Agreement."). Finally, to the extent that denial of TMA's motion would prejudice its interests, TMA is largely responsible for this prejudice because it waited for defendants to raise its concerns rather than raising them itself. *See Consolidated Edison Co. v. Breznay*, 683 F. Supp. 832, 836 (D.D.C. 1987) (denying intervention where movants waited five months to intervene while "rel[ying] on another ... to advance their arguments").

In sum, TMA cannot satisfy the timeliness requirement for intervention under 24(a) or 24(b) because it failed to intervene when it became aware of the October 2002 requirements and their potential to harm TMA'S interests, and because intervention at this late date would cause substantial prejudice to the parties.

IV. CONCLUSION

For the foregoing reasons, it is this 17th day of January, 2002, hereby

ORDERED that TMA's motion to intervene is **DENIED**.

Henry H. Kennedy, Jr.
United States District Judge

