THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CENTER FOR BIOLOGICAL DIVERSITY, a nonprofit organization, Plaintiff, vs. **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** et al., Defendants.	§	Case No.: 2:09-cv-00670-JCC MOTION TO INTERVENE IN SUPPORT OF DEFENDANTS U.S. ENVIRONMENTAL PROTECTION AGENCY *ET AL.* NOTE ON MOTION CALENDER: **September 11, 2009**

Pursuant to Rules 24(a) and (b) of the Federal Rules of Civil Procedure, the American Petroleum Institute ("API"), the Chamber of Commerce of the United States of America (the "Chamber"), the Utility Water Act Group ("UWAG"), and the Utility Air Regulatory Group ("UARG") (collectively, the "Proposed Intervenors"), respectfully move for leave to intervene in the above-captioned matter.[1] The Complaint filed by the Center for

[1] Although Fed. R. Civ. P. 24(c) generally requires that a motion to intervene should be accompanied by a pleading, the Ninth Circuit has "approved intervention motions without a pleading where the court was otherwise apprised of the grounds for the motion." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992). Here, Proposed Intervenors' motion provides sufficient grounds to enable the Court to make the requisite determination as

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Biological Diversity ("CBD") in this case challenges a final decision of the United States Environmental Protection Agency ("EPA" or "Agency") reflected in January 29, 2009 correspondence from EPA Region 10 to the State of Washington's Department of Environmental Quality approving Washington State's 2008 list of impaired waters under Section 303(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1313(d) (the "303(d) List"). Counsel for Plaintiff in the above-captioned action has been contacted and has indicated that CBD does not consent to Proposed Intervenors' motion. Counsel for Proposed Intervenors has contacted counsel for EPA but EPA has not yet taken a position concerning the instant motion.

API is a nationwide trade association, representing over 400 member companies involved in all aspects of the oil and gas industry in the United States, including exploration, production, and refining. A number of API's members have facilities in Washington (or directly off its coast) that are subject to CWA permitting requirements that may be affected by the outcome of this litigation. Indeed, API members have at least three facilities that are currently permitted to discharge directly into the Washington coastal zone, the listing of which is at issue in this litigation. API frequently represents its members in regulatory and judicial matters involving the CWA.

The Chamber is the world's largest business federation representing an underlying membership of over 3,000,000 businesses and organizations of all sizes. The Chamber has multiple members in Washington that have CWA permits to discharge into waters that feed into

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to intervention. Moreover, it is not clear that the filing of a proposed answer now would be appropriate in light of the Court's order postponing the deadline to file an answer until October 26, 2009, pending the outcome of settlement discussions. Of course, the Proposed Intervenors are prepared to file an answer immediately if the Court concludes that would be helpful and consistent with its prior scheduling order. However, Proposed Intervenors believe it would be most efficient to keep the parties on the same schedule.

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Washington's coastal waters and must comply with any CWA obligations that may result from the current litigation. The Chamber often represents the interests of its members in litigation throughout the country.

UWAG is a voluntary, non-profit, unincorporated group of 207 individual electric energy companies and three national trade associations of electric energy companies, municipalities, and cooperatives, including at least one company that provides power directly to consumers within the State of Washington. UWAG also has at least one member with a facility in Washington with discharges regulated by a CWA permit that reach the coastal waters in question. UWAG's purpose is to address regulatory matters pertaining to the federal CWA and related litigation.

UARG is a voluntary, not-for-profit, unincorporated group of electric generating companies and organizations and five national trade associations. At least one of UARG's trade association members has members with facilities in Washington with discharges regulated by a CWA permit that reach the coastal waters in question. UARG's purpose is to participate collectively on behalf of its members in agency rulemakings and other regulatory proceedings under the Clean Air Act and other environmental statutes that affect the interests of electric generators and in litigation arising from those proceedings.

As discussed below, Proposed Intervenors should be allowed to intervene in this action because they meet the standards for intervention.

I. PROPOSED INTERVENORS MEET THE STANDARD TO INTERVENE AS OF RIGHT UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(a)

Federal Rule of Civil Procedure 24(a) provides for intervention as of right if each of the following tests is met: (1) the motion is timely made; (2) the applicant claims a

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"significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the interest could be impaired or impeded as a result of the litigation; and (4) existing parties do not adequately represent the applicant's interests. Fed. R. Civ. P. 24(a); *see California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006) ("*Lockyer*"). The U.S. Court of Appeals for the Ninth Circuit has stated that these tests should be applied liberally in favor of potential intervenors. *Id.*; *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). In light of this liberal standard, it is not surprising that this district has allowed other groups to intervene in citizen suits such as this one. *See, e.g., Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962, 964-65 (W.D. Wash. 1996) (allowing an industry-sponsored entity to intervene in a citizen suit brought against EPA under the CWA); *Dioxin/Organochlorine Ctr. v. Rasmussen*, 1993 WL 484888 (W.D. Wash. 1993) (allowing multiple intervenors in a citizen suit brought against EPA under the CWA). Likewise, this Court should grant Proposed Intervenors' motion because it satisfies each of the Rule 24(a) tests for reasons explained in greater detail below.

A. Proposed Intervenors' Motion to Intervene Is Timely

Courts evaluate timeliness for Rule 24(a) purposes with reference to: (1) the stage of the proceeding, (2) possible prejudice to other parties, and (3) the reason for the length of delay. *See Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978). Proposed Intervenors' motion comes before EPA has filed an answer or certified the administrative record, and before any other substantive issues have been presented to the Court, and thus satisfies this three-part test.

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First, proposed Intervenors seek to intervene in the current proceeding while it is in its very earliest stage. The parties have not briefed any issues, and the party on whose behalf Proposed Intervenors intend to intervene – EPA – is not even currently scheduled to file an answer and the administrative record until October 26, 2009. Order, *CBD v. EPA*, No. 2:09-cv-00670 (order dated July 24, 2009, setting date for Government's answer and filing of the administrative record at October 26, 2009) (Docket No. 13).

Second, the proposed intervention would not result in any prejudice to any of the parties to the litigation because, as already detailed above, EPA is not scheduled to file an answer and the administrative record until October 26, 2009. The Court has not yet set a schedule for the briefing that would follow. Intervention at this juncture would not result in any delay in the briefing schedule or in any way compromise the ability of the Plaintiff to respond to the arguments raised by Proposed Intervenors. Thus, no party faces prejudice by intervention at this stage.

Finally, proposed Intervenors have not unreasonably delayed filing their motion because they were not provided any notice of the commencement of this action. The Ninth Circuit has previously held that intervention was appropriate—even where potential intervenors did not move to intervene until after a settlement had been reached—in a case where the respondent was the government and intervenors were not initially put on notice that their interests could be harmed. *See United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) ("*Carpenter*"). In *Carpenter*, the intervenors moved to intervene promptly upon learning that a settlement had been reached that they thought would harm their interests, and the court concluded that the intervention motion was timely. 298 F.3d at 1125. If the intervenors in

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Carpenter did not unreasonably delay their filing, then it follows that Proposed Intervenors, who acted far more quickly, did not unreasonably delay their filing.

Under the current circumstances, Proposed Intervenors' motion, coming before the filing of an answer or the administrative record, any substantive briefing, or a proposed settlement, is timely and imposes no prejudice on any of the parties.

B. Proposed Intervenors Possess a Cognizable Interest, and that Interest May Be Impaired or Impeded as a Result of this Proceeding

Proposed Intervenors have a cognizable interest that can be impaired by the outcome of this proceeding. The Ninth Circuit has explained that Rule 24's "'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Moreover, the Ninth Circuit has "rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest." *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (*citing Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)); *see also Lockyer,* 450 F.3d at 441 (Rule 24 does not require a specific legal or equitable interest for intervention). Viewed in this light, the Proposed Intervenors clearly have an interest in this litigation and its outcome that is sufficient under Rule 24(a).

Various companies that are members of Proposed Intervenors' constituent organizations own and/or operate facilities throughout Washington that have CWA permits and that are directly impacted by EPA's determination to approve or reject Washington's 303(d) List. Some of these facilities have permits issued under the CWA that authorize them to discharge directly into the coastal waters that CBD seeks to have declared impaired under Section 303(d), while other facilities discharge to rivers or streams that ultimately flow into the coastal waters at issue. If Plaintiff obtains the relief sought in the Complaint – through either a judicial decision

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or settlement – then the CWA permits that Proposed Intervenors' members hold may be modified by the State or EPA in order to reduce or eliminate certain discharges of wastewater that are currently allowed.[2] Although Rule 24(a) intervention does not necessarily require a specific legal interest, Proposed Intervenors' members have such an interest because it is well-settled that CWA permitting requirements affect the use of real property and create legally protectable interests sufficient to support intervention. *Sierra Club v. U.S. Environmental Protection Agency*, 995 F.2d at 1483, 1485-86 (9th Cir. 1993) ("In the case before us, . . . the lawsuit would affect the use of real property owned by the intervenor by requiring [EPA] to change the terms of permits it issues to the would-be intervenor, which permits regulate the use of that real property. These interests are squarely in the class of interests traditionally protected by law."). Moreover, if Proposed Intervenors' members have conditions of their permits modified (or eliminated entirely), they are likely to be forced to engage in costly and time-consuming studies and construction in order to comply with the resulting new discharge and reporting requirements. Thus, Proposed Intervenors' members have a cognizable interest in this litigation that will be directly and materially harmed if this Court grants the relief CBD seeks.

C. Proposed Intervenors' Interest Will Not Be Adequately Protected By CBD or EPA

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[2] CBD states in its complaint that "once a water body is listed as impaired pursuant to Clean Water Act § 303(d), the state has the authority and duty to control pollutants from all sources that are causing the impairment. Specifically, the state or EPA must establish total maximum daily loads of pollutants that a water body can receive and still attain water quality standards." Complaint, ¶ 29. Proposed Intervenors' members include companies that – pursuant to CWA permits – discharge to or upstream of water bodies that CBD seeks to have listed as impaired. Thus, they would have to bear the burden of complying with these total maximum daily loads ("TMDLs") that must be established if CBD is granted the relief it seeks. In this respect, they are similarly situated to the City of Phoenix in *Sierra Club v. U.S. Environmental Protection Agency,* where the Ninth Circuit allowed the city to intervene, stating "[b]ecause the Act protects the interest of a person who discharges pollutants pursuant to a permit, and the City of Phoenix owns such permits, the City has a protectable interest. These permits may be modified by control strategies issued as a result of this litigation, so the City's protectable interest relates to this litigation." *Sierra Club v. U.S. Environmental Protection Agency,* 995 F.2d 1478, 1485-86 (9th Cir. 1993) (emphasis added).

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Proposed Intervenors' direct and substantial interest in the outcome of this proceeding will not be adequately protected by CBD or EPA. An applicant for intervention need show only that representation of its interest "may be" inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538-39 & n.10 (1972) ("*Trbovich*"); *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1498 (9th Cir. 1995) ("*Forest Conservation Council*") (citing *Trbovich, supra*). This burden should be treated as "minimal." *Trbovich,* 404 U.S. at 538 n.10.

In this case, neither CBD nor EPA will adequately represent the interests of Proposed Intervenors and their members. CBD certainly does not represent the interests of Proposed Intervenors. CBD seeks to reverse EPA's prior approval of Washington's 303(d) List and impose discharge limits on Proposed Intervenors' members. Indeed, CBD is actively opposing Proposed Intervenors' participation in this litigation. Thus, CBD's interests in this litigation are plainly adverse to those of Proposed Intervenors and their members.

Although EPA is not directly adverse to Proposed Intervenors, EPA also will not adequately represent their interests' either. EPA has already admitted that it is actively engaged in "positive and productive" settlement discussions with CBD. Stipulation to Extend Time, ¶4, *CDC v. EPA*, No. 2:09-cv-00670 (Docket No. 12). EPA properly determined to approve Washington's 303(d) List, and any action that might revise or reopen that determination would prejudice the interests of Proposed Intervenors' members. Consequently, EPA has already demonstrated that it does not adequately represent the interests of Proposed Intervenors and their members.

Regardless of the status of settlement discussions, it is well-settled that regulatory agencies generally do not adequately represent the "narrow, parochial interests" of regulated

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entities, because agencies are charged with broad duties to the public. *Forest Conservation Council*, 66 F.3d at 1499. In this case, EPA's broad duty under the CWA is to implement the various programs established by Congress to achieve the objectives of the Act to restore and maintain the quality of the Nation's waters. As the Supreme Court explained in *Trbovich*, a government agency cannot be characterized as able to represent adequately the interests of intervenors such as Proposed Intervenors if the agency has substantially similar interests to the potential intervenor but also has a statutory charge to pursue a goal different from that of the potential intervenor. *Trbovich*, 404 U.S. at 538-39; *see also Forest Conservation Council*, 66 F.3d at 1498. EPA clearly has objectives in this case that differ from those of Proposed Intervenors because EPA's priority is to fulfill its statutory duties and to regulate a specific geographic area while Proposed Intervenors' primary goal is to protect their members' interests and ensure that they are regulated consistent with the law. There is no guarantee that EPA's determination of what is appropriate for the regulated community will be acceptable to the regulated community or consistent with the law. EPA, in assessing its statutory duties to regulate for the public's benefit, and Proposed Intervenors, in seeking to protect their members of the regulated community, will not necessarily share all of the same interests in defending EPA's 303(d) decision. Thus, EPA's representation of Proposed Intervenors' interests will be inadequate.[3]

This is not a case where EPA is acting to enforce for the benefit of the public as a whole a law that does not have any unique impact on Proposed Intervenors or their members. In

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[3] CBD's complaint focuses on global CO_2 emissions as the source of impairment of Washington's coastal waters. To the extent EPA itself focuses on this alleged source of purported changes in the pH of the coastal waters, it may not adequately consider the potential impacts of its decisions on facilities that discharge – directly or indirectly – to those coastal waters.

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this case, EPA's defense of its decision will necessarily affect regulated entities differently from the general public. *Forest Conservation Council*, 66 F.3d at 1498 (discussion of intervention in cases where intervenor's interests differ from those of general public). Other circuits have recognized that under those circumstances, it is possible that the government's protection of the movant's interests may be inadequate and the minimal burden for intervention is met. *See, e.g., Mille Lacs Band of Chippewa Indians v. Minn.*, 989 F.2d 994, 999-1001 (8th Cir. 1993); *Conservation Law Found. v. Mosbacher*, 966 F.2d 39, 44-45 (1st Cir. 1992); *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986). As in those cases, Proposed Intervenors' and the government's interests here are potentially different, as Proposed Intervenors seek to protect their members' interests while EPA takes actions intended to promote its view of the public good. In sum, because their interests are not adequately represented by either CBD or EPA, Proposed Intervenors should be allowed to intervene in this case.

Because Proposed Intervenors have filed a timely motion and demonstrated a protectable interest in this litigation that would not be protected by any of the existing parties to the litigation, this Court should allow Proposed Intervenors to intervene under Rule 24(a) to defend EPA's decision on the 303(d) List.

II. PROPOSED INTERVENORS MEET THE STANDARD FOR PERMISSIVE INTERVENTION UNDER RULE 24(b)

Even if the Court concluded that intervention under Rule 24(a) was inappropriate, this Court still should grant Proposed Intervenors' motion because it meets the standard for permissive intervention under Federal Rule of Civil Procedure 24(b). Rule 24(b) authorizes intervention when intervenors show: "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a

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question of fact in common." *San Jose Mercury News, Inc. v. U.S. Dist. Court--Northern Dist.*, 187 F.3d 1096, 1100 (9th Cir. 1999). In addition, courts must examine whether intervention "will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b); *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1111 n.10 (9th Cir. 2002) (there was no issue of undue delay when defendant-intervenors filed their motion for intervention shortly after the case was filed and agreed to abide by briefing orders). Proposed Intervenors' motion satisfies all of these criteria.

First, to the extent this Court has jurisdiction to hear this suit, it has jurisdiction to entertain Proposed Intervenors' defenses. Second, Proposed Intervenors' motion is timely because it has been filed before any substantive filings in this case, and the motion was filed promptly upon learning of a complaint for which they received no prior actual notice. EPA has not even filed the administrative record yet and is not obligated to do so until October 26, 2009. Consequently, intervention will not delay proceedings in this action or prejudice any party. Third, Proposed Intervenors are representatives of regulated industries that possess extensive expertise and interest in the regulation of water discharges in the State of Washington and the consequences of alterations to the permitting schemes that regulate those discharges that CBD seeks to effect through the instant litigation. Moreover, Proposed Intervenors' defense of this suit will raise questions of law or fact that are in common with those raised in the Complaint. Therefore, Proposed Intervenors meet the standards for permissive intervention under Rule 24(b), and their motion should be granted.

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WHEREFORE, for the foregoing reasons, Proposed Intervenors meet the requirements for intervention pursuant to Federal Rules of Civil Procedure 24(a) and 24(b), and respectfully request that this Court grant this motion for leave to intervene in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2009, I electronically filed the foregoing *Motion to Intervene in Support of Defendants U.S. Environmental Protection Agency et al.* via the Court's CM/ECF system, which will send notification of such filing to the following counsel:

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