THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CENTER FOR BIOLOGICAL DIVERSITY, a nonprofit organization, Plaintiff, v. **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** et al., Defendants.	§	Case No.: 2:09-cv-00670-JCC REPLY OF AMERICAN PETROLEUM INSTITUTE, *ET AL.*, IN RESPONSE TO FEDERAL DEFENDANT'S OPPOSITION TO MOTION TO INTERVENE AS DEFENDANTS-INTERVENORS NOTE ON MOTION CALENDAR: **September 11, 2009**

Defendant United States Environmental Protection Agency ("EPA") filed on September 8, 2009, an opposition ("EPA's Opp.") (Docket No. 24) to the Proposed Intervenors' Motion to Intervene ("Motion") (Docket No. 18). EPA argues that the Proposed Intervenors should be denied participation in the instant litigation because they lack a protectable interest significant enough to justify intervention. EPA's Opp. at 5-11. EPA's opposition is without

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merit because EPA clearly misapprehends the relevant standard in the Ninth Circuit for granting intervention in a case such as the current one. Consequently, this Court should grant the Motion.

The requirements for granting intervention should be read broadly in favor of intervention. *Donelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). The Ninth Circuit therefore refuses to adopt a bright line rule on intervention and instead instructs that the analysis should be guided by practical and equitable considerations. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). The National Pollution Discharge Elimination System ("NPDES") permits issued to Proposed Intervenors' members under the Clean Water Act ("CWA") are protected interests that will be affected if the Center for Biological Diversity ("CBD") should prevail in this litigation and force EPA to list Washington's coastal waters as impaired for pH. Thus, it is wholly appropriate for the Proposed Intervenors to be allowed to participate now – before the coastal waters are listed – rather than to force them to litigate these issues later should CBD prevail (or should the case be settled on terms unfavorable to Proposed Intervenors).

EPA seeks to exclude the Intervenors from the litigation for essentially two reasons: (1) Proposed Intervenors fail to identify specific NPDES permits affected by the litigation; and (2) Proposed Intervenors' interests are speculative because they have not shown that the litigation would impair their NPDES permits. EPA's Opp. at 5-10. Neither of EPA's arguments has any merit.[1]

EPA's first argument fails because it is ultimately irrelevant. Proposed Intervenors affirmatively established in their motion that some of their members discharge

[1] The arguments set forth herein regarding intervention as of right apply equally to EPA's opposition to the Proposed Intervenors' motion for permissive intervention.

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directly into the waters at issue in this litigation – Washington's coastal waters. Motion at 2-3, 6. *See Southwest Center for Biological Diversity v. Berg,* 268 F.3d 810, 820 (9th Cir. 2001) (court required to take all well-pleaded nonconclusory allegations in a motion to intervene as true). They further established that other members discharge into waterbodies that feed into Washington's coastal waters. *Id.* They also established that these discharges were pursuant to NPDES permits, which contain pH limits.[2] *Id.* While not required to do so, Proposed Intervenors are providing further evidence of the existence of these permits herewith. *See* Declaration of Ronald Chittim at ¶¶ 2, 3.

EPA's more fundamental point seems to be that because specific permits are not directly at issue in the litigation, the Proposed Intervenors lack sufficient interest to intervene. The Ninth Circuit addressed this issue directly in *Sierra Club v. EPA*, 995 F.2d 1478, 1486 (9th Cir. 1993). After devoting several pages to whether the City of Phoenix could intervene to protect its NPDES permits against relief seeking to alter them, the Ninth Circuit explained that the City:

> also has a protectable interest with respect to the compilation of lists of problem waters, and to the identification of point sources. Once the lists are compiled and the point sources identified, control strategies will be required for waters which fail to meet water quality standards "due entirely or substantially to discharges from point sources of any toxic pollutants." 33 U.S.C. § 1314(l)(1)(B) ("B" list waters). The obligation to implement control strategies is triggered by the compilation of the problem water lists and the identification of point sources, so an adjudication on these issues could "result in practical impairment of the [City's] interests." *Yniguez*, 939 F.2d at 735. Waters affected by City discharges may be listed. Therefore, the City has a sufficient interest as to all of the remaining issues raised in the underlying litigation.

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[2] It is surprising that EPA seeks to raise some doubt in the Court's mind about the terms of the permits in question. EPA must be aware that the permits are all publicly available at http://www.ecy.wa.gov/programs/wq/permits/wwdischargepermits.html (last visited September 10, 2009) – they are certainly available to EPA as the agency responsible for overseeing the NPDES permit program – and all of them contain limits for pH.

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Sierra Club, 995 F.2d at 1486 (emphases added). This analysis regarding when intervention in a case involving a 303(d) listing is appropriate makes no reference to specific permits. Instead, the Ninth Circuit's reasoning was based on the City having a protectable interest in the listing decision because the regulatory consequences that flow from a 303(d) listing "could" impair the City's interests because waters to which the City discharged "may" be listed. *Id.*

EPA's reliance on *ManaSota-88, Inc. v. Tidwell*, 896 F.2d 1318 (11th Cir. 1990), is misplaced given that in *ManaSota-88* the court affirmed the denial of intervention because the intervenors could not identify any waterbody remaining at issue in the litigation into which any member discharged. *Id.* at 1322-23. That contrasts starkly with the instant case in which only one defined set of waters is at issue – Washington's coastal waters – and Proposed Intervenors have members discharging into those waters or into tributaries of the coastal waters. Thus, Proposed Intervenors would satisfy the test for intervention applied in *ManaSota-88*.

EPA's second argument is that Proposed Intervenors' interests are too speculative and remote because the 303(d) listing is the first step in a multi-stage process with multiple possible outcomes. EPA's Opp. at 7-11. EPA's argument simply has no relevance in the Ninth Circuit. The Ninth Circuit's use of the terms "could" and "may" in *Sierra Club* demonstrates that a negative impact need not be definite before intervention is warranted. *See* 995 F.2d at 1486. In light of the legal consequences that flow from a 303(d) listing, the court understood that the results of listing are far more definite (and consequential) than EPA suggests. In this case, following a listing of State of Washington marine waters as impaired for pH, Washington State Department of Ecology ("WSDE") staff would review applications of Proposed

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Intervenors' members to renew or amend NPDES permits that discharge to or adjacent to the listed segment and in the process would apply additional considerations not previously applicable to the discharges.[3] These new considerations would have direct cost implications for studies and engineering requirements that would be automatically applicable to applications of Proposed Intervenors' members based solely upon the Section 303(d) listing.[4] Moreover, although a TMDL does not spring into being the moment a waterbody is listed, eventually a TMDL would be established. Federal regulations at 40 C.F.R. Section 130.7(b) require that states establish a priority ranking for TMDL development for each waterbody listed as impaired, so eventually the State of Washington would have to create a TMDL with which permittees must comply. In *Sierra Club*, the Ninth Circuit correctly recognized that a 303(d) listing has consequences and that permittees should be allowed to intervene to participate in litigation on issues concerning that listing. 995 F.2d at 1486. Likewise, Proposed Intervenors should be allowed to intervene here.

EPA also fails to acknowledge the practical advantages in allowing Proposed Intervenors to participate now rather than being excluded and having to litigate later should EPA either lose or settle on terms unfavorable to the Proposed Intervenors. EPA argues that "if any such modification [of NPDES permits] were to occur, it would only occur after several more interim, time-consuming steps." EPA's Opp. at 11. If Proposed Intervenors prevail, then they and EPA would be spared these several "interim, time-consuming steps."

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[3] The additional considerations are provided at Section 3.3.11 and Figure VI-6 of the WSDE *Water Quality Program Permit Writer's Manual* (Publication No. 92-109, Revised July 2008), and include potential requirements to conduct a receiving water study, potential interim permit limits, a restriction on additional loading of the pollutant causing the impairment, and potential requirements to prepare an engineering report on options and cost.

[4] As the heading for Figure VI-6 clearly states, it applies to permitting discharges to a 303(d) listed waterbody with no TMDL.

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In summary, practical and equitable considerations should guide this Court's decision-making. Given that the law states that intervention is warranted where parties with an interest, such as a NPDES permit, seek to intervene in a 303(d) listing challenge that may impact that permit, and given that intervention now would save resources later, this Court should grant the Motion.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2009, I electronically filed the foregoing *Reply of American Petroleum Institute, et al., in Response to Federal Defendant's Opposition to Motion to Intervene as Defendants-Intervenors* via the Court's CM/ECF system, which will send notification of such filing to the following counsel:

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