THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	CASE NO. C13-1839-JCC ORDER

This matter comes before the Court on motions to intervene from the State of Washington Department of Ecology ("Ecology") (Dkt. No. 11), Northwest Pulp & Paper Association ("NWPPA") (Dkt. No. 12), and Manufacturing Industrial Council (MIC) (Dkt. No. 14). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motions for the reasons explained herein.

I. BACKGROUND

Plaintiffs are a number of non-profit organizations and a trade association, all of which have interests related to the implementation of the Clean Water Act. (Dkt. No. 1 at 3–6.) On October 11, 2013, they filed a complaint for declaratory and injunctive relief under the Clean Water Act, 33 U.SC. § 1251, *et seq*.

Under the Clean Water Act, states must establish water-quality standards "to protect the

public health or welfare, enhance the quality of water and serve the purposes of [the Clean Water Act].” 33 U.S.C. §1313(c)(2)(A). States submit these standards to the EPA for review. *See* 33 U.S.C. § 1313(c). If the EPA determines that a state’s standard is not consistent with the Clean Water Act, it must inform the state of what changes are required and, if the changes are not made, the EPA must promulgate a revised or new standard. *See* 33 U.S.C. § 1313(c)(3)–(4).

One component of calculating safe water-quality standards is establishing a fish-consumption rate, which theoretically reflects how much fish people eat and therefore what level of water pollutants are safe. Washington currently uses a fish-consumption rate of 6.5 grams/day. (Dkt. No. 1 at 8.) Plaintiffs argue that a number of communications from EPA to Washington state demonstrate that EPA has already determined that Washington’s water-quality standards and fish-consumption rate are inaccurate and must change. (Dkt. No. 1 at 10–13.) In this action, Plaintiffs seek an order requiring EPA to promulgate revised standards pursuant to 33 U.S.C. § 1313(c)(3). (Dkt. No. 1 at 13–14.)

Ecology, NWPPA, and MIC have filed motions to intervene. Plaintiffs oppose Ecology’s motion (Dkt. No. 16), but do not oppose the motions from NWPPA and MIC (Dkt. No. 20). Plaintiffs do, however, object to these actors’ characterizations of the claims in the case and seek to bar any intervenors from “impermissibl[y] broadening . . . the issues.” (Dkt. No. 20 at 6.)

II. DISCUSSION

A. Standards for Intervention

Under Federal Rule of Civil Procedure 24(a), a court must allow an applicant to intervene if four conditions are met: (1) the motion is timely; (2) the applicant has a “significantly protectable” interest in the property or transaction that is the subject of the action; (3) resolving the action may, as a practical matter, impair or impede the movant’s ability to protect that interest; and (4) the existing parties do not adequately represent that interest. Fed. R. Civ. P. 24(a)(2); *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817–18 (9th Cir. 2001) (internal quotation marks and citation omitted). The party seeking to intervene must show that it

meets all requirements for intervention. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). Rule 24(a) is generally construed liberally in favor of potential intervenors and is guided by practical rather than technical considerations. *Southwest Ctr.*, 268 F.3d at 818.

No party argues that any of these motions to intervene are untimely, and the court agrees. The following analyses therefore discuss only the other three considerations relevant to intervening. [1]

B. Motion from Ecology

Ecology argues that its "significantly protectable" interest is that it is engaged in an ongoing effort to revise its standards and may, as a result of the litigation, be forced instead to implement standards from EPA. (Dkt. No. 11 at 4.) Ecology acknowledges that EPA may adequately represent Ecology's belief that the EPA Administrator has not made the requisite statutory finding to trigger EPA's promulgation of standards. (*Id.* at 5.) It argues, however, that EPA will not adequately represent Ecology's interest in continuing with its efforts to revise the standards. (Dkt. No. 11 at 5.)

Plaintiff argues that Ecology has demonstrated no impaired interest because it can at any time propose a new standard, meaning that it has "the ability to potentially moot this lawsuit or supersede any ultimate result." (Dkt. No. 16 at 6.) Because Ecology has these other means of protecting its interests—"namely finalizing and publishing its own revised fish consumption rate"—there is no risk that its interests will be impaired. (*Id.* at 7.)

A potential intervenor's interests may not be impaired if it can protect those interests without participating in the lawsuit. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (party's interest in collecting debt not impaired when summary-claims process provided "adequate due process"). In a case that Plaintiffs particularly emphasize, a district court held that politicians seeking to intervene had political avenues of protecting their interests,

[1] Because the Court concludes that the requirements for intervention as a matter of right are met, it does not address the standards for permissive intervention.

including conducting oversight hearings or seeking to amend the relevant statute. *See Center for Biological Diversity v. Brennan*, 571 F.Supp.2d 1105, 1126 (N.D. Cal. 2007). In that case, however, the court not only determined that the politicians lacked a protectable interest, but also noted that "American historical practice suggests that legislators *qua* legislators should protect their interests through legislating rather than litigating." *Id.* at 1128–29. Neither of these considerations is relevant here.

The question of whether interests are impeded is a practical matter. Here, the Court is unconvinced that it is practical either to require Ecology to publish standards immediately or to require two simultaneous revision processes. As a practical matter, Ecology's interests in its process are impaired if the EPA imposes a federal standard. Concluding otherwise would undermine the premise of cooperative federalism in the Clean Water Act. *See Arkansas v. Oklahoma*, 503 U.S. 91 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government . . . ."). Ecology's motion to intervene is GRANTED.

C. Motions from NWPPA and MIC

Both NWPPA and MIC seek to intervene. NWPPA and MIC are trade associations with many members who must comply with effluent limitations based on Washington's water-quality standards. (Dkt. No. 14 at 3.) Both actors state that any change in the standards could harm their economic interests. (Dkt. No. 12 at 3; Dkt. No. 14 at 3.)

Although both actors contend—and the Court agrees—that no party currently in the action represents their interests, both applicants appear to have interests that are very similar to each other. Indeed, even the motions to intervene make largely similar arguments. *Compare* (Dkt. No. 12 at 8 ("Where applicants for intervention such as NWPPA have private interests . . . this is sufficient to demonstrate that the existing governmental parties do not adequately represent their interests for purposes of intervention under FRCP 24(a)(2).") *with* Dkt. No. 14 at 7 ("The federal agency Defendants cannot be expected to adequately represent the interests of private parties such as MIC."); and *compare* (Dkt. No. 21 at 3) (arguing that the scope of

litigation should not be limited because "the exact nature of plaintiffs' claims . . . is a matter for dispositive motions") *with* (Dkt. No. 24 at 3) (arguing that the scope of litigation should not be limited because Plaintiffs have not yet "fully articulate[d] their claims in a dispositive motion"). Where there is already an intervenor who may represent a party's interest, a subsequent applicant's interests may be adequately represented. *See, e.g.*, *Canadian Nat'l Ry. Co. v. Montreal, Maine & Atlantic Ry., Inc.*, 272 F.R.D. 44, 46 (D. Me. 2010) (denying motion to intervene in part because party's interests were already represented, including by a party who had already intervened); *Bates v. Jones*, 904 F.Supp. 1080, 1087 (N.D. Cal. 1995) (granting two of five motions for intervention when the two intervenors would clearly represent the interests of the other three). Here, neither intervenor is yet a party, but it appears clear that if their motions to intervene are both granted, they will be making many similar arguments.

A court may impose conditions on intervention. *See* Fed. R. Civ. P. 24, Advisory Committee notes to the 1966 Amendment ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (Brennan, J., concurring) ("[R]estrictions on participation may . . . be placed on an intervenor of right"); *United States v. South Florida Water Mgmt. Dist.*, 922 F.2d 704, 710 (suggesting options for the district court "to condition . . . intervention in this case on such terms as will be consistent with the fair, prompt conduct of this litigation"). Here, it would be inefficient for NWPPA and MIC to continue to submit duplicative sets of briefs. The motions to intervene are therefore GRANTED, but the parties are directed to coordinate to avoid duplicative filings.

D. Scope of Arguments

Plaintiffs argue that the motions to intervene inaccurately characterize its claims: "This case does *not* involve any claim against Ecology or challenge Washington's existing fish consumption standard. . . . Industry Intervenors . . . should not be allowed to expand this case to

seek relief regarding the adequacy of Ecology's current fish consumption rate or any process Ecology may be pursuing to revise that rate and related water quality standards." (Dkt. No. 20 at 2.)

Intervenors reply that they should not be barred from raising issues in defense before it is clear what arguments Plaintiffs will make in any dispositive motion. (Dkt. No. 21 at 3; Dkt. No. 24 at 3.) The Court agrees with both parties—intervenors should not be allowed to change the issues framed between the original parties, and it is too soon to know with certainty what those issues will be and what arguments will be relevant. The Court therefore does not address the scope of the issues at this time.

III. CONCLUSION

For the foregoing reasons, the motions for intervention from Ecology, NWPPA, and MIC (Dkt. Nos. 11, 12, 14) are GRANTED.

DATED this 18th day of February 2014.

John C. Coughenour
UNITED STATES DISTRICT JUDGE