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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE,)
COLUMBIA RIVERKEEPER, SPOKANE)
RIVERKEEPER, RE SOURCES FOR) No. 2:13-cv-01839-JCC
SUSTAINABLE COMMUNITIES, PACIFIC)
COAST FEDERATION OF FISHERMEN’S)
ASSOCIATIONS, and INSTITUTE FOR) PLAINTIFFS’ OPPOSITION TO
FISHERIES RESOURCES,) WASHINGTON STATE
) DEPARTMENT OF ECOLOGY’S
Plaintiffs,) MOTION TO INTERVENE AS
) DEFENDANT

v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY and GINA McCARTHY,)
Administrator, United States Environmental)
Protection Agency,)
)
Defendants.)

1 INTRODUCTION

2 Plaintiffs Puget Soundkeeper Alliance, Columbia Riverkeeper, Spokane Riverkeeper,
3 RE Sources for Sustainable Communities, Pacific Coast Federation of Fishermen’s Associations,
4 and Institute for Fisheries Resources (collectively, “Waterkeepers Washington”) oppose
5 Washington State Department of Ecology’s (“Ecology”) motion to intervene. Waterkeepers
6 Washington oppose the motion because even assuming Ecology possesses an interest in this
7 litigation, its interest will not be impaired by this litigation.

8 Waterkeepers Washington seeks to establish a deadline for the U.S. Environmental
9 Protection Agency (“EPA”) to comply with its mandatory duties under the Clean Water Act.
10 Waterkeepers Washington does not make any claim that, if successful, would prohibit Ecology from
11 continuing its process to develop a revised fish consumption rate or from substituting a proposed
12 standard later for one developed by EPA.

13 BACKGROUND

14 The Clean Water Act employs a cooperative federalism approach to protecting and cleaning
15 up our nation’s waters. To that end, the Clean Water Act requires that states, in the first instance,
16 must develop water quality standards and submit them to EPA for review and approval or
17 disapproval. 33 U.S.C. § 1313(b). A water quality standard is a criteria—numeric or narrative—
18 necessary to protect “designated uses.” “Designated uses” include the “fishable and swimmable”
19 protections of the Clean Water Act and require protecting and cleaning up our nation’s waters such
20 that they are fit for drinking, direct human contact for fishing or recreation, healthy aquatic
21 resources, and catching and consuming fish and shellfish. The Clean Water Act further requires that
22 states review, as part of a public process, their water quality standards not less than once every three
23 years. 33 U.S.C. § 1313(c). If EPA determines that a state is failing in its obligations—either
24 because it fails to promulgate protective standards or the standards it submits to EPA for approval
25 are insufficient, EPA is required to step in and promulgate standards for the state. 33 U.S.C.
26 § 1313(c)(3) and (4).

1 Determining the amount of fish people in a state actually consume is a critical component of
2 setting human health water quality standards because one of the ways water pollution adversely
3 affects human health is through the consumption of fish and shellfish that have accumulated toxic
4 water pollutants such as mercury or polychlorinated biphenyls (“PCBs”) in their tissue. In setting
5 human health water quality standards, a state must set the level of toxic pollutants low enough that
6 fish remain safe to eat at actual rates of consumption. If a state sets the fish consumption rate lower
7 than the amounts actually consumed, the commensurate human health standard will be too lenient
8 such that people will ingest levels of toxins that will put them at risk for adverse health
9 consequences. EPA guidance to states directs that states should assess a proper fish consumption
10 rate as a basis for setting human health water quality standards from surveys of what members of
11 the state’s population actually consume. EPA, *Methodology for Deriving Ambient Water Quality*
12 *Criteria for the Protection of Human Health* at 1-12 (2000). Washington’s fish consumption rate is
13 part of the National Toxics Rule (“NTR”), 40 C.F.R. § 131.36(d)(14) (2013), and it is set at 6.5
14 grams per day (“g/day”), which is cumulatively about one fish meal per month. Surveys of various
15 communities in Washington show consumption rates of 200, 300, and even over 500 g/day. See
16 National Environmental Justice Advisory Committee, *Fish Consumption and Environmental Justice*
17 at 14-15 (2002).

17 EPA has repeatedly informed Washington that Washington’s fish consumption rate is not
18 accurate, that it does not reflect what people in Washington actually consume, and that the rate and
19 human health criteria based on Washington’s fish consumption rate must change. In this case,
20 Waterkeepers Washington assert that EPA has made a determination under 33 U.S.C. § 1313(c)(4)
21 that Washington’s fish consumption rate and attendant human health criteria are inadequate and that
22 EPA has a nondiscretionary duty to promptly set an accurate fish consumption rate and adequately
23 protective human health water quality criteria. This lawsuit seeks an order setting deadlines for
24 EPA to promulgate accurate protective standards. It does not seek a particular standard from EPA.

1 It does not seek any action on the part of the State of Washington or Ecology, nor will nor could it
2 prevent Ecology from issuing a revised fish consumption rate and attendant water quality standards
3 now or in the future.

4 ARGUMENT

5 I. ECOLOGY IS NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

6 Because it misconstrues the law and the nature of the case, Ecology fails to demonstrate a
7 necessary element of intervention: that any interest it possesses may be impaired or impeded by the
8 disposition of the action. Even assuming Ecology has an interest in this case, there is no outcome of
9 this case that would impair that interest.

10 A. A Party Must Demonstrate That Its Interest Will Be Impaired or Impeded and
Cannot Otherwise Be Protected.

11 Rule 24(a)(2) allows a party to intervene who “claims an interest relating to the property or
12 transaction that is the subject of the action, and is so situated that disposing of the action may as a
13 practical matter impair or impede the movant’s ability to protect its interest.” Fed. R. Civ. P.
14 24(a)(2). In the Ninth Circuit, the applicant for intervention must show that it has a ‘significant
15 protectable interest’ relating to the property or transaction that is the subject of the action and the
16 disposition of the action may, as a practical matter, impair or impede the applicant’s ability to
17 protect its interest. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009)
18 (citations omitted); *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (citing *Cabazon Band
19 of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997), *cert. denied*, 524 U.S. 926
20 (1998)). Failure to satisfy any of these requirements is fatal to the application for intervention.
21 *Perry*, 587 F.3d at 950 (citing *California ex rel. Van de Kamp v. Tahoe Reg’l Planning Agency*, 792
22 F.2d 779, 781 (9th Cir. 1986)). The party seeking to intervene bears the burden of showing that it
23 meets all requirements for intervention. *See U.S. v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir.
24 2004) (citations omitted).

Because Ecology’s asserted interest is based on incorrect legal premises about the lawsuit’s

1 implications for Ecology's development of water quality standards, Ecology has failed to
2 demonstrate an interest that could be impaired or impeded. Ecology has sufficient means to protect
3 any interest it may actually have because Ecology remains fully in control of its own destiny here;
4 Ecology retains the ability at any time during or after this lawsuit to set a fish consumption rate for
5 EPA's review, rendering its ability to protect any interests complete.

6 B. Ecology Has Failed to Identify Impairment of Its Interest.

7 Ecology apparently misinterprets the nature of this lawsuit and its possible implications.
8 First, Ecology erroneously characterizes Waterkeepers Washington's claim as "based on an
9 allegation that Washington's water quality standards are deficient." Intervention Motion at 2 ("Int.
10 Mot."). Ecology also claims that this lawsuit "challenges a regulation adopted by Ecology." *Id.*
11 The actual deficiency of Washington's water quality standards under the Clean Water Act is not an
12 issue that must be decided by the Court in this litigation. EPA has repeatedly informed Ecology that
13 "[t]he best available science includes evidence of consumption rates well above 6.5 grams per day
14 among high fish consumers and shows that the human health criteria currently in effect for clean
15 water purposes in Washington are not sufficiently protective." *See, e.g.*, most recent
16 communication to Ecology, Letter from Dennis McLerran, EPA Regional Director, to Maia Bellon,
17 Director of Ecology (June 21, 2013), Decl. of Matthew Baca Ex. A. Ecology also apparently
18 concedes this point at least in part because, in a recent public presentation, Ecology staff stated that
19 the fish consumption rate is important because "[e]xisting standards [are] not based on current
20 data." Washington Department of Ecology, Ecology's Water Quality Standards Public Meeting
21 PowerPoint Presentation at 4 (Nov. 6, 2013), Baca Decl. Ex. B. Waterkeepers Washington's claims
22 concern only the action EPA has taken relative to Washington's standards—whether *EPA*
23 *determined* that Washington's standard is inadequate—and whether EPA has a mandatory
24 obligation to promulgate a replacement. This case is not about the actual sufficiency of the current
25 standard. Waterkeepers Washington seek no relief against Ecology or direct ruling regarding the

1 existing standards or a ruling dictating a particular standard.

2 Ecology's asserted interest is in its ongoing process to revise Washington's fish
3 consumption rate and to preserve the prerogative to develop a revised standard. Int. Mot. at 4.
4 There is, however, no scenario in which this lawsuit would force Ecology to end or abort its
5 development of a standard. Regardless of the outcome of this case, Ecology maintains authority
6 under the Clean Water Act at any time to propose new water quality standards for EPA review and
7 approval. 33 U.S.C. § 1313(c). In fact, that's the exercise Ecology is currently engaged in.
8 Washington's current fish consumption rate was set by EPA as part of the National Toxics Rule
9 when it and a number of states failed to set such standards over twenty years ago. Nearly every
10 other state that was part of the NTR has since developed alternative standards, approved by EPA.
11 See Catherine O'Neill, *Fishable Waters*, 1 Am. Indian L.J. 181, 184 (2013) (noting that only
12 Alaska, Idaho, and Washington still assume 6.5 g/day fish consumption—interestingly, all states
13 with much higher consumption rates than many states in other regions of the country). Ecology is
14 in the process of developing a standard it hopes to substitute for the NTR previously promulgated
15 by EPA. Plainly, even if Waterkeepers Washington prevails in this litigation and EPA sets a fish
16 consumption rate for Washington, Ecology retains statutory authority to submit a change to EPA for
17 consideration by continuing the process in which it is currently engaged.

18 Ecology is in a unique position as a state entity with the ability to potentially moot this
19 lawsuit or supersede any ultimate result. It has, accordingly, failed to demonstrate that “disposing
20 of the action would as a practical matter impair or impede [Ecology's] ability to protect its interest.”
21 Fed. R. Civ. P. 24(a)(2). Courts have found that an interest is not impaired if there exist other
22 means to protect it. See *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004);
23 *California ex rel. Lockyer v. U.S.*, 450 F.3d 436, 442 (9th Cir. 2006) (citing *Alisal*, 370 F.3d at 921);
24 *U.S. v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1152 (9th Cir. 2010) (citing *Lockyer*, 450 F.3d at 442).
25 In one particularly relevant case, a court in the Northern District of California found that members

1 of Congress could not intervene where they had unique political means to protect their policy
2 interests. *See Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1129 (N.D. Cal.
3 2007) (citations omitted). In that case, the court held that the politician intervenor-applicants, as
4 members of Congress, maintained “political arrows” that they could draw and release to protect
5 their interests and that, therefore, the litigation did not impair or impede their interests. *See id.* Like
6 the members of Congress in *Center for Biological Diversity*, Washington has means other than this
7 lawsuit for protecting any interest it might have, namely finalizing and publishing its own revised
8 fish consumption rate.

9 Ecology characterizes its process for developing a new fish consumption rate as being at the
10 mercy of this lawsuit. *See, e.g., Int. Mot.* at 3-4. In fact, the opposite is true because Ecology can at
11 any time issue updated water quality standards and moot this action. Any interest Ecology has,
12 therefore, is not at risk of being impaired and should be denied intervention as of right.

13 II. THE COURT SHOULD DENY PERMISSIVE INTERVENTION.

14 Ecology requests that the Court allow it to permissively intervene in this lawsuit under Rules
15 24(b)(2) and (b)(1). *See Int. Mot.* at 5-6. Under Rule (b)(2), a court may permit intervention by a
16 state government if any claim or defense is based on a statute the government administers or
17 regulation it has issued. Fed. R. Civ. P. 24(b)(2). A court also has discretion to allow permissive
18 intervention where the intervenor’s claim or defense shares a common question of law or fact with
19 the underlying litigation. *Id.* at (b)(1). Because this litigation concerns EPA’s duties under the
20 Clean Water Act, not Ecology’s, permissive intervention is not warranted.

21 There is no dispute that Ecology has been delegated some duties under the Clean Water Act.
22 *See Int. Mot.* at 5-6. Those duties, however, are not the subject of the litigation, and while Ecology
23 administers parts of the Clean Water Act, it does not administer the section relevant to this lawsuit.
24 Rather, 33 U.S.C. § 1313(c)(4) relates to EPA’s duty after making a determination that a state’s
25 water quality standards are inadequate. Similarly, Waterkeepers Washington does not directly

1 challenge the validity of Washington’s water quality standards under EPA’s NTR. This suit is
2 about EPA’s duties and does not implicate or impair Ecology’s responsibilities or regulations under
3 the Clean Water Act. For those reasons, Rule 24(b)(2) is inapplicable.

4 Rule 24(b)(1) permissive intervention is also not warranted. Ecology says that its “claim is
5 that Washington should be allowed to continue with its process.” Int. Mot. at 6. As discussed
6 above, Washington is legally permitted to continue its process regardless of the outcome of this
7 litigation. Waterkeepers Washington makes no argument to the contrary. Ecology’s purported
8 claim is simply not one that needs to be decided by the Court and is not at issue in this litigation.
9 Inasmuch as Ecology intends to raise these extraneous claims, it will unnecessarily complicate and
10 muddle the issues before the Court as opposed to aiding their resolution.

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CONCLUSION

Waterkeepers Washington requests that the court deny Ecology’s Motion to Intervene.

Respectfully submitted this 16th day of December, 2013.

s/ Matthew R. Baca

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

I HEREBY CERTIFY that on December 16, 2013, I electronically filed the following documents:

- 1. Plaintiffs’ Opposition to State of Washington, Department of Ecology’s Motion to Intervene as Defendant; and
- 2. Declaration of Matthew R. Baca in Support of Plaintiffs’ Opposition to State of Washington, Department of Ecology’s Motion to Intervene as Defendant, including Exhibits A and B.

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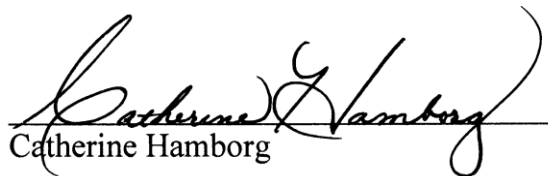
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25 AND I FURTHER CERTIFY that I have mailed by United States Postal Service the
26 documents to the following non-CM/ECF participants:

27 None

28 I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of December, 2013, at Seattle, Washington.


Catherine Hamborg