

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CENTER FOR BIOLOGICAL DIVERSITY,
a nonprofit organization;

Case No. C09-0670-JCC

Plaintiff,

ORDER

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; LISA JACKSON,
Administrator, United States Environmental
Protection Agency, MICHELLE PIRZADEH,
Acting Region 10 Administrator, United
States Environmental Protection Agency;

Defendants.

This matter comes before the Court on Intervenor Defendants American Petroleum Institute, *et al.*'s Motion to Intervene in Support of Defendant EPA (Dkt. No. 18), Plaintiff Center for Biological Diversity's Response (Dkt. No. 23), Defendant United States Environmental Protection Agency's Response, (Dkt. No. 24), Intervenor Defendants' Replies to Federal Defendant (Dkt. No. 27) and to Plaintiff (Dkt. No. 28). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

1 **I. BACKGROUND**

2 The American Petroleum Institute (“API”), the Chamber of Commerce of the United
3 States of America (“Chamber of Commerce”), the Utility Water Act Group (“UWAG”), and
4 the Utility Air Regulatory Group (“UARG”), collectively “Proposed Intervenors,” seek leave
5 to intervene both permissively and as of right in this environmental action under Federal Rule
6 of Civil Procedure 24.

7 The underlying lawsuit concerns the 2008 decision by the United States Environmental
8 Protection Agency (“EPA”) to approve Washington State’s impaired-waters list.¹ Under
9 Section 303(d) of the Clean Water Act, each state must identify those water bodies within its
10 borders that are not attaining water quality standards. 33 U.S.C. § 1313(d)(1)(A). The states
11 submit these “impaired waters” lists to the EPA every two years, and the EPA must approve or
12 disapprove a state’s impaired-waters list within thirty days of submission. *Id.* § 1313(d)(2). If
13 the EPA disapproves of a list, it must identify impaired waters omitted by the state, and go
14 through the notice and comment process. 40 C.F.R. § 130.7(d)(2).

15 The Complaint alleges the following: In 2008, the EPA approved Washington State’s
16 impaired-waters list. (Compl. ¶ 59 (Dkt. No. 1 at 14).) That list did not include any ocean
17 water areas impaired by ocean acidification. *Id.* Ocean acidification is caused by the ocean
18 absorbing carbon dioxide in the atmosphere. When atmospheric concentrations of carbon
19 dioxide increase, the oceans absorb some of the excess, which changes seawater chemistry and
20 increases ocean acidity. *Id.* ¶ 3. The Center for Biological Diversity (“CBD”) challenges the
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23 ¹ This factual statement is based only on the pleadings, including Plaintiff’s Complaint
24 and the Proposed Intervenors’ Motion and Replies. In considering a motion to intervene,
25 “courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the
26 proposed complaint or answer in intervention, and declarations supporting the motion as true
absent sham, frivolity or other objections.” *Southwest Ctr. for Biological Diversity v. Berg*, 268
F.3d 810, 820 (9th Cir. 2001). Nothing in this background section establishes any factual
matter conclusively; it is written to give context for considering this Motion to Intervene alone.

1 EPA's decision to approve an impaired-waters list that omitted Washington coastal waters.
2 CBD argues that the EPA's decision was arbitrary and capricious under the Administrative
3 Procedure Act, 5 U.S.C. § 706(2), and unlawful under the Clean Water Act, 33 U.S.C. §
4 1313(d). Among other relief, CBD seeks to compel the EPA to add ocean waters impaired by
5 ocean acidification to Washington's list of impaired waters. (Compl. 15 (Dkt. No. 1).)

6 Once a water body is placed on the state's impaired-waters list, states undertake to
7 decrease pollution in these areas by establishing a "total maximum daily load" ("TMDL") for
8 pollutants in that water body. 33 U.S.C. § 1313(d)(1)(C), 40 C.F.R. § 130.7(c)(1). One of the
9 ways in which Washington State regulates pollutants is by issuing discharge permits to private
10 parties under the National Pollutant Discharge Elimination System ("NPDES"). (Chittim Decl.
11 ¶ 3 (Dkt. No. 28-2 at 2).) Through the permitting process, the State of Washington places
12 limits on, among other things, the pH of any discharge into impaired waters, informed in part
13 by the limitations guidelines established under the Clean Water Act by the EPA. *Id.*

14 Proposed Intervenors, each of which is an organization representing a large number of
15 members, claim an interest in this litigation based on these NPDES permits. API claims that an
16 unspecified number of its members "have at least three facilities that are currently permitted to
17 discharge directly into the Washington coastal zone . . ." (Mot. to Intervene (Dkt. No. 18 at 2).)
18 The Chamber of Commerce claims to "have multiple members in Washington that have CWA
19 permits to discharge into waters that feed into Washington's coastal waters and must comply
20 with any CWA obligations that may result from the current litigation." (*Id.* at 3.) UWAG and
21 UARG each claim to have "at least one member with a facility in Washington with discharges
22 regulated by a CWA permit that reach the coastal waters in question." (*Id.*) The theory is that,
23 should Washington coastal waters be listed as impaired, the permit obligations of these
24 members will change.

25 Proposed Intervenors moved collectively for intervention on August 14, 2009. (Dkt.
26 No. 18.) Both the EPA and CBD oppose intervention.

1 **II. DISCUSSION**

2 **A. Intervention as of Right**

3 Under Federal Rule of Civil Procedure 24,² an applicant is entitled to intervention as of
4 right upon a four-part showing: (1) the application for intervention must be timely; (2) the
5 applicant must have a “significantly protectable” interest relating to the property or transaction
6 that is the subject of the action; (3) the applicant must be so situated that the disposition of the
7 action may, as a practical matter, impair or impede the applicant’s ability to protect that
8 interest; and (4) the applicant’s interest must not be adequately represented by the existing
9 parties in the lawsuit. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th
10 Cir. 2001). In general, courts construe Rule 24(a) liberally in favor of potential intervenors.
11 *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir.1995).

12 The burden is on the intervenors to demonstrate all four prongs. *See U.S. v. City of Los*
13 *Angeles*, 288 F.3d 391, 397 (9th Cir. 2002). Because the Court finds that Potential Intervenors
14 have not demonstrated a protectable interest that may be impaired by the outcome of this
15 lawsuit, the Court need not discuss timelines or adequacy of representation.

16 Applicants must point to a protectable interest that is “concrete” and directly related to
17 the underlying subject matter of the action. *U.S. v. Alisal Water Corp.*, 380 F.3d 915, 920 (9th
18 Cir. 2004). There must be a relationship between that interest and Plaintiff’s claims that is
19 more than theoretical. *So. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002)
20 (applicants’ “contingent, unsecured claim” fell short of the “direct, non-contingent, substantial
21 and legally protectable” interest required for intervention as a matter of right). Here, CBD and
22 EPA oppose intervention by arguing that the connection between the permits held by the
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24 ² “On timely motion, the court must permit anyone to intervene who . . . claims an
25 interest relating to the property or transaction that is the subject of the action, and is so situated
26 that disposing of the action may as a practical matter impair or impede the movant’s ability to
protect its interest, unless existing parties adequately represent that interest.” FED. R. CIV. P.
24(a)(2).

1 Proposed Intervenors’ members and the subject matter of this litigation is too attenuated to
2 support intervention, and the Court agrees. The Court finds that Proposed Intervenors have not
3 demonstrated a sufficiently direct interest that may be impaired by the outcome of this suit.

4 First, the underlying environmental action does not directly challenge any existing
5 permit. Nonetheless, Proposed Intervenors argue that their permits would likely require
6 alteration if CBD prevails. The chain of events, established by law, is as follows: If the 303(d)
7 list is revised to include Washington coastal waters, the State must establish a TMDL, subject
8 to public review, and submit the TMDL to the EPA for approval. (Fed. Def.’s Opp. at 3 (Dkt.
9 No. 24)) (citing applicable statutes). If the EPA approves the TMDL, it becomes a “goal that
10 may be implemented by adjusting pollutant discharge requirements in individual NPDES
11 permits.” *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003), *aff’d* 411 F.3d
12 1103 (9th Cir. 2005). It is important to note that Washington State, not the EPA, issues NPDES
13 permits pursuant to these TMDL goals. (*See* Chittim Decl. ¶ 2 (Dkt. No. 28-2 at 2).) Thus, if
14 CBD is successful, Washington State *may* alter its TMDLs, EPA *may* approve that alteration,
15 and the State *may* then adjust its permits to accommodate this new TMDL. Even if the
16 impaired-waters list is altered, therefore, several steps stand between this action and changes to
17 Proposed Intervenors’ members’ NPDES permits—steps that involve nebulous “goals,” *two*
18 public entities’ discretion, and additional opportunities for public comment.

19 Proposed Intervenors, in a declaration submitted with their Replies, point to a State
20 permitting manual that applies to impaired waters for which no TMDL has been established.
21 (Chittim Decl. ¶¶ 5, 6 (Dkt. No. 28-2 at 2, 3).) The declarant interprets the State’s manual as
22 “automatically applicable” to all current permit-holders. (*Id.*) The questions regarding the
23 application of the State’s permitting manual to currently held permits, besides being untimely
24 presented to the Court, require investigation into Washington State policy: extrinsic evidence
25 inappropriate to consider on a motion to intervene. *Lake Investors Dev. Group, Inc. v. Egidi*
26 *Dev.*, 715 F.2d 1256 (7th Cir. 1983). Even taking the declarant’s word for it, the declarant

1 admits that subsequent administrative action will allow Proposed Intervenors an opportunity
2 for notice and comment. (Chittim Decl. ¶ 7 (Dkt. No. 28-2 at 4).) His one complaint is that
3 such action will be costly. (*Id.*) But where the substantive content of new regulations is not the
4 subject of the underlying lawsuit, and applicants may protect their members' interests during a
5 later administrative process, intervention is not mandated. *See Our Children's Earth Found. v.*
6 *EPA*, No. C 05-05184 WHA, 2006 WL 1305223 at *2–*3 (N.D. Cal. May 11, 2006).

7 Second, and equally as important, *three* of the four Proposed Intervenors have no
8 protectable interest because their members do not hold permits to discharge into the water body
9 that is the subject of this action. Only one small group of permit-holders (three facilities owned
10 by some of API's members) hold permits that discharge directly into Washington coastal
11 waters. (Fed. Def.'s Opp. 6 (Dkt. No. 24); *see also* Mot. to Intervene (Dkt. No. 18 at 2).) The
12 others only hold permits to discharge into the ocean's tributaries—hardly a radical concept on
13 the west coast of this State. If the Court were to allow intervention by every permit-holder who
14 could discharge into one of Washington's rivers that eventually flows into the sea, this suit
15 would balloon out of control.

16 The Ninth Circuit does not require the axe to be poised above the intervenor's head to
17 allow them a voice in the lawsuit, but intervention based on wholly contingent claims will not
18 suffice. In *Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993), the case relied on most heavily
19 by Proposed Intervenors, the Sierra Club sought a declaratory judgment compelling the EPA to
20 “implement [control] strategies by promulgating final [NPDES] permits containing pollutant-
21 specific, numerical, water quality-based effluent limitations that reduce toxics being discharged
22 from each of the Arizona point sources.” *Id.* at 1480. The City of Phoenix moved to intervene
23 because it was discharging toxic pollutants into two protected water bodies pursuant to the
24 precise types of permits challenged in the lawsuit. *Id.* The Ninth Circuit held that the City
25 should be allowed to intervene as a right because the lawsuit “may compel EPA to change the
26 terms of the City's NPDES permits.” *Id.* at 1483. Proposed Intervenors zero in on this language

1 of contingency—along with another sentence in the opinion, that “[w]aters affected by City
2 discharges *may* be listed.” (*See* Repl. to Fed. Def.’s at 4 (Dkt. No. 27) (emphasis in motion).)
3 But their quotation of dicta, out of context, is unavailing. A closer reading of the case reveals
4 that the contingency language focused on the possible *outcome of the suit in Sierra Club’s*
5 *favor*, not the possible outcome of a subsequent chain of hypothetical administrative action.

6 This case presents different facts. Unlike in *Sierra Club*, the permits held by Proposed
7 Intervenors are not the target of CBD’s action. The Proposed Intervenors’ economic interest in
8 this suit requires the precipitation of a chain of events that involves several layers of
9 administrative review by both the EPA and Washington State. This is insufficient to establish
10 that their interest is more than theoretical. An interest that is contingent upon the occurrence of
11 a train of contingent events, many of which require the discretion of public entities, cannot
12 support intervention. *See also Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 992
13 F.2d 92, 97 (2d Cir. 1990).

14 **B. Permissive Intervention**

15 An applicant seeking permissive intervention must prove three threshold requirements:
16 (1) it shares common questions of law or fact with the main action; (2) its motion is timely, and
17 (3) the court has an independent basis for jurisdiction over the applicant’s claims. *Donnelly v.*
18 *Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). Even if an applicant satisfies these threshold
19 requirements, the district court has discretion to deny permissive intervention. *Id.* In exercising
20 its discretion, the Court must consider whether intervention will unduly delay the main action
21 or will unfairly prejudice the existing parties. *See* FED. R. CIV. P. 24(b)(2).

22 The Court declines to allow permissive intervention in this case. In the first place,
23 Proposed Intervenors have not established independent subject matter jurisdiction. NPDES
24 permits are issued by the State, and Proposed Intervenors point only to Washington State
25 permitting manuals. (*See* Chittim Decl. ¶ 5 (Dkt. No. 28-2 at 2).) Courts have denied
26 permissive intervention where intervention may require the court to consider novel or difficult

1 issues of state law. *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989). Second, as discussed
2 above, Proposed Intervenors have not established a common question of law or fact because
3 their interests are not the subject of this lawsuit. Indeed, they have not submitted a pleading or
4 answer in intervention, as required by Federal Rule of Civil Procedure 24(c), that establishes
5 any claim or defense at all. *See Our Children's Earth Found.*, 2006 WL 1305223 at *7.

6 Even if Proposed Intervenors had demonstrated all three prongs, the Court would
7 discretionarily deny intervention. Permissive intervention is not favored on the eve of
8 settlement. *Aleut Corp. v. Tyonek Native Corp.*, 725 F.2d 527, 530 (9th Cir. 1984). Here, the
9 parties have indicated that settlement talks are productive. (*See* Dkt. No. 12 at 2.) Allowing
10 intervention will unduly complicate a case that is moving toward an amicable resolution.
11 Moreover, the Court may deny permissive intervention when an applicant has not shown that
12 its participation will significantly contribute to full development of the underlying factual
13 issues in the suit. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).
14 Proposed Intervenors have not alleged that they will bring anything factually different to the
15 table other than speculative interests that are removed from the underlying dispute; otherwise,
16 they seek the same result as the EPA. *See also id.* (district courts may consider whether the
17 applicants' interest is adequately represented by existing parties).

18 **III. CONCLUSION**

19 For the foregoing reasons, the Motion to Intervene (Dkt. No. 18) is DENIED.

20 DATED this 5th day of October, 2009.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE