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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER
ALLIANCE, et al.,

Plaintiffs,

CASE NO. C16-0293JLR

ORDER DENYING
MOTION TO INTERVENE

v.

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY, et al.,

Defendants.

I. INTRODUCTION

Before the court is Northwest Pulp & Paper Association’s (“NWPPA”) motion to intervene pursuant to Federal Rule of Civil Procedure 24. (*See Mot. (Dkt. # 10).*) Plaintiffs Puget Soundkeeper Alliance, Center for Justice, RE Sources for Sustainable Communities, Pacific Coast Federation of Fisherman’s Associations, and the Institute for Fisheries Resources (collectively, “Plaintiffs”) “take no position” on whether the court

1 should grant the motion, but if the court grants the motion Plaintiffs ask the court to
2 condition NWPPA's intervention to avoid delay of the case. (Resp. (Dkt. # 13) at 1-2.)
3 Defendants United States Environmental Protection Agency (the "EPA") and Gina
4 McCarthy, the Administrator of the EPA (collectively, "Defendants"), have not
5 responded to the motion to intervene. (*See* Dkt.) Having considered all submissions
6 pertaining to the motion,¹ the balance of the record, and the relevant law, the court
7 DENIES NWPPA's motion to intervene.

8 II. BACKGROUND

9 On February 26, 2016, Plaintiffs filed their complaint in this action. (Compl. (Dkt.
10 # 1).) They bring injunctive claims against the EPA for violating the Clean Water Act
11 ("CWA"), 33 U.S.C. § 1251 *et seq.* The CWA requires states to enact regulations that
12 comply with the CWA. *See* 33 U.S.C. § 1313. If at any time the Administrator of the
13 EPA determines that a state's regulations are noncompliant with the CWA, the
14 Administrator "shall promptly prepare and publish proposed regulations setting forth a
15 revised or new water quality standard for the navigable waters involved." *Id.*
16 § 1313(c)(4); *see also id.* § 1251 (defining "Administrator"). Section 1313 goes on to
17 state that the Administrator "shall promulgate" such "revised or new standard . . . not
18 later than ninety days after" publishing proposed standards. *Id.* § 1313(c)(4).

19 Plaintiffs allege that the EPA issued a proposed revised standard to remedy
20 Washington's noncompliant water quality standards on September 14, 2015, but has not

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22 ¹ No party has requested oral argument, and the court finds it unnecessary. *See* Local
Rules W.D. Wash. LCR 7(b)(4).

1 yet issued a final standard. (Compl. ¶ 35.) Because the EPA's 90-day window to
2 promulgate a final standard has passed, Plaintiffs seek a declaration that the EPA has
3 failed to comply with the provision in the Clean Water Act that provides the following:

4 The Administrator shall promulgate any revised or new standard under this
5 paragraph not later than ninety days after he publishes such proposed
6 standards, unless prior to such promulgation, such State has adopted a
revised or new water quality standard which the Administrator determines
to be in accordance with this chapter.

7 33 U.S.C. § 1313(c)(4); (*see also* Compl. ¶¶ 5-8.) Plaintiffs seek an order compelling the
8 EPA to issue final standards no later than 30 days after the entry of the order. (*See*
9 Compl. at 12.) On March 1, 2016, Plaintiffs moved for summary judgment seeking that
10 relief. (MSJ (Dkt. # 4).)

11 NWPPA, a "nonprofit trade association representing Washington, Oregon and
12 Idaho pulp and paper manufacturers on environmental and energy public policy issues,"
13 submitted written comments regarding the EPA's proposed rule on December 18, 2015.
14 (McCabe Decl. (Dkt. # 11) ¶¶ 1, 4.) On March 3, 2016, NWPPA moved to intervene as a
15 defendant as a matter of right under Federal Rule of Civil Procedure 24(a)(2) or, in the
16 alternative, permissively under Rule 24(b)(1). (Mot at 1-2.) Pursuant to Rule 24(c),
17 NWPPA submitted a proposed answer to Plaintiffs' complaint, which states as
18 affirmative defenses failure to state a claim, lack of jurisdiction, improper venue, res
19 judicata, collateral estoppel, failure to exhaust administrative remedies, lack of standing,
20 lack of ripeness, and mootness. (*See* Mot. Ex. A ("NWPPA Prop. Ans.") (Dkt. # 10-1) at
21 5.) Defendants have not yet filed a responsive pleading in this case, and pursuant to the
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1 parties' stipulated briefing schedule, Defendants' response to Plaintiffs' motion for
2 summary judgment is due on April 27, 2016. (See 3/11/16 Order (Dkt. # 15).)

3 III. ANALYSIS

4 A. Intervention as of Right

5 Intervention as of right is governed by Federal Rule of Civil Procedure 24(a)(2).

6 When analyzing a motion to intervene of right, courts apply a four-part test:

- 7 (1) the motion must be timely;
- 8 (2) the applicant must claim a "significantly protectable" interest relating to
the property or transaction which is the subject of the action;
- 9 (3) the applicant must be so situated that the disposition of the action may
as a practical matter impair or impede its ability to protect that interest; and
- 10 (4) the applicant's interest must be inadequately represented by the parties
to the action.

11 *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011). On a motion
12 to intervene, a district court must accept as true the nonconclusory allegations of the
13 motion and proposed answer. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810,
14 819 (9th Cir. 2001). The Ninth Circuit construes Rule 24(a) liberally in favor of potential
15 intervenors. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440-41 (9th Cir.
16 2006). The party seeking to intervene bears the burden of showing that all the
17 requirements for intervention have been met. *United States v. Alisal Water Corp.*, 370
18 F.3d 915, 919 (9th Cir. 2004).

19 There is no indication that NWPPA's motion is untimely or that disposition of the
20 action would not impair NWPPA's interest. (See generally Resp.; Reply (Dkt. # 16) at 2
21 ("EPA has indicated that it will take no position on the motion to intervene and will not
22 file a response.")) However, despite "tak[ing] no position" on the motion to intervene,

1 Plaintiffs question whether NWPPA meets element four. (See Resp. at 2 (“It is unclear
2 whether NWPPA has a unique interest in a federal agency meeting Congressionally
3 mandated deadlines. . . . [I]t is difficult to imagine what defense or argument NWPPA
4 can offer that will differ from the defense asserted by the [EPA] itself.”).)

5 The Ninth Circuit examines three factors in evaluating adequacy of representation:
6 “(1) whether the interest of a present party is such that it will undoubtedly make all of a
7 proposed intervenor’s arguments; (2) whether the present party is capable and willing to
8 make such arguments; and (3) whether a proposed intervenor would offer any necessary
9 elements to the proceeding that other parties would neglect.” *Citizens for Balanced Use*
10 *v. Mont. Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki v.*
11 *Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). Where a prospective intervenor and an
12 existing party share the same objective, however, “a presumption of adequacy of
13 representation arises.” *Citizens for Balanced Use*, 647 F.3d at 898 (citing *League of*
14 *United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997)). A similar
15 presumption arises “when the government is acting on behalf of a constituency it
16 represents” in the action. *Arakaki*, 324 F.3d at 1086. To rebut either of these
17 presumptions, “an applicant must make a ‘compelling showing’ of inadequacy of
18 representation.” *Citizens for Balanced Use*, 647 F.3d at 898 (quoting *Arakaki*, 324 F.3d
19 at 1086).

20 NWPPA attempts to differentiate its interests from the EPA’s interests in two
21 ways. (See Mot. at 9.) First, NWPPA argues that EPA represents “interests of the
22 general public” whereas NWPPA represents the “narrower economic and other interests

1 of its members.” (*Id.*; *see also* Reply at 2 n.1.) Second, NWPPA differentiates the
2 EPA’s “interest in publishing a final rule . . . that reflects the criteria set out in its
3 Proposed Rule” from NWPPA’s interest “in [the] EPA’s promulgation of a final rule that
4 reflects NWPPA’s comments and concerns.” (Mot. at 9.)

5 By offering these two abstract differentiations, both of which concern the content
6 of the final rule, NWPPA overlooks the actual claim at issue in this litigation. Plaintiffs
7 “bring a single legal claim: EPA has failed to meet its mandatory duties by the deadlines
8 set in the Clean Water Act.” (Resp. at 2 (citing 33 U.S.C. § 1313(c)(4)); *see also* Compl.
9 ¶¶ 5-8.) They seek a declaratory judgment that the EPA has unlawfully delayed and an
10 order requiring the EPA to “to comply with the Clean Water Act by finalizing and issuing
11 the regulations published on September 14, 2015, setting forth a revised fish consumption
12 rate and human health criteria for Washington within thirty (30) days of the Court’s
13 order.” (Compl. at 12.)

14 NWPPA apparently reads this language as a request that “this Court order EPA to
15 adopt the Proposed Rule as a final rule, ignoring comments from NWPPA and other
16 stakeholders.” (Mot. at 11.) This interpretation of Plaintiffs’ plea for relief is incorrect.
17 Plaintiffs seek an injunction requiring the EPA to “finaliz[e] and issu[e]” the relevant
18 regulations within 30 days, not an order requiring the EPA to simply adopt the proposed
19 regulations as final regulations. (*See* Compl. ¶¶ 7-8; MSJ at 2 (“[Plaintiffs] request[] an
20 order from the Court requiring EPA to finalize the proposed revised fish consumption
21 rate and human health water quality standards for Washington within 30 days of the
22 Court’s order.”), 15 (“For the foregoing reasons, [Plaintiffs] respectfully request[] that the

1 Court grant [their] motion for summary judgment and that the Court order EPA to
2 finalize and promulgate its revised human health criteria for Washington within 30 days
3 of the court's order."); *see also* 33 U.S.C. § 1313(c)(4) ("The Administrator shall
4 promulgate any revised or new standard under this paragraph not later than ninety days
5 after he publishes such proposed standards"); *Norton v. S. Utah Wilderness All.*, 542
6 U.S. 55, 64 (2004) ("[W]hen an agency is compelled by law to act within a certain time
7 period, but the manner of its action is left to the agency's discretion, a court can compel
8 the agency to act, but has no power to specify what the action must be."). Thus, although
9 NWPPA is correct that its interests in the substance of the regulations diverge from the
10 EPA's, that divergence is unrelated to this litigation, which concerns the timing of the
11 final regulations, and is therefore irrelevant to the instant motion.²

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14 ² NWPPA argues that "[w]here applicants for intervention such as NWPPA have private
15 interests—or even narrower public interests than those of existing governmental parties that
16 represent a broader public interest—this is sufficient to demonstrate that the existing
17 governmental parties do not adequately represent their interests." (Mot. at 9.) However, all four
18 of the cases that NWPPA cites in support of this proposition involved claims addressing the
19 substance of administrative permits or regulations, whereas Plaintiffs in this case seek to compel
20 the EPA to timely issue regulations without regard to their content. *Am. Farm Bureau Fed'n v.*
21 *U.S. E.P.A.*, 278 F.R.D. 98, 100-01, 110 (M.D. Pa. 2011) (allowing private entities to intervene
22 in a suit that sought to vacate the total maximum daily load of pollutants discharged into the
Chesapeake Bay and its tributaries); *Citizens for Balanced Use*, 647 F.3d at 895-96, 900-01
(reversing the district court's denial of three conservation groups' motion to intervene as of right
in a challenge to the United States Forest Service's travel management plan for certain
wilderness areas); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1491,
1498-99 (9th Cir. 1995) (reversing the district court's denial of the State of Arizona and Apache
County's motion to intervene as of right in an action to enjoin the United States Forest Service
from "taking any action in connection with the sale of timber"), *abrogated on other grounds by*
Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011); *Sierra Club v. E.P.A.*, 995
F.2d 1478, 1481 (reversing the district court's denial of the City of Phoenix's motion to
intervene as of right in a case seeking to compel the EPA to alter the restrictions contained in
discharge permits issued in Arizona, where adequacy of representation "ha[d] not been put at

1 Put simply, this case poses a single question to this court: Can Plaintiffs compel
2 the EPA to issue final regulations within a certain period of time? Defendants and
3 NWPPA want the answer to this question to be “no.” In other words, Defendants and
4 NWPPA share the same “ultimate objective”—to afford the EPA sufficient time to fully
5 consider comments to the proposed rule, such as NWPPA’s, before issuing a final rule.
6 *Citizens for Balanced Use*, 647 F.3d at 898; (see also McCabe Decl. ¶ 4.)

7 Because Defendants and NWPPA share a common ultimate objective, NWPPA
8 must make a “compelling showing” that the EPA inadequately represents its interests.
9 *Citizens for Balanced Use*, 647 F.3d at 898. Aside from the abstract differentiations
10 discussed above, NWPPA makes only conclusory assertions that Defendants might fail to
11 represent its interests. (See Mot. at 9 (“NWPPA’s interests are considerably different than
12 [sic] the interests of Defendant EPA. . . . [The EPA] does not represent NWPPA’s
13 interests and may not be capable of making or willing to make all the arguments that
14 NWPPA would make in support of its interests.”); Reply at 2 n.1 (“NWPPA’s interest are
15 considerably different than the interests of Defendant EPA.”).) These assertions do not
16 constitute the requisite “compelling showing” that Defendants may fail to represent
17 NWPPA’s interests in this action. Furthermore, there is no indication that Defendants

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20 issue”), *abrogated on other grounds by Wilderness Soc’y*, 630 F.3d 1173; (see also Mot. at 9-10
21 (citing *Am. Farm Bureau*, *Citizens for Balanced Use*, *Forest Conservation Council*, and *Sierra*
22 *Club*); Reply at 2 n.1 (citing Mot. at 9-10).) This distinction between challenges to substance
and challenges to timeliness differentiates this case from those that NWPPA cites in support of
its motion to intervene.

1 lack the incentive, means, or ability to raise any of the nine affirmative defenses that
2 NWPPA states in its proposed answer. (*See* NWPPA Prop. Ans. at 5.)

3 Even under this Circuit’s liberal standard, NWPPA has made no showing that it is
4 entitled to intervene under Rule 24(a)(2). The court next turns to NWPPA’s alternative
5 argument that the court should allow NWPPA to intervene under Rule 24(b)(1)(B).

6 **B. Permissive Intervention**

7 In the alternative, NWPPA seeks to intervene pursuant to Rule 24(b)(1)(B), which
8 grants the court discretion to allow intervention by any party that “has a claim or defense
9 that shares with the main action a common question of law or fact.” Fed. R. Civ. P.
10 24(b)(1)(B); (Mot. at 10.) “Permissive intervention ‘requires (1) an independent ground
11 for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between
12 the movant’s claim or defense and the main action.’” *Freedom from Religion Found.,*
13 *Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (quoting *Beckman Indus., Inc. v. Int’l*
14 *Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992)). “Even if an applicant satisfies those
15 threshold requirements, the district court has discretion to deny permissive intervention.”
16 *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). Undue delay and unfair
17 prejudice to the existing parties are among the relevant considerations when exercising
18 this discretion. *See id.*

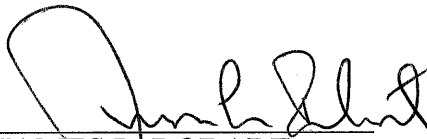
19 The court need not reach the threshold requirements because the court concludes
20 that NWPPA’s intervention would prejudice Plaintiffs by unduly delaying and
21 complicating this case. Plaintiffs seek to compel the EPA to issue final rules that
22 Plaintiffs allege are already overdue, making time of the essence in this case. (*See* Resp.

1 at 2-3.) The court has concluded that NWPPA fails to show the inadequacy of
2 representation by Defendants, and thus intervention would serve only to complicate and
3 delay this case. *See supra* § III.A. Furthermore, NWPPA has expressed resistance in
4 response to Plaintiffs' request that the court place conditions on intervention. (Reply at
5 4.) Given NWPPA's lack of a unique interest and the time-sensitivity of the case, the
6 court exercises its discretion to deny NWPPA's motion to permissively intervene as a
7 defendant.

8 IV. CONCLUSION

9 For the foregoing reasons, the court DENIES NWPPA's motion to intervene (Dkt.
10 # 10).

11 Dated this 6th day of April, 2016.

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14 JAMES L. ROBART
United States District Judge