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**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

WILLAPA-GRAYS HARBOR OYSTER
GROWERS ASSOCIATION,
Appellant,

v.

PCHB No. 18-073

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,
Respondent,

Motion to Intervene

and

AD HOC COALITION FOR WILLAPA
BAY,
Respondent Intervenors

CENTER FOR FOOD SAFETY, CENTER
FOR BIOLOGICAL DIVERSITY,
COALITION TO PROTECT PUGET SOUND
HABITAT,
Proposed Respondent Intervenors.

INTRODUCTION AND RELIEF REQUESTED

The Center for Food Safety, the Center for Biological Diversity, and the Coalition to Protect Puget Sound Habitat (collectively “Applicants”) move the Board for an order permitting them to intervene as Respondents in this action pursuant to WAC 371-08-420 and Civil Rule 24.

1 This motion is supported by the Declarations of George Kimbrell, Laura Hendricks, and Nathan
2 Donley filed concurrently.

3 On October 23, 2018, the Washington State Department of Ecology (“Ecology”) denied a
4 permit application to use the pesticide imidacloprid to kill native burrowing shrimp on and near
5 industrial shellfish operations in Willapa Bay and Grays Harbor. Without this permit, the
6 industry cannot move forward with its plans to use imidacloprid to kill the native burrowing
7 shrimp that live on or near commercial oyster and clam beds in Willapa Bay and Grays Harbor.
8 Applicants have been advocating for this outcome for over four years due to the harmful impacts
9 the application of this neurotoxin will have on human health and the environment and on
10 Applicants’ members’ use and enjoyment of the Willapa Bay and Grays Harbor.

11 The WGHOGA has asked the Board reverse Ecology’s decision denying the permit, and
12 enter an order finding that (a) the proposed use of imidacloprid to control burrowing shrimp will
13 not cause a violation of Washington’s Sediment Management Standards; (b) consistent with
14 Ecology’s finding pursuant to the 2015 EIS, there are no significant unavoidable adverse impacts
15 to the environment associated with the proposed use of imidacloprid to control burrowing
16 shrimp; and (c) directing Ecology to issue an NPDES permit to the shellfish growers in an
17 expeditious fashion. The relief requested by WGHOGA, if granted, would harm Applicants and
18 their members. Applicants have a unique interest in the resolution of this case as groups who, for
19 at least four years, have actively opposed WGHOGA’s plans.

20 This Court should grant Applicants’ motion to intervene as respondents because
21 Applicants meet the four-part test for intervention as of right under Civil Rule 24(a)(2). In the
22 alternative, the Court should grant Applicants permissive intervention pursuant to Civil Rule
23 24(b)(2).

24 As required by WAC 371-08-420, Applicants’ intervention will serve the interests of
25 justice, and the prompt and orderly conduct of this appeal will not be impaired. Applicants agree
26 to abide by any briefing schedule set by this Court and will not seek to delay proceedings.

1 Applicants have made a good faith effort to resolve the issue in dispute. Ecology does not
2 oppose this motion. WGHOGA provided no position with regard to this motion. The Ad Hoc
3 Coalition for Willapa Bay does not oppose this motion.

4 Applicants respectfully request an order granting their Motion to Intervene as
5 respondents to help defend Ecology's reasoned and lawful decision to deny the requested permit.

6 **EVIDENCE RELIED UPON**

7 In support of this motion, Applicants refer the Board to the Declarations of George
8 Kimbrell, Laura Hendricks, and Dr. Nathan Donley, submitted concurrently. Applicants also
9 rely upon Ecology's Denial Decision, as well as WGHOGA's Notice of Appeal and its attached
10 exhibits.

11 **STATEMENT OF ISSUES**

12 The issues presented by Applicants' Motion to Intervene are:

- 13 1. Whether Applicants are entitled to intervention as a matter of right, pursuant to
14 Civil Rule 24(a)(2) and WAC 371-08-420; and
- 15 2. In the alternative, whether Applicants are entitled to permissive intervention,
16 pursuant to Civil Rule 24(b)(2) and WAC 371-08-420.

16 **STATEMENT OF GROUNDS**

17 Applicants are entitled to intervention as a matter of right, pursuant to Civil Rule 24(a)(2),
18 because their motion is timely, they have a significant interest related to the subject of the action,
19 the litigation may as a practical matter impair their interest, and existing parties do not
20 adequately represent their interest. In the alternative, Applicants are entitled to permissive
21 intervention, pursuant to Civil Rule 24(b)(2), because their defenses have questions of law and
22 fact in common with the existing litigation, and intervention would not unduly delay or prejudice
23 the adjudication of the rights of the original parties. Additionally, Applicants meet the standard
24 for intervention set forth in WAC 371-08-420 because the interests of justice are served by
25 allowing a voice and the opportunity to participate to parties who have been engaged in the
26 various administrative processes related to WGHOGA's request to use imidacloprid for years,

1 and whose members would be significantly impacted by this Board’s decision. Moreover, the
2 prompt and orderly conduct of the appeal will not be impaired by Applicants’ intervention.

3 **RELEVANT FACTS**

4 **A. Background**

5 Shellfish, including oysters and clams (including geoduck), have been harvested and
6 grown in Washington for over 150 years, but aquaculture has greatly expanded in recent years.
7 Today, modern industrial shellfish aquaculture exists in Willapa Bay, Grays Harbor, Hood
8 Canal, and Puget Sound, covering between 38,700 and 50,000 acres of tidelands (or about a
9 quarter of all tidelands) in Washington. The bulk of this acreage (26,000-36,000 acres) is in
10 Willapa Bay, a large shallow bay in Pacific County, Washington. It is Washington’s largest
11 outer coast estuary, covering 88,000 acres at high tide, and 45,000 acres of tidelands. Additional
12 acreage (around 3,800 acres) is in nearby Grays Harbor, a shallow, bar-built estuary north of
13 Willapa Bay. Shellfish are raised either directly on the tidal bed (“bottom culture”), or with
14 some kind of support (“off-bottom culture”). Oysters may be grown using: bottom culture; long
15 lines (oysters suspended on nylon ropes strung on stakes in rows in tidal bed); rack and bag
16 culture (plastic net bags hold oysters, rack suspends off the ground, including emerging “flip
17 bag” technique); or stake culture (oyster attached to stakes in tidal bed). Clams are also grown
18 with bottom culture, often with anti-predator netting, and geoducks are grown inside PCV tubes
19 inserted into the tidal bed (at a rate of 42,000 tubes per acre), which are then covered with the
20 anti-predator netting.

21 The same intertidal areas and inland bays that support shellfish aquaculture are also home
22 to numerous wildlife species, including threatened and endangered species. This shoreline
23 habitat is essential for many species, including: invertebrates (such as benthic invertebrates that
24 are the backbone of the food chain and larger, commercially important Dungeness crab); finfish
25 (including forage fish like herring and many varieties of salmon); and birds (migratory and
26 shorebirds). The nearshore is also habitat for marine mammals, including the critically

1 endangered Southern Resident Orca whales. These areas serve as nurseries, feeding grounds,
2 and have essential roles in cycling nutrients. Shellfish aquaculture impacts this environment
3 through physical barriers; impacts to water quality through the deposition of wastes, disruption
4 of sediments, and intentional addition of chemical pesticides; and the removal of important and
5 native species and a reduction in biodiversity. In addition to impacts from bed preparation,
6 seeding, grow out, and harvest of commercial shellfish, some shellfish growers use synthetic
7 pesticides to kill unwanted species, like eelgrass, and burrowing shrimp.

8 For decades, the commercial shellfish aquaculture industry in Washington used carbaryl
9 to kill burrowing shrimp,¹ despite this chemical having serious impacts to non-target species,
10 including threatened and endangered species,² and being classified as a likely human carcinogen
11 by the U.S. Environmental Protection Agency (EPA). The growers agreed to phase out the use
12 of carbaryl by 2012 in a 2003 settlement between WGHOGA and the Washington Toxics
13 Coalition and other community residents.³

14 Although more than 50 years of carbaryl use has not solved the WGHOGA's shrimp
15 "problem," the growers went in search of another replacement pesticide, rather than adapt to the
16 presence of these native invertebrates, or work to ensure healthy populations of shrimp predators
17 in the Bay, or even curb their use of another pesticide, imazamox, to kill eelgrass, given the
18 inverse relationship observed between the presence of eelgrass and burrowing shrimp.

19 The growers identified imidacloprid, the oldest and most hazardous of the neonicotinoid
20 system insecticides. Imidacloprid is a systemic neurotoxin, related to nicotine. As a
21 neonicotinoid, imidacloprid is especially toxic to invertebrates, highly effective in small doses,

22 ¹ Wash. Dept. of Ecology, Burrowing Shrimp Control – Carbaryl,
23 http://www.ecy.wa.gov/programs/wq/pesticides/final_pesticide_permits/oyster/oyster_index.htm
24 1.

25 ² See National Marine Fisheries Service, *ESA – Section 7 Programmatic Consultation Biological*
and Conference Opinion: Nationwide Permit 48 Washington, at 48-49 (April 28, 2009).

26 ³ See OPB, *Chinook Observer: Willapa Sprays Bound to Stir Debate*,
27 <http://www.opb.org/news/article/willapa-sprays-bound-to-stir-debate/> (Jan. 7, 2014).

1 persistent in the environment, and moves easily in water. In 2015, Ecology initially granted a
2 ND PES permit for spraying imidacloprid, over the objections of the Applicants and many others,
3 including the National Marine Fisheries Service (NMFS), the expert federal wildlife agency.
4 NMFS stated that in addition to reducing the numbers of native burrowing shrimp that play an
5 important role in the environment, and serve as prey for species like Dungeness crab, green
6 sturgeon, and salmon, imidacloprid would kill nearly all benthic organisms on the acreage
7 directly treated. Indeed, imidacloprid product labels expressly prohibit use in water because of
8 its high toxicity to aquatic invertebrates. The first permit was cancelled after major shellfish
9 companies like Taylor Shellfish pulled out, due to customer pressure, including from major
10 restaurant chefs in Seattle citing food safety concerns with serving shellfish directly sprayed with
11 neurotoxin and refusing to serve it.

12 The WGHOGA renewed their pesticide application in 2017. Ecology drafted a
13 Supplemental Environmental Impact Statement, recognizing that the science on neonicotinoids
14 and imidacloprid had evolved since their 2015 Impact Statement, including a new EPA risk
15 assessment for imidacloprid and its impacts to aquatic invertebrates, and to incorporate
16 monitoring data from a 500-acre commercial scale experimental trial in 2014 which was
17 unavailable when the 2015 permit was issued.⁴ Applicants commented on the proposed permit,
18 urging Ecology to reject it based on the serious hazards of using imidacloprid in aquatic
19 environments and on commercial shellfish.⁵ Indeed, this would be the first and only such use of
20 imidacloprid in the country, at a time when communities around the U.S. and other nations like
21 Canada and the European Union are phasing out the use of imidacloprid based on the significant
22 water contamination associated with just land-based use.⁶ Recognizing the dangers of

23 _____
24 ⁴ [https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Aquatic-pesticide-
permits/Burrowing-shrimp-control-Imidacloprid](https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Aquatic-pesticide-permits/Burrowing-shrimp-control-Imidacloprid).

25 ⁵ <http://ws.ecology.commentinput.com/comment/extra?id=gWPx2>; *see also* Declaration of G.
26 Kimbrell, Declaration of L. Hendricks, Declaration of N. Donley.

27 ⁶ *See* Damian Carrington, *EU agrees total ban on bee-harming pesticides*, *The Guardian* (Apr.
27, 2018), <https://www.theguardian.com/environment/2018/apr/27/eu-agrees-total-ban-on-bee->

1 imidacloprid as now understood in the scientific, regulatory, and global communities, and the
2 “uneven control of burrowing shrimp even when applied at commercial scale,” Ecology denied
3 the permit, citing reasons like:

- 4 • Significant, unavoidable impacts to sediment quality and benthic invertebrates.
- 5 • Negative impacts to juvenile worms and crustaceans in areas treated with imidacloprid
and nearby areas covered by incoming tides, including high mortality for Dungeness
6 crabs.
- 7 • Negative indirect impacts to fish and birds caused by killing sources of food and
disrupting the food web.
- 8 • Concern about non-lethal impacts to invertebrates in the water column and sediment.
- 9 • A risk of impacts to invertebrates from imidacloprid even at low concentrations.
- 10 • Increased uncertainty about long-term, non-lethal, and cumulative impacts.⁷

11 Applicants applauded Ecology’s decision, grounded in scientific evidence and ecological
12 protection. *See, e.g.*, Declaration of George Kimbrell. Now, despite all the evidence of harm
13 from imidacloprid to the environment and other commercially important species, the WGHOGA
14 seeks to overturn Ecology’s decision.

15 **B. Applicants**

16 **Center for Food Safety (CFS).** CFS is a tax-exempt, nonprofit membership
17 organization, founded in 1997, with offices in the Portland, Oregon; San Francisco, California;
18 and Washington, District of Columbia. CFS’s mission is to empower people, support farmers,
19 and protect the environment by addressing the harmful impacts of industrial agriculture. CFS
20 represents nearly one million members in every state across the country, including tens of
21 thousands of members in Washington State. CFS’s activities have focused on the environmental,
22 human health, and economic impacts of the development and commercialization of agriculture
and food processing technologies. Principal among these activities are analyses and actions to

23 harming-pesticides; Canada’s Pesticide Management Regulatory Agency (PMRA) is currently
24 considering a ban on imidacloprid, <https://www.canada.ca/en/health-canada/services/consumer-product-safety/pesticides-pestmanagement/public/consultations/proposed-re-evaluation-decisions/2016/imidacloprid/document.html>; Kathy Lundy Springuel, *Maryland is First State to Ban Neonicotinoids*, Bloomberg Environment (May 31, 2016), <https://www.bna.com/maryland-first-state-n57982073298/>.

27 ⁷ *Id.*

1 mitigate the impact of industrial agriculture on human health and the environment. This includes
2 major programs on both animal factories, including aquaculture, and pesticides. CFS members
3 join and support CFS because they believe in safe, sustainable food production. These members
4 are being adversely affected by the commercial shellfish industry's use of pesticide, and support
5 Ecology's denial of the imidacloprid permit to protect Washington's unique ecology and
6 habitats, used by numerous species of wildlife and human alike. CFS seeks to protect the natural
7 habitats and wildlife that CFS staff and members enjoy from industrial animal agriculture,
8 including aquaculture. CFS also seeks to ensure a healthy and safe food supply for its members
9 and the public, one that promotes, rather than threatens, public health.

10 **Center for Biological Diversity (CBD).** CBD's mission is to ensure the preservation,
11 protection, and restoration of biodiversity, native species, ecosystems, public lands and water,
12 and public health through science, policy, and law. Based on the understanding that the health
13 and vigor of human societies, plants and wildlife, and the natural environment are deeply
14 intertwined, CBD works to protect and to secure a future for animals and plants hovering on the
15 brink of extinction, for the ecosystems they need to survive, and for the people that interact with,
16 depend on, and cherish these ecosystems.

17 **Coalition to Protect Puget Sound Habitat.** The Coalition's mission since 2007 has
18 been to voice citizens' concerns regarding the dramatic increase in industrial-scale aquaculture in
19 Washington waters, educate decision makers and the public about the impact of the industry's
20 actions on the health and quality of Puget Sound and Washington's coastal waters, and advocate
21 for improvements in laws, regulations, and policies to protect shoreline habitat. The Coalition is
22 supported by hundreds of interested citizens, environmentalists, beach naturalists, scientists, and
23 recreational users who reside near Washington's coastal waters. Our supporters use the waters of
24 Puget Sound and its coastal shorelines to boat, kayak, beachcomb, hike, birdwatch, view wildlife
25 and fish. They share a deep interest in the ecological health of Washington's nearshore waters.

1 **ARGUMENT**

2 Applicants respectfully ask the Board for leave to intervene as defendants. Applicants
3 have a long and committed history of involvement with both opposing the unnecessary and
4 potentially dangerous use of pesticides and protecting the Willapa Bay, Grays Harbor and the
5 surrounding areas from environmental degradation.

6 The Board’s rules incorporate the standard for intervention from the Rules of Civil
7 Procedure. *See* WAC 371-08-420(1) (intervention may be granted upon determination that
8 “petitioner qualifies as an intervenor pursuant to civil rule 24, that the intervention will serve the
9 interests of justice and that the prompt and orderly conduct of the appeal will not be impaired.”).
10 Civil Rule 24(a) provides the requirements for intervention as a matter of right: Upon timely
11 application anyone shall be permitted to intervene in an action: (1) when a statute confers an
12 unconditional right to intervene; or (2) when the applicant claims an interest relating to the
13 property or transaction which is the subject of the action and he is so situated that the disposition
14 of the action may as a practical matter impair or impede his ability to protect that interest, unless
15 the applicant's interest is adequately represented by existing parties. CR 24(a).

16 Alternatively, CR 24(b) allows for permissive intervention when: an applicant’s claim or
17 defense and the main action have a question of law or fact in common, and when “exercising its
18 discretion the court shall consider whether the intervention will unduly delay or prejudice
19 adjudication of the rights of the original parties.” CR 24(b). Applicants should be allowed to
20 intervene under either standard as the intervention rule is “liberally construed to favor
21 intervention.” *Columbia Gorge Audubon Soc’y v. Klickitat Cnty.*, 98 Wn. App. 618, 623, 989
22 P.2d 1260 (1999).

23 As explained below, Applicants fully satisfy the standard for intervention as of right
24 under Civil Rule 24(a)(2) and WAC 371-08-420. In the alternative, Applicants satisfy the
25 standard for permissive intervention under Civil Rule 24(b)(2).

1 **A. Applicants are Entitled to Intervene as of Right.**

2 Under a broad construction of the rule, Washington courts use a four-part test to evaluate
3 motions to intervene as a matter of right: (1) timely application for intervention; (2) the applicant
4 claims an interest which is the subject of the action; (3) the applicant is so situated that the
5 disposition will impair or impede the applicant's ability to protect the interest; and (4) the
6 applicant's interest is not adequately protected by the existing parties. *Spokane Cnty. v. State*, 136
7 Wn.2d 644, 649, 966 P.2d 305 (1998) (citing *Westerman v. Cary*, 125 Wn.2d 277, 303, 892 P.2d
8 1067 (1994)). Because Applicants satisfy each of these requirements, they are entitled to
9 intervene as of right.

10 **1. Applicants' Motion for Intervention is Timely.**

11 On the question of timeliness in particular, CR 24(a)(2) allows intervention as of right
12 unless it would work a hardship on one of the original parties. *Loveless v. Yantis*, 82 Wn.2d 754,
13 759, 513 P.2d 1023 (1973). More specifically, "in Washington, a motion to intervene is timely if
14 it is filed before the commencement of the trial." *Columbia Gorge Audubon Soc'y*, 98 Wn. App.
15 at 623 (citing *Am. Disc. Corp. v. Saratoga W., Inc.*, 81 Wn.2d 34, 43, 499 P.2d 869 (1972)).
16 Under this test, Applicants' motion is timely.

17 First, WGHOGA filed its appeal on October 26, 2018. Applicants filed this motion as
18 soon as practicable. Applicants satisfy the general requirement that a motion to intervene be filed
19 prior to the commencement of trial. Second, neither side will be prejudiced by Applicants'
20 intervention. Applicants agree to comply with briefing and hearing schedules established by the
21 Board, and Applicants will not seek to delay the proceedings. Finally, Applicants have not
22 unreasonably delayed filing this motion. Given the early stages of this proceeding and the lack
23 of any prejudice to the existing parties, the motion to intervene is timely.

24 **2. Applicants Have an Interest in the Subject Matter of This Action.**

25 CR 24(a)(2) requires that an applicant for intervention possess an interest in the subject of
26 the action. In Washington, "[t]he meaning of 'interest' is broadly interpreted." *In re Dependency*

1 of *J.H.*, 117 Wn.2d 460, 468, 815 P.2d 1380 (1991). Indeed, Washington courts have observed
2 that “[n]ot much of a showing is required . . . to establish an interest. And insufficient interest
3 should not be used as a factor for denying intervention.” *Columbia Gorge Audubon Soc’y*, 98
4 Wn. App. at 629 (citing *Am. Disc. Corp.*, 81 Wn.2d at 36). The “interest test” does not require
5 an economic or property interest in the action, but instead includes a “broad range of possible
6 interests which elude satisfactory classification under the terms of the rule.” *See Am. Disc.*
7 *Corp.*, 81 Wn.2d at 41-42.

8 Applicants have substantial interests in the specific subject matter of this action. First,
9 Applicants are non-profit organizations that represent the interests of their members and the
10 public in protecting Willapa Bay, Grays Harbor and the freshwater and marine environments
11 throughout Washington from industrial pesticide use. *See* Declaration of George Kimbrell, ¶¶ 2,
12 10-12.; Declaration of Laura Hendricks, ¶ 3; Declaration of Nathan Donley, ¶ 3-4. Second,
13 Applicants have opposed the WGHOGA’s proposed use of imidacloprid, and other toxic
14 pesticides, to kill native burrowing shrimp for several years. These efforts have included
15 submitting extensive comments on each iteration of the proposed permit, providing public
16 comment in a variety of forums, and regularly disseminating information to the public on the
17 threats from the proposed actions. *See* Kimbrell Decl. ¶¶ 9-10; Hendricks Decl. ¶¶ 10-12;
18 Donley Dec. ¶ 9-12. Third, Applicants and their members specifically urged Ecology to take the
19 action challenged here by WGHOGA. *See* Kimbrell Decl. ¶¶ 10; Hendricks Decl. ¶¶ 12-13;
20 Donley Dec., ¶ 10.

21 Applicants’ interests are affected by this proceeding because the project so plainly
22 jeopardizes them: if appellants are successful and the Board orders Ecology to issue the NPDES
23 permit, WGHOGA’s members will be permitted to use an incredibly toxic neonicotinoid in an
24 unprecedented manner. Applicants represent tens of thousands of members who care about these
25 issues, *See* Kimbrell Decl. ¶¶ 2, 10-12; Hendricks Decl. ¶ 3; Donley Dec., ¶¶ 3-4; they have
26 extensive policy, technical, and scientific expertise on staff and among their memberships on the
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1 issues involved in WGHOGA’s proposal; they submitted written and technical information to
2 Ecology regarding the adverse impacts to human health and the environment that would result
3 from the proposal; and they have decades of experience advocating for the public’s interest in
4 environmental protection in Washington.

5 Applicants have no financial stake and will not profit from their participation in this
6 appeal. It is well accepted that such interests are sufficient for purposes of intervention as a
7 matter of right. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir. 1983)
8 (holding that environmental and conservation interests are sufficient for intervention as a matter
9 of right under Fed. R. Civ. P. 24(a)); *Columbia Gorge Audubon Soc’y*, 98 Wn. App. at 623, n.2
10 (“Washington’s CR 24 is the same as the federal rule. Therefore, we may look to federal
11 decisions and analysis for guidance.”) (citing *Am. Disc. Corp.*, 81 Wn.2d at 37). Had Ecology
12 ignored the substantial evidence supporting denial, and instead issued the NPDES permit,
13 Applicants would have been able to appeal that decision to this Board directly. *See RCW*
14 *34.05.570*. As such, Applicants should be allowed to intervene to defend their position in the
15 instant case, as well as throughout the ongoing regulatory process.

16 **3. Applicants’ Interests May Be Impaired as a Result of This Litigation.**

17 Rule 24(a) also requires that an applicant for intervention as a matter of right be situated
18 such that “the disposition of the action may as a practical matter impair or impede the person’s
19 ability to protect [his/her] interest.” CR 24(a)(2). This rule does not require that an intervenor
20 applicant’s interest be threatened by an actual legal effect of the litigation; an intervenor need
21 only show a practical impairment of an interest. *See Am. Disc. Corp.*, 81 Wn.2d at 41-42.
22 Applicants easily meet this requirement because of their significant interest and investment in
23 protecting Willapa Bay and Grays Harbor and surrounding areas from the effects of industrial-
24 scale pesticide use on these fragile and irreplaceable ecosystems. WGHOGA seeks a ruling from
25 the Board ordering Ecology to issue the NPDES permit; should WGHOGA succeed in obtaining
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1 such an order, Applicants' interests would suffer as a direct result. *See* Kimbrell Decl. ¶13;
2 Hendricks Decl. ¶ 13; Donley Dec., ¶ 13.

3 **4. Applicants' Interests Are Not Adequately Represented.**

4 The final requirement for intervention as of right is a showing that the existing parties to
5 the litigation do not adequately represent the Applicants' interests. *See* CR 24(a)(2). Like the
6 "interest test," this requirement is broadly interpreted and mandates only that applicants make "a
7 minimal showing that its interests may not be adequately represented." *Columbia Gorge*
8 *Audubon Soc'y*, 98 Wn. App. at 629-30; *see also* *Citizens for Balanced Use v. Montana*
9 *Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) ("The burden of showing inadequacy of
10 representation is 'minimal' and satisfied if the applicant can demonstrate that representation of
11 its interests 'may be' inadequate."), *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d
12 810, 823 (9th Cir. 2001) (intervention appropriate even though city and proposed construction
13 industry intervenors shared same ultimate objective of defending city's land management plan).

14 The Washington Court of Appeals illustrated the nature of the appropriate inquiry in
15 *Columbia Gorge Audubon Soc'y v. Klickitat Cnty.*, a case in which the court considered whether
16 existing plaintiff Audubon Society adequately represented intervenor-applicant Yakama Nation's
17 interests:

18 The relevant questions are: Will the Audubon Society *undoubtedly* make *all* the
19 Yakama Nation's arguments? That is, is the Audubon Society able and willing to
20 make those arguments? Will the Yakama Nation more effectively articulate any
21 aspect of its interest? It is not necessary that the intervenor's interest be in direct
22 conflict with those of the existing parties. It is only necessary that the interest may
23 not be adequately articulated and addressed. When in doubt, intervention should
be granted . . . [T]he intervention rules entitle an interested party to legal
standing as a party plaintiff with the right to define, explain and defend its own
interests directly. There is no more reason to suppose that the Audubon Society
can advocate effectively for the Yakama Nation than that the Yakama Nation,
however willing, could adequately present the concerns of the Audubon Society.

24 *Id.* at 630 (emphasis in original).

25 Applicants satisfy this requirement as well because no existing party adequately
26 represents their interests. The interests of appellant WGHOGA are directly adverse to

1 Applicants' interests. Applicants are aligned with respondent Ecology, but as a state agency,
2 Ecology must balance many competing interests in determining its policy and litigation positions
3 and cannot exclusively prioritize protection of Willapa Bay and Grays Harbor from the impacts
4 of pesticide use in industrial activities. Applicants, in contrast, have a specific interest in the
5 protection of these sensitive and fragile ecosystems, and an even more specific interest in
6 opposing WGHOGA's proposed use of a dangerous toxin in a wholly unprecedented manner.
7 "[T]he state's general duty to protect the public's interest does not sufficiently protect the
8 narrower interests of private groups." *Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 182
9 Wn.2d 519, 532, 342 P.3d 308 (2015).

10 Similarly, the intervenor-respondent the Ad Hoc Coalition for Willapa Bay may not
11 adequately represent Applicants interest. Applicants are non-profit conservation groups that
12 have a unique interest and history of involvement in the WGHOGA proposal. Applicants'
13 members live, work, and recreate near the proposed application sites, and they have been
14 engaged in grassroots organizing against this project and the harmful impacts it would have on
15 nearby communities since at least 2014. *See* Kimbrell Decl. ¶¶ 9-10; Hendricks Decl. ¶¶ 10-12;
16 Donley Dec. ¶ 9-12. In addition, Applicants have worked for years to on pesticide and
17 aquaculture issues throughout Washington, the Pacific Northwest and nationally. Kimbrell Decl.
18 ¶¶ 3-8; Donley Dec. ¶ 3-5. As a result, the Applicants bring experience, expertise, and
19 perspective to this proceeding that are different from the existing parties. Under Washington's
20 broad standard that permits intervention unless the existing party would "undoubtedly make" all
21 of the proposed intervenor's arguments and the proposed intervenor could not "more effectively
22 articulate any aspect of its interest," *Columbia Gorge Audubon Soc'y*, 98 Wn. App. at 629-630,
23 Applicants' interests are not adequately represented.

24 **B. Applicants Satisfy the Standards for Permissive Intervention.**

25 If the Board denies Applicants' intervention as of right, Applicants should be granted
26 permission to intervene under Civil Rule 24(b)(2). In Washington, permissive intervention is
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1 available at the court's discretion when "an applicant's claim or defense and the main action have
2 a question of law or fact in common," and the intervention will not "unduly delay or prejudice
3 the adjudication of the rights of the original parties." *Id.* Under this standard, Washington courts
4 have found that a court should deny intervention "only when it will unduly delay or prejudice the
5 rights of the original parties." *Wilson Sporting Goods Co. v. Pedersen*, 76 Wn. App. 300, 303,
6 886 P.2d 203 (1994) (citing *State ex rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 767, 575
7 P.2d 713 (1978)). In the present case, Applicants' defenses are both factually and legally related
8 to the main action. Applicants seek to defend Ecology's denial of the application for the NPDES
9 permit, and Applicants' intervention will not prejudice any of the existing parties or delay the
10 proceedings. The litigation is in its early stages, and Applicants "will significantly contribute...to
11 the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City*
12 *Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

13 **C. Applicants Satisfy the Criteria for Intervention in WAC 371-08-420.**

14 The Board's rules give the Board authority to grant intervention when doing so would
15 "serve the interests of justice," and the intervention would not impair "the prompt and orderly
16 conduct of the appeal." WAC 371-08-420(1). As noted above, the prompt and orderly conduct
17 of the appeal will not be impaired as Applicants' motion is timely, and Applicants agree to abide
18 by any schedules and procedures already set by the Board. Furthermore, the interests of justice
19 are served by giving a voice and the opportunity to participate to parties who have been engaged
20 in the various administrative processes related to WGHOGA's proposal for years, and whose
21 members would be significantly impacted by this Board's decision.

22 **CONCLUSION**

23 For the reasons set forth above, Applicants respectfully request that the Board grant their
24 motion to intervene as of right, or, in the alternative, for permissive intervention.

1 Respectfully submitted this 5th day of February, 2019.

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ANDREW M. HAWLEY, WSBA # 53052
Western Environmental Law Center
1402 3rd Ave., Suite 1022
Seattle, WA 98101
Tel: (206) 487-7250
E-mail: hawley@westernlaw.org

Attorneys for Proposed Intervenor-Respondents

1 **CERTIFICATE OF SERVICE**

2 I certify under penalty of perjury under the laws of the state of Washington that on
3 February 5, 2019, I served a true and correct copy of the *Motion to Intervene* on the following
via electronic mail and First Class Mail:

4 Environmental and Land Use Hearings Office
5 Attn: Pollution Control Hearings Board
6 1111 Israel Rd. SW, Suite 301
Tumwater, WA 98501

7 *Respondent*

8
9 Department of Ecology
10 PO Box 47600
11 Olympia, WA 98504-7600
12 eluho@elaho.wa.gov
13 Ivy Anderson
14 Assistant Attorney General
15 Office of the Attorney General
16 Ecology Division
17 PO Box 40117
18 Olympia, WA 98504-0117
19 Ivy A@atg.wa.gov

Appellant

Doug Steding
dsteding@nwresourcelaw.com
Diane M. Meyers
dmeyers@nwresourcelaw.com
Eliza Hinkes
ehinkes@nwresourcelaw.com
Kristine Williams
kwilliams@nwresourcelaw.com

17 *Intervenor Respondent*
18 Ad Hoc Coalition for Willapa Bay
19 Larry Warnberg
20 31 Hurt Rd.
Raymond, WA 98577
warnberg@pacifier.com

21 DATED this 5th day of February, 2019, at Seattle, Washington.

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23 

24 _____
25 Andrew Hawley