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HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, v. WASHINGTON STATE DEPARTMENT OF ECOLOGY and THE PORT OF SEATTLE, Respondents.	PCHB No. 01-160 MEMORANDUM SUPPORTING CASE'S MOTION TO INTERVENE

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ORIGINAL

I. RELIEF REQUESTED

Pursuant to Civil Rule 24 and WAC 371-08-420(1), Citizens Against SeaTac Expansion ("CASE") moves the Pollution Control Hearings Board for status as an intervenor in this case.

II. STATEMENT OF FACTS

On August 10, 2001, the Washington Department of Ecology issued Clean Water Act Certification No. 1996-4-02325, and a Coastal Zone Management Act Section 307(c)(3) concurrence statement to the Port of Seattle for Sea-Tac Airport Master Plan Update projects including the proposed third runway. Both the Airport Communities Coalition and the Port of Seattle appealed the Certification, in PCHB Nos. 01-133 and 01-150, respectively. The latter appeal resulted in the issuance of an Amended Certification ("Certification Order No. 1996-4-02325 (Amended-1)") on September 21, 2001. The Airport Communities Coalition subsequently appealed the Amended Certification in PCHB No. 01-160.

Petitioner/intervenor CASE is a non-profit corporation organized and in good standing under Washington law. *See,* Declaration of Brett Fish ("Fish Dec.") at 1 ¶1. CASE is a broad-based, local citizen's group which, among other things, acts to protect the local environment and communities from the impacts of Sea-tac Airport. *Id.* CASE and its members have consistently fought for clean water, including fighting for better enforcement of the Port of Seattle's NPDES permit for discharges from Sea-tac into local streams. *Id.*

CASE's efforts to safeguard its members, local communities, and local ecosystems from the impacts of Sea-Tac Airport have included appealing the reissued NPDES permit authorizing discharges at Sea-Tac, and appealing the Washington State Department of Ecology's recent

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modification of the Port's NPDES permit. The latter appeal is presently pending before the Board as PCHB No. 01-090. *Id.* at 1 ¶2.

CASE submitted oral and written comments on the proposed 401 Certification. *Id.* at 2 ¶4. CASE does not believe that Ecology had sufficient information to satisfy the legal standard of reasonable assurance that the proposed projects will not violate water quality standards. *Id.* By definition, violations of water quality standards in Miller, Walker, Des Moines, or Gillian Creek would impair water quality and beneficial uses in those creeks. *Id.* Further degradation and pollution of these creeks will impact CASE and its members, through their use and enjoyment of the creeks and the fish and wildlife that depend on them. *Id.*

CASE was not able to comment on the revised conditions contained in the Amended 401 Certification resulting from Ecology's same-day settlement of the Port's appeal. *Id.* at 2 ¶6. CASE and the public were deprived of any meaningful opportunity to participate in or to comment upon the revision of the conditions contained in the initial certification. *Id.* Ecology cut a deal with the Port without giving the public any opportunity -- short of appealing the amended certification -- to comment. *Id.*

The existing parties will not provide adequate representation of CASE's interests because none of the existing parties is a grass roots citizens' group representing individual citizens. *Id.* at 3 ¶7. The parties represent governmental organizations. *Id.* The parties have organizational perspectives, and do not adequately represent the individual citizens who live in the areas that will be impacted by the proposed discharges. *Id.* Ecology's willingness to revise the Certification as requested by the Port confirms that Ecology is not adequately representing the public interest in this matter. *Id.*

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CASE's intervention will cause no undue delay or prejudice to the rights of the existing parties to this action because the appeal is still in its early stages. *Id.* at 3 ¶ 8. CASE will agree to be bound by the case schedule order that is presently in force. *Id.* CASE's intervention and participation will not impact the case schedule in any way. *Id.*

CASE understands that the ACC's Motion for a Stay of the 401 Certification has already been fully briefed and argued. *Id.* at 3 ¶ 9. CASE does not ask to submit its own arguments supporting the stay motion. *Id.* Because CASE believes that a stay is needed to protect the local creeks, fish, and wildlife, CASE urges the Board to rule on the stay motion without delay. *Id.* CASE respectfully requests that its motion to intervene not be allowed to interfere with the pending stay motion. *Id.*

Because CASE satisfies the requirements for intervention under WAC 371-08-420 and Civil Rule 24, its motion to intervene in this action should be granted.

III. STATEMENT OF ISSUE

Whether CASE should be granted intervenor status under CR 24 and WAC 371-08-420.

IV. EVIDENCE RELIED UPON

The facts relevant to this Motion are set forth in the attached Declaration of Brett Fish, and in the pleadings and record of this appeal.

V. ARGUMENT AND AUTHORITY

WAC 371-08-420(1) provides for intervention in an appeal before the Pollution Control Hearings Board ("Board") as follows:

> The presiding officer may grant a petition for intervention at any time, upon determining that the petitioner qualifies as an intervenor pursuant to civil rule 24, that the

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intervention will serve the interests of justice and that the prompt and orderly conduct of the appeal will not be impaired.

WAC 371-08-420(1). Civil Rule 24 authorizes both intervention of right and permissive intervention. *See,* CR 24(a), (b).

CASE meets the requirements both of the Board's rules of practice and of CR 24. Under the cases, a court "should disallow intervention only when it will unduly delay or prejudice the rights of the original parties." Wilson Sporting Goods Co. v. Pedersen, 76 Wn.App. 300, 303, 886 P.2d 203 (1994), *citing* State ex rel. Keeler v. Port of Peninsula, 89 Wash.2d 764, 767, 575 P.2d 713 (1978). CASE's intervention will neither delay these proceedings nor prejudice the rights of the parties. CASE will abide by the briefing schedule and hearing schedule already established in this case. Therefore, this petition for intervention should be granted.

A. CASE Satisfies the Requirements of CR 24(a).

In Washington, the requirements of CR 24(a) are liberally construed to favor intervention. Columbia Gorge Audubon Society v. Klickitat County, 98 Wn.App. 618, 623, 989 P.2d 1260 (1999), *citing* Fritz v. Gorton, 8 Wn.App. 658, 660, 509 P.2d 83 (1973). CASE readily makes the showing required by CR 24(a) because CASE claims an interest relating to the subject matter of the action; its ability to protect its interest may be impaired by disposition of the action in its absence; its interest is not being adequately protected by existing parties; and the motion to intervene is timely. *See, e.g.,* Loveless v. Yantis, 82 Wn.2d 754, 758, 513 P.2d 1023 (1973).

In considering intervention requests, the term "interest" is to be construed broadly. *See,* Vashon Island Committee for Self-Government v. Washington State Boundary Review Bd. for King County, 127 Wn.2d 759, 765, 903 P.2d 953 (1995), *citing* Fritz, 8 Wn.App. at 660. "Not

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much of a showing is required, however, to establish an interest. And insufficient interest should not be used as a factor for denying intervention." Columbia Gorge, 98 Wn.App. at 629, *citing* American Discount Corp. V. Saratoga West, Inc., 81 Wn.2d 34, 41, 499 P.2d 869 (1972).

CASE claims an interest relating to the subject of this action because CASE exists to protect the local ecosystem, the water quality of Miller, Des Moines, and Walker Creeks, and the quality of life of its members. CASE's organizational interests -- as well as the individual interests of its members -- will be directly impacted by the diminished water quality that will result if the airport expansion projects are allowed to proceed under the 401 certification as issued and amended. CASE must be allowed to intervene to protect its interests and the interests of its members. The issues that have been raised in these appeals are issues that CASE has studied and tracked for years. Disposition of this action in CASE's absence would impair CASE's ability to protect its interests, because CASE will be unable to participate fully and effectively in the hearing unless party status is granted.

As for the adequacy of existing representation, the intervenor "need make only a minimal showing that its interests may not be adequately represented." Columbia Gorge, 98 Wn.App. at 629 (citations omitted). Indeed, "[i]t is only necessary that the interest [of the proposed intervenor] may not be adequately articulated and addressed. When in doubt, intervention should be granted." *Id.* at 630 (citations omitted).

Here, the existing parties are not adequately representing CASE's interests. The Department of Ecology cannot represent CASE's interests because Ecology is tasked with representing the interests of the entire state of Washington, not just the interests of CASE and its members. *See, e.g.,* Loveless, 82 Wn.2d at 759. Moreover, Ecology cannot be expected to

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represent the interests of CASE and its members with the zeal of interested, private citizens. Similarly, the Airport Communities Coalition (ACC) will not adequately represent CASE's interests because it represents local governments, rather than individual citizens themselves. CASE's interests and organizational perspective are different from those advocated by the ACC. *See,* Columbia Gorge, 98 Wn.App. at 629.

Finally, this motion is timely. Intervention should be allowed "unless it would work a hardship on one of the original parties." Loveless, 82 Wn.2d at 759. There is no hardship or prejudice to the original parties here. As explained in Columbia Gorge, "prejudice in the context of CR 24(a) does not mean the extra bother resulting from having to deal with the intervenor's issues. It refers only to difficulties caused by delay in bringing the motion." Columbia Gorge, 98 Wn.App. at 629 (citation omitted). CASE's motion to intervene is timely because it is raised prior to trial and judgment. 98 Wn.App at 624. Respondents here were timely informed of ACC's appeal and were put on notice to defend. *Id.* at 628. And like the intervenor in Columbia Gorge, CASE is "simply another voice asking for the same result as the [original appellant], only for different reasons." *Id.*

B. CASE Satisfies the Requirements for Permissive Intervention Under CR 24(b).

CASE also meets the requirements for permissive intervention under CR 24(b), which allows intervention when a statute confers a conditional right to intervene, and when an applicant's claim and the main action have a question of law or fact in common. Since CASE satisfies the requirements of WAC 371-08-420, as discussed below, and because CASE's notice of appeal (submitted herewith) shares common questions of law and fact with the main action, permissive intervention is appropriate.

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C. CASE Satisfies the Requirements of WAC 371-08-420

WAC 371-08-420(1) requires that the intervention will serve the interests of justice, and that the prompt and orderly conduct of the appeal will not be impaired by the intervention. Granting intervention would serve the interests of justice because CASE's intervention would ensure that the citizens directly impacted by diminished water quality resulting from the proposed airport expansion will be able to participate in this appeal. As noted above, CASE has participated in this process from the start, submitting comments throughout the process. Allowing CASE to intervene would work no hardship on the parties, and would serve the interests of justice by affirming the public's expectation that Ecology remains subject to the law and to judicial review.

V. CONCLUSION

For all of the reasons set forth above, CASE urges the Board to grant its petition for intervention.

DATED this 30th day of November, 2001.

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