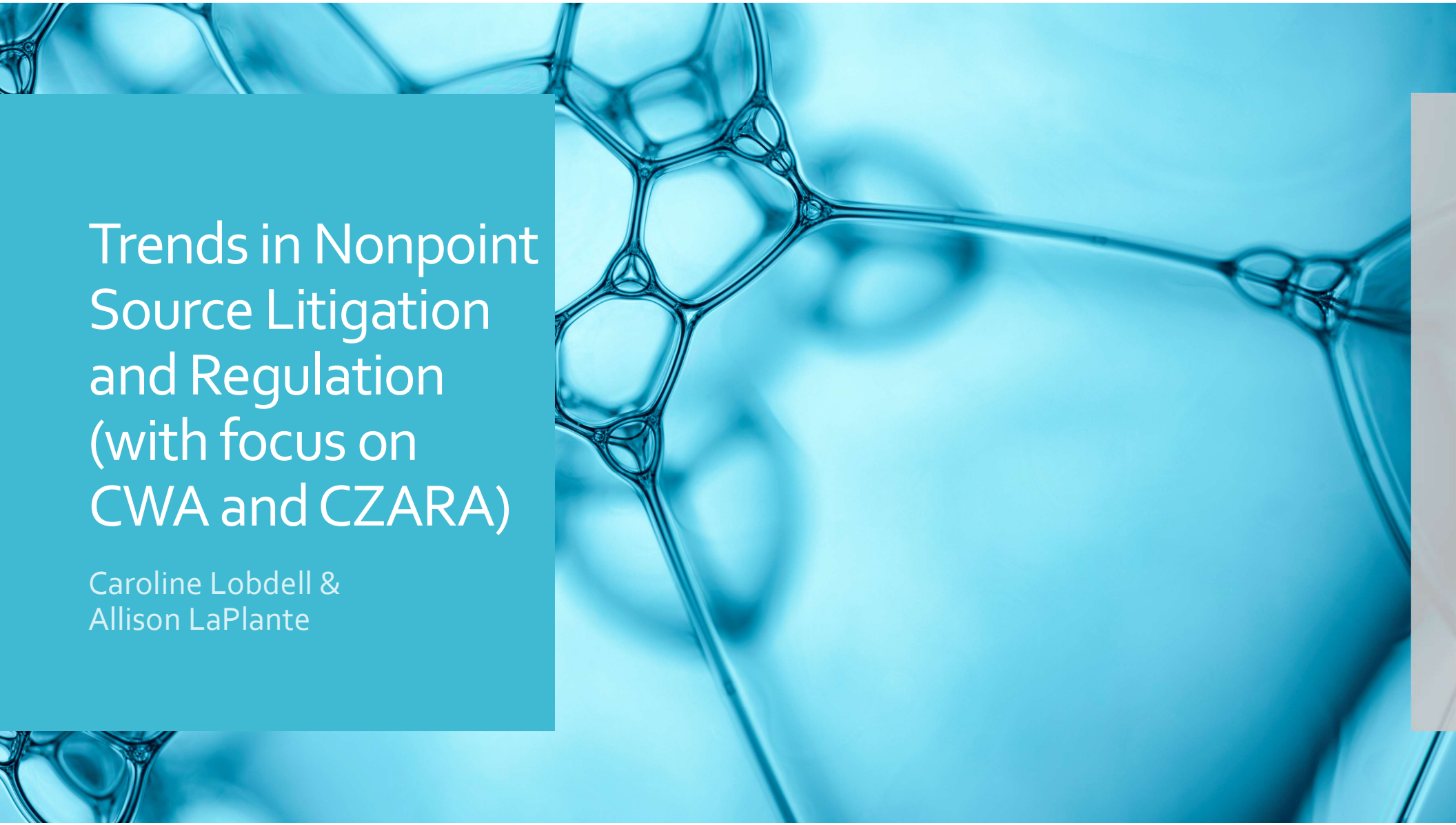


# Trends in Nonpoint Source Litigation and Regulation (with focus on CWA and CZARA)

Caroline Lobdell &
Allison LaPlante

# "Point Source" & "Nonpoint Source" Defined

- **Point Source** (33 U.S.C. § 1362(14) **:**
  - *"Any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged…"*
  - *"This term does not include agricultural stormwater discharges and return flows from irrigated agriculture."*

# "Point Source" & "Nonpoint Source" Defined

- **Nonpoint Source:**
  - **Anything that is not a point source**
  - Specifically exempted from point source definition "*agricultural stormwater discharges and return flows from irrigated agriculture.*"
  - Diffuse sources:
    - Land runoff
    - Precipitation
    - Atmospheric deposition
    - Drainage
    - Seepage
    - Hydrologic modification

# CWA Section 319, Funding & Federal-State Relationship

CWA Section 319 requires states to assess the quality of their waters and sources of water quality impairment before developing **nonpoint source management plans,** which are supposed to assist with meeting water quality standards and the goals of the CWA. 33 U.S.C. § 1329(a), (b), (c)(2), (d).

Section 319 Plans must:

(1) identify the best management practices ("BMPs") the state will use to reduce pollution from nonpoint sources;

(2) identify the programs the state will use to implement those BMPs;

(3) include an implementation schedule;

(4) certify that state law authorizes the management programs; and

(5) describe the funding available for the program.

33 U.S.C. § 1329(b)(2).

# CWA Section 319, Funding & Federal-State Relationship

- CWA Section 319(d)(1) requires EPA to approve or disapprove all or a portion of a state's Section 319 Plan within 180 days of submission. 33 U.S.C. § 1329(d)(1).
- If EPA finds a proposed plan is insufficient, EPA must notify the state of the revisions that are necessary to obtain approval and EPA and the state can then work toward final approval for the program. 33 U.S.C. § 1329(d)(2).

**Issue in Litigation:**

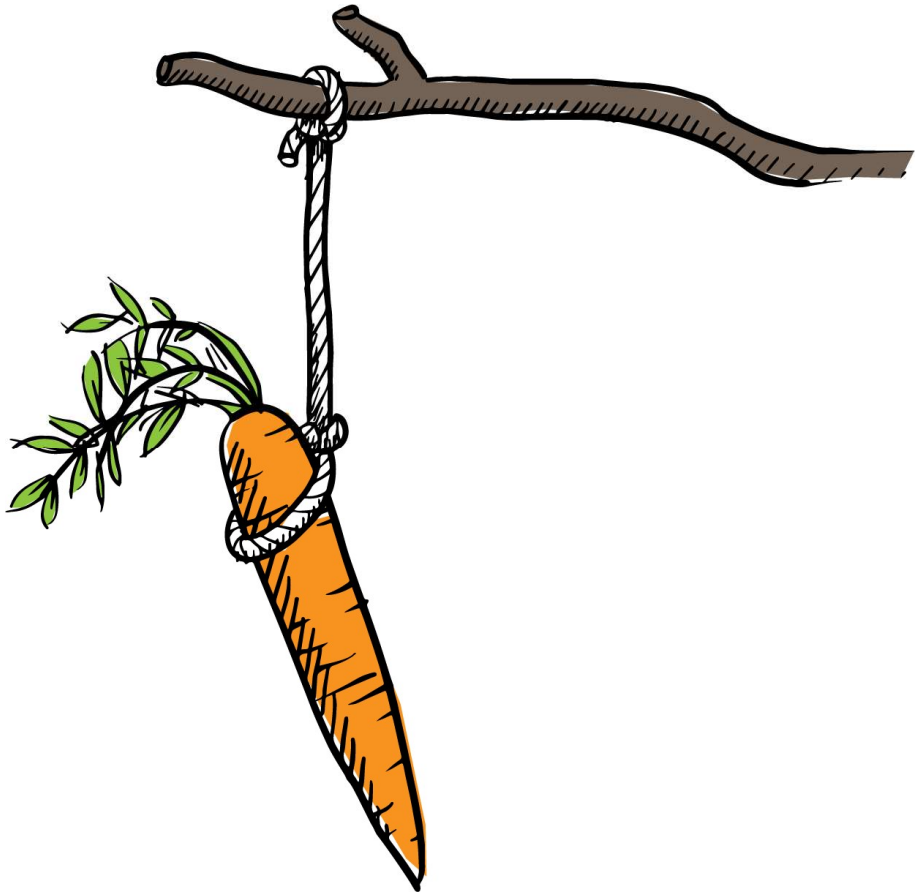
Do the requirements of Section 319 apply to a **state's original 319 Plan only** or do they apply when a state **updates** its 319 Plan?

- *Note*: EPA guidance requires states to update their 319 Plans every five years. And EPA's guidance references the elements of Section 319(b).

# CWA Section 319, Funding & Federal-State Relationship

- After EPA approves its Section 319 Plan, a state may apply for **federal grants** to assist with implementation. 33 U.S.C. § 1329(h)(1).
- **The CWA prohibits EPA** from making grants to a state that has an approved Section 319 program, and that received a Section 319 grant in the preceding fiscal year, unless EPA finds that the state made **"satisfactory progress"** toward meeting the **implementation schedule in its Section 319 Plan**. 33 U.S.C. § 1329(h)(8).
- The "satisfactory progress" finding—specifically**, EPA's ability to withhold Section 319 grant funds** from states that are not making satisfactory progress—is important **because it is a means by which EPA can encourage states to implement their Section 319 Plans, including through TMDLs, to protect water quality.**

# CWA Section 319, Funding & Federal-State Relationship



# CZARA, Funding & Federal-State Relationship

- CZARA requires each state with an approved plan under the Coastal Zone Management Act ("CZMA")—at least 34 states and territories—to submit a **Coastal Nonpoint Program** to EPA and NOAA for approval. 16 U.S.C. § 1455b(a)(1).
- The purpose of the program is "to develop and implement management measures **for nonpoint source pollution to restore and protect coastal waters,** working in close conjunction with other State and local authorities." *Id*.
- CZARA requires state Coastal Nonpoint Programs to comply with certain statutory criteria and nonpoint source pollution control guidance published by EPA. 16 U.S.C. § 1455b(b) & (g).

# CZARA, Funding & Federal-State Relationship

Once approved, states are required to implement their Coastal Nonpoint Programs through **changes to their Section 319 Plans** and coastal zone management programs. 16 U.S.C. §§ 1455b(a)(2), (c)(2).

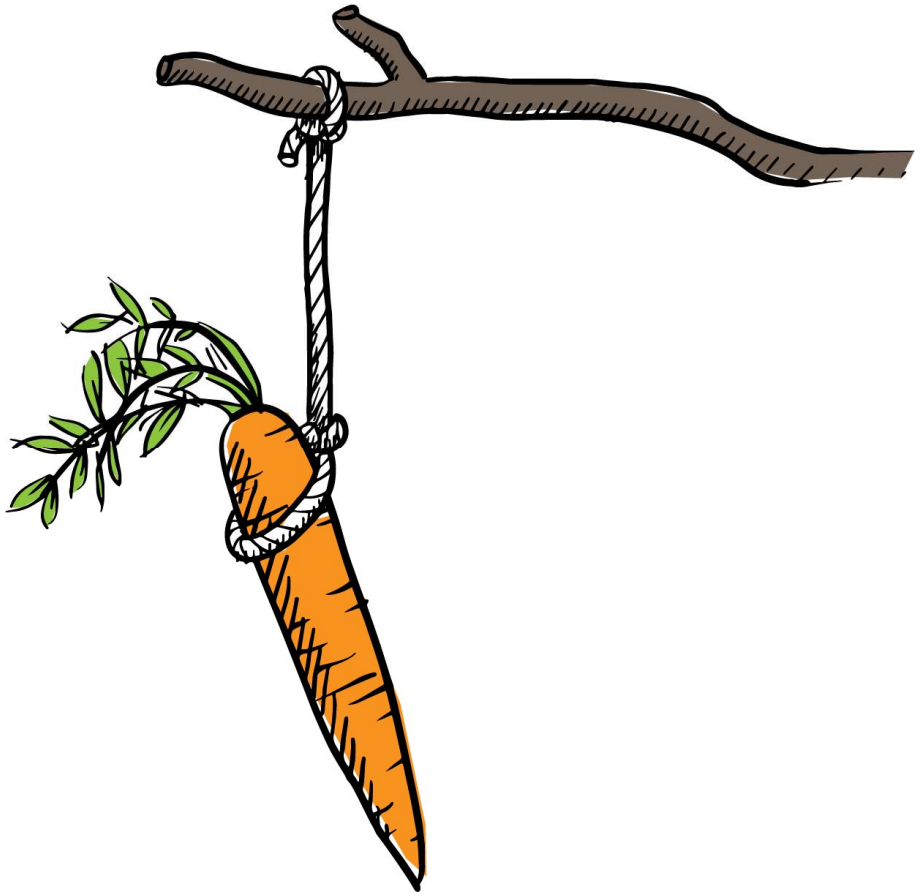
- **This is one way that CZARA and the CWA work together.**

# CZARA, Funding & Federal-State Relationship

- **CZARA requires NOAA** to withhold a portion of CZMA Section 306 grant funds from a state if it finds under CZARA that the state has failed to submit an approvable Coastal Nonpoint Program.
- Similarly**, CZARA requires EPA** to withhold a portion of CWA Section 319 grant funds from a state if EPA finds that the state has failed to submit an approvable program.

16 U.S.C. § 1455b(c)(3) and (4).

# CZARA, Funding & Federal-State Relationship



# CWA Claims in Case

Excerpt from Complaint in *NWEA v. Dept of Commerce, et al*.

95. Washington's final [319 Plan] identifies how it will create a *process* to identify BMPs for agricultural nonpoint pollution, but does not identify BMPs by categories of nonpoint sources or programs to achieve implementation of any identified BMPs, as required by CWA Section 319(b)(2)(A), (B).

96. Washington's final Section 319 Plan does not includes a schedule, containing annual milestones, that demonstrates it will utilize identified BMPs and program implementation methods, which together will provide for utilization of the BMPs at the earliest practicable date, as required under CWA Section 319(b)(2)(C).

**Therefore arbitrary and capricious approval of 319 Plan.**

# CWA Claims in Case

Excerpt from Complaint in *NWEA v. Dept of Commerce, et al*.

103. EPA's 2015 and 2016 satisfactory progress findings are arbitrary and capricious because, *inter alia*, EPA based its findings on Washington's 2015 Section 319 Plan, which contains no schedule for implementing BMPs and no identified BMPs.

104. Notwithstanding 33 U.S.C. § 1329(h)(8), EPA awarded Section 319 grant funds to Washington in 2015 and 2016.

**Therefore grants to Washington were arbitrary and capricious.**

# CZARA Claims in Case

Excerpt from Complaint in *NWEA v. Dept of Commerce, et al*.

28. EPA and NOAA have indefinitely delayed withholding CWA and CZMA grant funds from Washington and other states that failed to submit approvable Coastal Nonpoint Programs. EPA and NOAA accomplished that delay through their **conditional approval policy.** In general, where a state submits a Coastal Nonpoint Program that does not meet the applicable criteria, EPA and NOAA note deficiencies in the program—they find the state has not submitted an approvable program—and they identify conditions that need to be satisfied before the state can obtain full program approval. EPA and NOAA **then "conditionally approve"** the deficient program and **continue *full* CWA and CZMA funding pending completion of the conditions and final program approval.**

**Therefore agency action unlawfully withheld or unreasonably delayed.**

**Alternatively, granting of funds was arbitrary and capricious.**

# Citizen Suits/Standing

- How to establish standing in a suit that involves these federal/state dynamics, including relief that could include funding cuts to the state?
  - CZARA claims: "procedural standing" so lower burden on causation/redressability
  - **Standard**: *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220 (9th Cir. 2008) = "could protect concrete interests"

**Our arguments:**

- An order to withhold CZARA funds until the agencies approve Washington's program is the relief Congress designed to address insufficient protection of coastal resources and deficient state programs. *See* 16 U.S.C. § 1455b(c)(3)–(4); PL 101-508 § 6202(a).
- Congress chose to use statutory penalties to promote stronger regulation of nonpoint source pollution in coastal areas. 16 U.S.C. § 1455b(c)(3)–(4). Because Congress included that remedy in the statute, the Court must presume that remedy will contribute to Washington's improving its program to meet CZARA standards.

# Citizen Suits/Standing

- Courts have long recognized Congress' prerogative to induce action by offering a '**carrot**' of federal funding.
  - *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (discussing Congressional authority to condition federal funds "to further broad policy objectives").
- Likewise, the '**stick**' of withdrawing funding is known to produce Congress' desired results.
  - *See, e.g., Nat'l Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 575 & n.32 (D.C. Cir. 1983) (funding termination proceedings under the Civil Rights Act "ha[ve] proven very effective" and resulted in subsequent compliance in virtually every case);
  - *Nat'l. Solid Wastes Mgmt. Ass'n v. Alabama Dept. of Envtl. Mgmt.*, 910 F.2d 713, 722 n. 11 (11th Cir. 1990) (noting the sanction of withholding funds under CERCLA "seems effective" where most states adopted conditions to avoid losing funds).

# Citizen Suits/Standing

**Ruling on Motion to Dismiss Based on Standing**

**NWEA need only show that the procedural step the agency failed to take "*could* protect** [its] economic interests." *Salmon Spawning*, 545 F.3d at 1226; *see also Ctr. for Biological Diversity v. Envtl. Prot. Agency*, 861 F.3d 174, 184 (D.C. Cir. 2017) (procedural deficiency need only be "connected to the substantive result."). **NWEA has met this burden.** NWEA plead [*sic*] that EPA and NOAA's failure to fulfill its obligations under CWA and CZARA "subvert[ed] and render[ed] ineffective the statutes Congress adopted to protect water quality, aquatic species, and drinking water supplies from nonpoint sources of water pollution." (Dkt. No. 18 at 2.) It further plead [*sic*] that its members "regularly use these waters and adjacent lands and have definite future plans to continue to use and enjoy these waters for recreational, subsistence, scientific, aesthetic, spiritual, commercial, educational, employment, conservation . . . study, and photography, and recreational" purposes, and that **its members would "derive more benefits from their use of Washington's coastal waters if Defendants properly implemented the laws Congress adopted to reduce nonpoint source water pollution."** (*Id*. at 4.) The Court accepts these allegations as true at this point in the proceeding. *Leite*, 749 F.3d at 1121 (9th Cir. 2014).

# Citizen Suits/Standing

**Ruling on Partial Summary Judgment on CZARA Claims**

- Court agrees with NWEA that we are within the "procedural standing" rubric.
- But….court holds:
  - Plaintiff must show that it is ***reasonably probable*** that NOAA and EPA's failure to withhold funds threatens Plaintiff's concrete interests. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011).
  - Plaintiff has failed to provide **sufficient evidence** to support its assertion that NOAA and EPA's failure to withhold funds from Washington's CZMA Section 306 and CWA Section 319 grants represents a redressable procedural injury.
  - Whereas Defendants provide evidence that withholding grant funds is likely to increase, rather than reduce, harm to Plaintiff's concrete interests.

# Citizen Suits/Standing

**Ruling on Motion for Reconsideration/Request for Discovery**

- Plaintiff…asserts that it was manifest error to apply the "reasonably probable" test to redressability. (Dkt. No. 113 at 6–7.) Even if this were true, "the redress[a]bility requirement is not toothless in procedural injury cases . . . [p]rocedural rights can loosen . . . the redressability prong, not eliminate it." *Friends of Santa Clara River* v. *U.S. Army Corps of Engineers*, 887 F.3d 906, 918 (9th Cir. 2018) (internal quotation marks and citations omitted). **Plaintiff put forth insufficient evidence to demonstrate that withholding grant funds *could* protect its concrete interests**.
- [I]t is not clear to the Court what information Plaintiff could gather that would demonstrate that **reducing grant funding could reduce, rather than increase, Plaintiff's injury**. *See Qualls By and Through Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994) (movant must "show how allowing additional discovery would have precluded summary judgment.").

# Endangered Species Act Claims

- **Section 7:**
  - Failure to consult
  - Failure to ensure agency action is not likely to jeopardize the continued existence of endangered or threatened species, or result in the destruction or adverse modification of habitat of such species
- **EPA approval of Washington's NPS program, "satisfactory progress" determinations, approval of grants**
  - **EPA/NOAA failure to consult**
  - **Failure to insure against "jeopardy"**

# Endangered Species Act Claims

# Endangered Species Act Claims

# Intervention:

# Participating in NPS Litigation Involving State & Federal Governments

- Why Agricultural interests sought to intervene?
- Arguments for **Agricultural interests – Reliance on NPS funding, direct stakeholder in NPS regulatory decisions, environmental interest**
  - Significant protectable interest
  - Disposition will impair/impede
  - Unique interest – aka not adequately represented by existing parties (i.e., state government)

# Intervention:

# Participating in NPS Litigation Involving State & Federal Governments

- Why intervene?
  - Giving Agriculture a voice in a case that placed their livelihood & way of life at issue.
  - "*Proposed intervenors have an interest in an economically viable regulatory scheme and are in a better position to understand the financial and economic implications of various regulatory measures than the parties.*"
  - "*Proposed intervenors also benefit from funding of nonpoint source programs throughout the state, and the funding has helped to implement farm practices to improve water quality through the Farmed Smart certification program and for riparian planning.*"

# Intervention:

# Participating in NPS Litigation Involving State & Federal Governments

- Arguments against intervention: only Federal Defendant opposed
  - Claimed no practical impairment to Proposed Intervenors
    - "*Movants' interests would not as a practical matter be impaired or impeded by the disposition of this action because their interests (like Plaintiff's interests), could be (if at all) only indirectly affected by the outcome of this case based on actions the State of Washington may or may not take.*"
  - Adequate representation by FEDERAL DEFENDANTS!
    - "*Movants and the Federal Agencies share the same ultimate objective: that the Federal Agencies' determinations be upheld under the relevant statutes, as well as the Federal Agencies' issuance of grants issued under the CZMA and the CWA.*"
    - "*The Federal Agencies and Movants [proposed intervenors] share the same interest in the proper interpretation of the relevant statutes to ensure that the State continues to receive and administer such federal grants. Movants' interests therefore are adequately represented by the Federal Agencies.*"

# Intervention:

# Participating in NPS Litigation Involving State & Federal Governments

- Denial of intervention at U.S. District Court:
  - "*[E]xisting parties adequately represent Proposed Intervenors' interests in these claims… Proposed Intervenors do not purport to bring any necessary or novel elements to the adjudication of this procedural claim, and fail to illustrate how the Court's holding on this matter would impact them.*"
  - "*Proposed Intervenors' interest… is wholly eclipsed by Washington's identical interest in ensuring the grants continue.*"

# Intervention:

# Participating in NPS Litigation Involving State & Federal Governments

- 9th Circuit Decision Allowing Intervention:
  - "*We reject the government's argument that the state of Washington will advance the same arguments in litigation as the WCA and WFB, because the record shows that Washington seeks to promote the "highest possible standards" for water purity, while the proposed intervenors have a narrower parochial interest in ensuring the continued economic feasibility of their constituents' operation. Moreover, the record indicates that the WCA and WFB have specialized expertise*." Memorandum, D.C. No. 2:16-cv-01866-JCC

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*Attorneys for Plaintiff Northwest Environmental Advocates*

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

| | |
|---|---|
| NORTHWEST ENVIRONMENTAL ADVOCATES, an Oregon non-profit corporation,<br><br>Plaintiff,<br><br>v.<br><br>THE U.S. DEPARTMENT OF COMMERCE, THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, and THE U.S. ENVIRONMENTAL PROTECTION AGENCY, agencies of the United States of America,<br><br>Defendants. | Case No. 2:16-cv-01866-JCC<br><br>PLAINTIFF'S SECOND AMENDED AND SUPPLEMENTAL COMPLAINT |

## I. INTRODUCTION

1. This is an action against the U.S. Department of Commerce, the National Oceanic and Atmospheric Administration (collectively "NOAA") and the U.S. Environmental Protection Agency ("EPA") for violations of the Coastal Zone Act Reauthorization Amendments of 1990

("CZARA") and the Clean Water Act ("CWA"). These statutes encourage or require states to develop programs to manage nonpoint source pollution to protect water quality. Nonpoint source pollution is precipitation runoff that moves over the ground, carrying away pollutants and depositing them into lakes, rivers, wetlands, and other waters. These statutes also require EPA and NOAA to review state programs and to withhold certain federal grant funds from states that fail to develop and implement their programs in a complete and timely manner.

2. Plaintiff Northwest Environmental Advocates ("Advocates") brings this action because although EPA and NOAA have repeatedly found that Washington has failed to submit an approvable coastal nonpoint pollution control program under CZARA, they have failed to disapprove Washington's program or to withhold the grant funds from Washington, as required. Additionally, EPA recently approved the nonpoint source program Washington developed under Section 319 of the CWA, allowing EPA to continue granting CWA funds to Washington even though Washington's program is plainly deficient under federal law.

3. This action also alleges violations of the Endangered Species Act ("ESA"). The ESA requires federal agencies to consult with federal fish and wildlife agencies to insure that any action authorized, funded, or undertaken by the federal government does not jeopardize species protected by the ESA or destroy or adversely modify those species' critical habitats. Here, although nonpoint source pollution adversely affects dozens of aquatic species protected by the ESA in Washington State, Defendants have never evaluated whether their approach to overseeing Washington's nonpoint source pollution control programs jeopardizes those species or adversely modifies their designated critical habitats.

4. Defendants' actions and inactions with respect to Washington's nonpoint source programs subvert and render ineffective the statutes Congress adopted to protect water quality, aquatic species, and drinking water supplies from nonpoint sources of water pollution. Plaintiff


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therefore seeks a declaration that Defendants have violated these laws by failing to disapprove Washington's programs, by failing to withhold grant funds from Washington as required, and by failing to insure that federal oversight of Washington's programs—or the lack thereof—does not threaten aquatic species in Washington. Plaintiff also seeks a court order compelling Defendants to comply with these laws and requiring Defendants to pay Plaintiff's costs and attorneys' fees.

## II. JURISDICTION AND VENUE

5. Plaintiff brings this action pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the citizen suit provisions of the Endangered Species Act, 16 U.S.C. § 1540(g). This Court has jurisdiction pursuant to 16 U.S.C. § 1540(g) and 28 U.S.C. § 1331 (federal question), § 2201 (declaratory judgment), and § 2202 (further relief).

6. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and Local Civil Rule 3(d)(1) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Seattle, Washington and because Defendants' regional offices are located there.

## III. PARTIES

7. Plaintiff NORTHWEST ENVIRONMENTAL ADVOCATES is a non-profit entity organized under Section 501(c)(3) of the Internal Revenue Code, with its principal place of business in Portland, Oregon. Founded in 1969, and incorporated in 1981, Advocates has actively worked to protect and restore water quality and fish habitat in the Northwest for over forty-five years. Advocates employs community organizing, strategic partnerships, public records requests, information sharing, public education, advocacy with administrative agencies, lobbying, and litigation to ensure better implementation of the laws that preserve the natural environment and protect water quality and wildlife.



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8. Advocates and its members reside near, visit, use, and/or enjoy rivers, streams, and other surface waters in Washington State, including waters in Washington's coastal areas. Advocates and its members regularly use and enjoy these waters and adjacent lands and have definite future plans to continue to use and enjoy these waters for recreational, subsistence, scientific, aesthetic, spiritual, commercial, educational, employment, conservation, and other purposes, including wildlife observation, study, and photography, and recreational and commercial fishing. Advocates and its members derive benefits from their use and enjoyment of Washington's waters, especially waters in Washington's coastal areas, and therefore have a specific interest in the full and proper implementation of the laws passed to control water pollution and protect wildlife, such as the CWA, CZARA, and the ESA. Advocates and its members would derive more benefits from their use of Washington's coastal waters if Defendants properly implemented the laws Congress adopted to reduce nonpoint source water pollution and to protect threatened species, and if farming, logging, and other sources of nonpoint source pollution were not adversely impacting water quality and native species of fish and wildlife.

9. Some of Advocates' members are engaged in voluntary and employment-related efforts to protect ESA-listed species or to restore habitat, including water quality, for threatened and endangered fish and the birds and mammals that depend upon them. These members' efforts are undermined by Defendants' failure to use the carrot-and-stick approach Congress adopted in CZARA and the CWA to control nonpoint source pollution in coastal and other watersheds. Defendants' failure to comply with the ESA also undermines and injures Advocates' members' habitat restoration and species protection activities. Advocates' members' advocacy for improved regulation of nonpoint source activities, including for example, logging on the Olympic Peninsula and protection of riparian areas in agricultural lands in the Green-Duwamish


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watershed, are undermined by Defendants' failure to hold the State of Washington accountable under CZARA, the CWA, and the ESA for inadequate logging and farming regulations and other land uses that adversely impact water quality. Advocates and its members have both substantive and procedural interests in complete implementation of environmental laws such as CZARA, the CWA, and the ESA.

10. The above-described interests of Advocates and its members have been, are being, and, unless this Court grants the relief prayed for herein, will continue to be adversely affected by Defendants' disregard of their statutory duties under CZARA, the CWA, and the ESA and by the unlawful harm imposed on water quality, fish and wildlife, and fish habitat that results. Defendants' failure to implement these statutes injures the interests of Advocates and its members. NOAA's failure to withhold the required amount of CZMA Section 306 funds, and EPA's failure to withhold the required amount of CWA Section 319 funds, has contributed to Washington's delay in meeting all conditions for final approval of its coastal nonpoint pollution control program ("Coastal Nonpoint Program") under CZARA. Additionally, EPA's improper approval of Washington's CWA Section 319 program and its improper grant of CWA Section 319 funds to Washington has contributed to Washington's maintaining a CWA program that does not protect water quality or aquatic species and that does not meet the requirements of the CWA. Both agencies' failure to comply with ESA Section 7 in authorizing and funding Washington's nonpoint source control programs has unlawfully caused and perpetuated adverse impacts to aquatic species that could have been avoided, reduced, or eliminated had the agencies complied with the ESA.

11. The relief requested in this lawsuit can redress these injuries. A court order requiring Defendants to comply with their procedural and substantive obligations under CZARA, the CWA, and the ESA would remedy Advocates' procedural injuries. Additionally, if this



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Court orders Defendants to comply with CZARA, CWA Section 319, and the ESA, Washington may improve its 319 plan and improve water quality in the state. In turn, Plaintiff's members' injuries would likely be at least partially redressed by improved agricultural, logging, and other practices that are contributing nonpoint source water pollution to surface waters in Washington and impairing Advocates' members' interests.

12. Defendants in this action are the U.S. DEPARTMENT OF COMMERCE, which Congress charged with implementing CZARA; the NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, which implements CZARA for the U.S. Department of Commerce; and the U.S. ENVIRONMENTAL PROTECTION AGENCY, which Congress charged with implementing CZARA and the CWA.

13. The U.S. Department of Commerce, the National Oceanic and Atmospheric Administration, and the U.S. Environmental Protection Agency are agencies within the meaning of Administrative Procedure Act. 5 U.S.C. § 551.

## IV. LEGAL BACKGROUND

A. The Clean Water Act.

14. In 1972, Congress adopted amendments to the CWA in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA establishes an "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife[.]" 33 U.S.C. § 1251(a)(2).

15. To accomplish that goal, the CWA requires states to develop water quality standards that establish the desired conditions of each waterway within the state's regulatory jurisdiction. 33 U.S.C. § 1313(a); 40 C.F.R. § 131.2. Water quality standards must be sufficient to "protect the public health or welfare, enhance the quality of water, and serve the purposes of


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[the CWA]." 33 U.S.C. § 1313(c)(2)(A). Upon review and approval by EPA, a state's water quality standards become a component of a state's regulatory scheme.

16. The CWA requires states to review the quality of surface waters on a regular basis. If a state finds that waters do not meet applicable water quality standards, CWA Section 303(d) requires the state to add the waters to its list of impaired waters. The CWA then requires states to develop total maximum daily loads ("TMDLs") for all waters on its CWA Section 303(d) list. A TMDL sets the allowable total daily loading of a pollutant for a particular waterbody that, when achieved, will ensure the water attains and maintains the applicable water quality standard. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. §§ 130.2(g)-(i), 130.7(c). Water quality standards and TMDLs are among the cornerstones of the CWA's pollution control measures.

17. The CWA regulates "point sources" of pollution differently than it regulates "nonpoint sources" of pollution. To limit and control pollution from "point sources," which the CWA defines as a "discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] well . . . from which pollutants are or may be discharged," 33 U.S.C. § 1362(14), the CWA established the National Pollutant Discharge Elimination System ("NPDES") permit program. In general, NPDES permits implement water quality standards, and pollutant wasteload allocations set by TMDLs, by incorporating them into effluent limitations and other permit conditions that limit the amount of pollution discharged.

18. The CWA does not require NPDES permits for nonpoint sources of pollution; instead, Section 319 of the CWA requires states to assess the quality of their waters and sources of water quality impairment before developing nonpoint source management plans ("Section 319 Plans"), which are supposed to assist with meeting water quality standards and the goals of the CWA. 33 U.S.C. § 1329(a), (b), (c)(2), (d). Section 319 Plans must: (1) identify the best management practices ("BMPs") the state will use to reduce pollution from nonpoint sources; (2)


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identify the programs the state will use to implement those BMPs; (3) include an implementation schedule; (4) certify that state law authorizes the management programs; and (5) describe the funding available for the program. 33 U.S.C. § 1329(b)(2).

19. Section 319(d)(1) of the CWA requires EPA to approve or disapprove all or a portion of a state's Section 319 Plan within 180 days of submission. 33 U.S.C. § 1329(d)(1). If EPA finds a proposed plan is insufficient, EPA must notify the state of the revisions that are necessary to obtain approval and EPA and the state can then work toward final approval for the program. 33 U.S.C. § 1329(d)(2).

20. After EPA approves its Section 319 Plan, a state may apply for federal grants to assist with implementation. 33 U.S.C. § 1329(h)(1). State grant applications must include a description of the BMPs the state proposes to assist, encourage, or require for nonpoint sources for the year covered by the grant. *Id*. at (h)(2).

21. The CWA prohibits EPA from making grants to a state that has an approved Section 319 program, and that received a Section 319 grant in the preceding fiscal year, unless EPA finds that the state made "satisfactory progress" toward meeting the implementation schedule in its Section 319 Plan. 33 U.S.C. § 1329(h)(8). The "satisfactory progress" finding—specifically, EPA's ability to withhold Section 319 grant funds from states that are not making satisfactory progress—is important because it is a means by which EPA can encourage states to implement their Section 319 Plans, including TMDLs, to protect water quality.

B. The Coastal Zone Act Reauthorization Amendments of 1990.

22. CZARA requires each state with an approved plan under the Coastal Zone Management Act ("CZMA")—at least 34 states and territories—to submit a Coastal Nonpoint Program to EPA and NOAA for approval. 16 U.S.C. § 1455b(a)(1). The purpose of the program


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is "to develop and implement management measures for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities." *Id.*

23. CZARA requires state Coastal Nonpoint Programs to comply with certain statutory criteria and nonpoint source pollution control guidance published by EPA. 16 U.S.C. § 1455b(b) & (g). As required by CZARA, 16 U.S.C. § 1455b(g), EPA, in consultation with NOAA, issued *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* in January 1993 ("EPA's 1993 Guidance"). In that guidance, EPA set forth "management measures" to limit nonpoint source pollution and protect coastal waters from various nonpoint sources of pollution. EPA's management measures address nonpoint source pollution from six primary areas: (1) agriculture; (2) urban runoff; (3) forestry; (4) marinas and boating; (5) channel modification, dams, and streambank and shoreline erosion; and (6) wetlands, riparian areas, and vegetated treatment systems.

24. Where compliance with EPA's 1993 Guidance is not expected to achieve and maintain water quality standards and protect designated uses—those uses designated by states and approved by EPA under Section 303(c) of CWA, 33 U.S.C. § 1313(c)—CZARA requires states to develop and implement "additional management measures" as necessary to achieve and maintain applicable water quality standards. 16 U.S.C. § 1455b(b)(3).

25. CZARA required states to submit their Coastal Nonpoint Programs to EPA and NOAA within 30 months of the publication of EPA's 1993 Guidance—*i.e.*, by July 1995—and required EPA and NOAA to review state programs within six months of submittal. 16 U.S.C. §§ 1455b(a)(1), 1455b(c)(1).

26. EPA and NOAA must approve a state's Coastal Nonpoint Program if the agencies determine that the portions of the program under their respective authorities meet the requirements of the Act. *Id.* In practice, EPA and NOAA coordinate their review of Coastal


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Nonpoint Programs; neither agency will approve a state's program until it meets all federal approval requirements as determined by both agencies. Once approved, states are required to implement their Coastal Nonpoint Programs through changes to their Section 319 Plans and coastal zone management programs. 16 U.S.C. §§ 1455b(a)(2), (c)(2).

27. CZARA requires NOAA to withhold a portion of CZMA Section 306 grant funds from a state if it finds under CZARA that the state has failed to submit an approvable Coastal Nonpoint Program. Similarly, CZARA requires EPA to withhold a portion of CWA Section 319 grant funds from a state if EPA finds that the state has failed to submit an approvable program. 16 U.S.C. § 1455b(c)(3) and (4). CZARA required EPA and NOAA to begin withholding the grant funds beginning in 1996. *Id*. at § 1455b(c)(3)(D) and (4)(D).

C. EPA's and NOAA's "Conditional Approval" Policy.

28. EPA and NOAA have indefinitely delayed withholding CWA and CZMA grant funds from Washington and other states that failed to submit approvable Coastal Nonpoint Programs. EPA and NOAA accomplished that delay through their conditional approval policy. In general, where a state submits a Coastal Nonpoint Program that does not meet the applicable criteria, EPA and NOAA note deficiencies in the program—they find the state has not submitted an approvable program—and they identify conditions that need to be satisfied before the state can obtain full program approval. EPA and NOAA then "conditionally approve" the deficient program and continue *full* CWA and CZMA funding pending completion of the conditions and final program approval.

29. The agencies' conditional approval policy established "one schedule for all coastal nonpoint programs" and scheduled for 2001 the withholding of grant funds from states without final program approval. On October 16, 1998, EPA and NOAA issued *Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for*


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*Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990* ("Final Administrative Changes"). There, the agencies reiterated that the timeframes for conditional approval would remain the same as those specified in the agencies' March 16, 1995 Flexibility Policy, *e.g.*, up to five years after conditional approval to meet conditions, with an evaluation of progress after three years.

30. In the 1998 Final Administrative Changes guidance, EPA and NOAA also set out their expectations that actual pollution controls for "all individually and cumulatively significant nonpoint source categories and all watersheds within the §6217 management area will be addressed within 15 years." The guidance further required states to submit a 15-year program strategy that would include, *inter alia,*

> a basis for determining whether [a state's] program will succeed in ensuring implementation within the 15 year implementation period (e.g., implementation rates); and, a process whereby the state will determine the need to use a backup authority and/or adopt additional enforceable policies and mechanisms to ensure implementation of the management measures within 15 years.

31. EPA and NOAA initially "conditionally approved" all states' Coastal Nonpoint Programs. EPA and NOAA did not issue any final decision disapproving a state's Coastal Nonpoint Program until 2015, when, because of litigation brought by Plaintiff, EPA and NOAA disapproved Oregon's Coastal Nonpoint Program and subsequently withheld some federal grant funding from Oregon.

32. When EPA and NOAA are prepared to approve a state Coastal Nonpoint Program, they develop a Full Approval Decision Memorandum, publish a notice of intent to approve in the Federal Register, and open a public comment period so the agencies can learn the views of the public before making their final decision. Under EPA's and NOAA's conditional approval policy, states receive full approval for their Coastal Nonpoint Programs only after they have satisfied all the conditions imposed on their program by EPA and NOAA.


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D. The Endangered Species Act.

33. Congress enacted the Endangered Species Act "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved ... [and] to provide a program for the conservation of such endangered species and threatened species[.]" 16 U.S.C. § 1531(b).

34. Section 4(a) and 4(c) of the ESA, 16 U.S.C. § 1533(a) and (c), require the federal agencies that implement the ESA to determine whether any species is "threatened" or "endangered" and, if so, to list that species as being subject to the protections of the ESA. Section 4(a)(3) of the Act, 16 U.S.C. § 1533(a)(3), then requires the federal agencies that implement the ESA to designate critical habitat for species listed as threatened or endangered.

35. Section 9 of the ESA makes it unlawful for any person to "take" an endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B). All "persons," including any "any officer, employee, agent, department, or instrumentality of the Federal Government" are subject to the ESA's take prohibition. 16 U.S.C. § 1532(13).

36. In addition to the take prohibition, Section 7(a)(2) of the ESA requires federal agencies to evaluate expected impacts to listed species and designated critical habitat before authorizing, funding, or taking any discretionary action. 16 U.S.C. § 1536(a)(2). For freshwater aquatic species, the ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service ("FWS"). For marine or oceangoing species such as salmon and steelhead, the ESA requires federal agencies to consult with the National Marine Fisheries Service ("NMFS").

37. FWS or NMFS must prepare a biological opinion if a proposed agency action is likely to adversely affect a listed species. FWS and NMFS must base their biological opinions on the best available science and must analyze whether the proposed agency action is likely to jeopardize any listed species or adversely modify any designated critical habitat. 16 U.S.C. §


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1536(a)(2). If a proposed agency action will jeopardize a listed species or adversely modify designated critical habitat, FWS or NMFS must suggest reasonable and prudent alternatives that will avoid those outcomes. 16 U.S.C. § 1536(b)(3)(A).

38. The consulting agency—FWS or NMFS, as the case may be—must issue an incidental take statement to the action agency if after consultation it concludes the proposed action will result in take of listed species but is not likely to jeopardize a listed species or adversely modify critical habitat. 16 U.S.C. § 1536(b)(4). Incidental take statements authorize the incidental take of listed species that will occur as a result of the action agency's proposed action. They also limit the allowed level of incidental take and impose terms and conditions on the proposed action. 16 U.S.C. § 1536(b)(4)(C)(iv). If, when implemented, the action exceeds the level of authorized take, the action agency, FWS, or NMFS must reinitiate consultation under Section 7(a)(2) of the ESA. 50 C.F.R. § 402.16.

## V. FACTUAL BACKGROUND

### A. Nonpoint Source Pollution Is A Serious and Widespread Problem in Washington.

39. Nonpoint source pollution dominates as the cause of water quality impairments throughout the United States. The most recent CWA Section 305(b) data estimate that 53 percent of the nation's assessed rivers and streams, 66 percent of the nation's estuaries and bays, and 69 percent of the nation's lakes are water quality impaired, meaning they fail to meet water quality standards. EPA estimates that more than half the waters on state CWA Section 303(d) lists of impaired waters are impacted primarily by nonpoint sources of pollution.

40. Washington's waters are no different. As of 2008, 80 percent of the 2.8 percent of Washington's total 70,439 miles of rivers and streams that have been assessed, were found to be impaired. Of 376 square miles of ocean and near coastal waters, 53 percent are impaired.



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B. Nonpoint Source Pollution Adversely Impacts Aquatic Species in Washington.

41. The coastal waters of Washington State serve as habitat for, and provide food for, numerous threatened and endangered species listed under the ESA. NMFS listed the Upper Columbia River spring Chinook salmon under the ESA in 1999. Puget Sound Chinook, Lower Columbia River Coho, Hood Canal summer chum salmon, Columbia River chum, Snake River and Lake Ozette sockeye, and Puget Sound steelhead were all listed under the ESA in 2005. NMFS then designated critical habitat for many species of West Coast salmonids, including Puget Sound Chinook, Upper Columbia Chinook, Hood Canal summer chum salmon, Snake River and Lake Ozette sockeye, and Upper Columbia steelhead. Upper Columbia River Steelhead was listed under the ESA as a threatened species in 2009. NMFS also listed as threatened under the ESA the southern distinct population segment ("DPS") of Pacific eulachon (*Thaleichthys pacificus*), commonly known as smelt. Subsequently, NMFS designated critical habitat for eulachon in Washington, Oregon, and California. In 2010, NMFS listed the Puget Sound/Georgia Basin DPS of yelloweye rockfish and canary rockfish as threatened, and bocaccio as endangered, under the ESA. Additionally, NMFS listed the Southern Resident killer whale (orca) DPS as an endangered species in 2005, with critical habitat designated in 2006.

42. Water quality that supports all life cycle stages is necessary for the survival and recovery of these ESA-listed species that depend on Washington's fresh, marine, and brackish waters.

43. Water pollution has a wide range of harmful effects on these species. Nonpoint pollution can impact coastal ecosystems through excess concentrations of nutrients from runoff, which can result in eutrophication, a leading cause of algal blooms, some of them toxic. When the nutrients run out, the algae die and sink to the bottom where they decompose, making anoxic zones uninhabitable for many fishes and invertebrates and lowering the overall dissolved oxygen


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levels that are needed to support aquatic life. High levels of nutrient pollution can also alter the marine food web, for example by creating conditions conducive to jellyfish and deleterious to forage fish, such as Pacific herring, upon which threatened and endangered species rely. Alteration of natural temperature regimes is caused by a range of nonpoint sources, also with the effect of depressing dissolved oxygen levels as well as raising temperatures beyond tolerances of cold-water species, such as threatened and endangered salmonids. Beyond lack of streamside shading, temperatures are increased by sedimentation of streams that makes them more shallow. This sediment, from nonpoint sources, also affects aquatic life directly and by carrying toxic pollutants into the environment.

44. Urban runoff often contains metal contaminants, which threaten aquatic life and persist in the sediments of coastal habitats. Metal contaminants can become available to marine organisms through uptake by wetland vegetation, adsorption by adjacent sediments, directly through the water column, or ingestion of sediment and bioaccumulation in coastal ecosystems. Pesticides, from nonpoint sources such as logging, farming, and urban development, can adversely affect coastal and estuarine ecosystems through indirect impairment of the productivity of aquatic ecosystems and the loss or degradation of habitat that provides physical shelter for fish and invertebrates. Runoff from all land-disturbing activities also carries the deposits from air pollution sources into water, from nitrogen produced by industrial and vehicle emissions to toxic chemicals, such as mercury. The process of biomagnification increases the contamination levels of species at the highest levels in the food chain.

45. At the top of the food chain in Washington's marine waters are the Southern Resident killer whales. NMFS has identified high levels of toxic polychlorinated biphenyls ("PCBs") in Southern Resident killer whales as one among many chemical compounds that have the same ability to induce immune suppression, impair reproduction, and cause other


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physiological effects in the species. Organochlorines—including PCBs, DDT, other pesticides, dioxins, and furans—are frequently considered to pose the greatest risk to killer whales. In addition, increasing and high levels of so-called "emerging contaminants," such as polybrominated diphenyl ethers (flame retardants), that have similar negative effects, have been found in killer whales, and are not yet directly regulated under the CWA. Bioaccumulation through trophic transfer (*i.e.*, up the food chain) allows concentrations of these compounds to build up in top-level marine predators, such as orca, where these highly fat-soluble pollutants accumulate in fatty tissues. According to NMFS, the orca's position atop the food web, their long life expectancy, and the fact that they consume other mammals make them especially vulnerable to water pollution. Heavy metals, including particularly mercury, cadmium, and lead, are also recognized as problematic. While toxic contaminants are often passed on to future generations, metals are not.

46. Orca rely on other ESA-listed species as prey. Therefore, toxic contamination in, for example, Puget Sound Chinook salmon and yelloweye rockfish, pose a threat to the orca as well as to the chinook and rockfish themselves. NMFS' 2008 Killer Whale Recovery Plan concluded that "pollutants originating within Puget Sound and the Georgia Basin probably play a greater role" in orca contamination than sources outside these areas, a "pattern [that] is apparent in Chinook salmon with longer residency periods in Puget Sound[.]"

47. Other water quality parameters also affect fish species, such as temperature and low dissolved oxygen, and make these species more vulnerable to extinction and reduce their role as prey for orcas. Temperature, in particular, is a function primarily of nonpoint source pollution. For example, NMFS' recovery plan for Puget Sound salmonids found that "high water temperatures and low streamflows in the late summer and early fall are unfavorable for salmonids south of northern British Columbia." Similarly, NMFS' five-year status review for


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Puget Sound Chinook and other species concluded that higher water temperatures contribute to the outbreak and spread of diseases in salmon. The effects of other pollutants that contribute to degraded water quality, such as toxic contaminants, pesticides, and excess sediment constitute a threat to habitat that limits recovery of Puget Sound Chinook and other salmonids.

C. Regulatory Agencies Are Unwilling to Address Nonpoint Source Pollution.

48. On July 14, 2011, western Washington Indian tribes issued a call to action—a white paper entitled *Treaty Rights at Risk: Ongoing Habitat Loss, the Decline of the Salmon Resource, and Recommendations for Change*—that raised concerns about the federal government's ability to protect water quality and salmon habitat in Washington State. In May 2012, fourteen federal agencies—including EPA and NOAA—responded with a pledge to coordinate their programs and funding, prioritize protection and restoration of certain habitats and water quality, and report their progress regularly to address the tribes' concerns.

49. Despite that pledge, EPA and NOAA have failed to comply with the very water quality laws that could address the longstanding problems summarized in the tribal white paper. Instead, and ironically, on April 23, 2013, EPA and NOAA notified the Washington Department of Ecology ("Ecology") that the ongoing federal response to the Treaty Rights at Risk *precluded* their making a decision about the approvability of Washington's Coastal Nonpoint Program. EPA and NOAA were concerned about declining fish populations across Washington, particularly in Puget Sound, and the adverse impacts of significant water quality problems. Based on those concerns, EPA and NOAA asked Washington to respond to the tribes' concerns by identifying, revising, and implementing Additional Management Measures under CZARA; by updating its Section 319 Plan to protect salmon habitat; and by placing conditions on federal funds that Ecology redistributes to others.


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50. EPA's and NOAA's response to the Treaty Rights at Risk white paper is emblematic of the agencies' approach to nonpoint source pollution problems in Washington State: instead of performing their duties under CZARA and the CWA, as Congress directed, the agencies instead handed off the problem to the very state agencies that have failed *for decades* to solve the problem. Specifically, although EPA and NOAA have identified numerous flaws in Washington's Coastal Nonpoint Program, the agencies have failed to make a final decision disapproving that program and failed to withhold CZMA and CWA grant funds from Washington, as required. Additionally, although Washington's Section 319 Plan does not meet CWA requirements because, among other things, it does not contain BMPs for agriculture or a schedule for implementing them, EPA recently approved Washington's Section 319 Plan and found that Washington made "satisfactory progress" in meeting the schedule for implementing BMPs. EPA's and NOAA's recent actions reflect a long-standing approach that has failed to protect water quality in Washington State.

D. Washington's CWA Section 319 Plan.

51. In October 1989, EPA completed its initial approval of Washington's first CWA Section 319 *Nonpoint Source Water Quality Assessment and Management Program*. EPA noted that "[a]griculture, particularly animal keeping, has a greater impact on rivers than any of the other major nonpoint source categories."

52. When, over 25 years later, Ecology issued a new draft Nonpoint Plan in May 2015, EPA instructed the state to identify mechanisms that would be used to implement BMPs developed for agriculture and how those BMPs would achieve and maintain water quality standards, with a clearly-described timeline. In its final Section 319 Plan issued in July 2015, Ecology agreed to design a process with which to develop BMP guidance for agriculture to meet both CWA Section 319 and CZARA. Washington's Section 319 Plan neither commits to using


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the process to develop or implement BMPs nor identifies any actual BMPs. Notwithstanding EPA's observation that the "[l]ack of BMPs for agricultural pollution and the absence of measurable goals and milestones were specific concerns raised by both the EPA and many Washington Tribes," EPA approved Washington's Section 319 Plan on August 21, 2015.

53. On September 15, 2015, EPA determined that Ecology's 2014 Annual Report demonstrated that the state had made "satisfactory progress" pursuant to CWA Section 319(h)(8), 33 U.S.C. § 1329(h)(8). EPA also reminded Ecology that its Section 319 Plan's process for developing agricultural BMPs designed to meet water quality standards was key to the state's having an approvable Coastal Nonpoint Program under CZARA while noting that the Section 319 Plan did not contain a "final strategy for satisfying CZARA requirements." By letter dated July 26, 2016, EPA also found that Washington made "satisfactory progress" in implementing its Section 319 Plan during 2015 even while noting that Washington did not have agricultural BMPs in place to protect water quality. Again on July 11, 2017, EPA found Washington had made "satisfactory progress" in implementing its nonpoint source management program in the 2016 calendar year, while once more noting the lack of agricultural BMPs in Washington's Section 319 Plan.

E. Washington's Coastal Nonpoint Program.

54. On September 29, 1995, Washington submitted its Coastal Nonpoint Program to EPA and NOAA for review under CZARA. Washington is subject to CZARA because it has a federally-approved Coastal Zone Management Program. Since its initial submission, Washington has periodically submitted additional and/or revised program elements to EPA and NOAA, including on the following dates: June 28, 1996; January 25, 1999; December 21, 1999; April 3, 2003; May 6, 2004; and December 23, 2004.


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55. EPA and NOAA have not approved Washington's Coastal Nonpoint Program. Instead, EPA and NOAA have repeatedly found that Washington failed to submit an approvable Coastal Nonpoint Program and instead conditionally approved Washington's program. In doing so, EPA and NOAA repeatedly noted that a final decision approving or disapproving Washington's Coastal Nonpoint Program would require public notice, and an opportunity for the public to comment, and that "final decisions may be subject to Tribal and [Endangered Species Act] consultation."

56. EPA and NOAA issued their first findings on Washington's Coastal Nonpoint Program on June 30, 1998. At that time, EPA and NOAA conditionally approved Washington's Coastal Nonpoint Program based on their assessment that Washington had met 14 of the required management measures. In their 1998 findings, EPA and NOAA gave Washington three years to include in its program management measures in conformity with CZARA's management measures and one year to demonstrate "a strategy . . . to implement the management measures throughout [Washington's coastal] area."

57. In their initial 1998 CZARA findings, EPA and NOAA found that Washington had not submitted a program of Additional Management Measures needed to achieve and maintain water quality standards. On September 21, 2000 and again, on December 8, 2003, EPA and NOAA found that Washington still had not met the Additional Management Measures requirement. Indeed, Washington's program is deficient in failing to adequately address at least the following: critical coastal areas; agricultural and forestry nonpoint source pollution; pesticide pollution and its effect on water quality and designated uses; failing septic systems and urban stormwater runoff; and the effects of livestock and concentrated animal feeding operations.



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**Critical Coastal Areas**

58. CZARA requires coastal states to identify land uses that degrade impaired or threatened waters and to identify critical coastal areas to ensure proper application of Additional Management Measures. 16 U.S.C. § 1455b(b)(1), (2), (3). In their 1998 CZARA findings, EPA and NOAA concluded that Washington had not submitted a program for critical coastal areas that included "a process for the identification of critical coastal areas adjacent to impaired and threatened coastal waters." On December 8, 2003, EPA and NOAA tentatively concluded that Washington had met this condition by identifying three types of areas as critical coastal areas, including those where TMDLs would be developed pursuant to CWA Section 303(d). In doing so, the agencies relied on the terms of a legal settlement that required the development of 1,566 TMDLs—equivalent to the number of waters listed on Washington's 1996 CWA Section 303(d) list of impaired waters—by June 30, 2013.

59. As of March 2016, neither Washington nor EPA had completed TMDLs for all the waters listed on Washington's 1996 CWA Section 303(d) list. Moreover, since 2003, Washington's CWA Section 303(d) list has grown exponentially and the agencies have not completed TMDLs for all those impaired waters, either. In addition, EPA and NOAA have expressed concern about the extent and breadth of water quality monitoring to support Washington's identification of impaired waters, and they have found that Washington has failed to explain how it uses monitoring data to evaluate the effectiveness of nonpoint source management measures in meeting water quality standards and protecting beneficial uses.

**Agricultural Nonpoint Pollution**

60. Agriculture is a dominant land use in the area subject to Washington's Coastal Nonpoint Program. In their 1998 findings, EPA and NOAA concluded the state lacked programs to ensure implementation of management measures for agriculture and gave the state three years


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in which to comply with CZARA. In 2000, and again in 2003, EPA and NOAA found fault with Washington's program to control agricultural nonpoint pollution.

61. In response, Washington again relied on its TMDL program. Ecology also relied on agreements with the Washington State Conservation Commission and most of the state's conservation districts to protect water quality in agricultural areas. Several conservation districts have since repudiated the agreements, including the Whatcom, Whidbey Island, and Pacific Conservation Districts, all of which are in the area subject to Washington's Coastal Nonpoint Program.

62. Riparian buffers on Washington agricultural lands are inadequate to protect water quality and demonstrate part of the problem with Washington's Coastal Nonpoint Program. On January 20, 2013, NMFS sent a letter to EPA and the U.S. National Resources Conservation Service ("NRCS") establishing the riparian buffers on agricultural lands that are necessary to protect and recover threatened and endangered salmonids and concurring in the Washington Department of Ecology's conclusion that existing standards, previously set by NRCS and generally used on agricultural lands, are inadequate. In March 2014, however, the Washington Association of Conservation Districts adopted Resolution No. 2013-04, seeking to "assure that all [riparian] buffers installed at the current width requirement be considered in full compliance of the [Department of Ecology] requirements for acceptable conservation levels and would be grandfathered in as continuing to be in full compliance."

**Forestry Nonpoint Pollution**

63. Forestry is a dominant land use in the area subject to Washington's Coastal Nonpoint Program. In their 1998 findings, EPA and NOAA pointed to "[t]he need to improve Washington's forestry program to protect water quality and beneficial uses [that] has been documented by Federal and state agencies." The 1998 findings also noted that "inadequate


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riparian width prescriptions have resulted in detrimental changes in the temperature regime of streams, and streamside management zones are not wide enough to prevent water quality standard violations due to aerial applications of pesticides." EPA and NOAA therefore concluded that Additional Management Measures were required for critical coastal areas with logging activities.

64. Although Washington's Additional Management Measures rest largely on its TMDL program, in 1999 Washington signed a 10-year agreement called "Clean Water Act Assurances" that allowed Ecology to postpone indefinitely the development of TMDLs to address forestry-related water pollution. In 2003, EPA and NOAA recommended that by February 2004 Washington complete an evaluation of whether existing forest practices were sufficient to meet water quality standards. And by July 15, 2009, Ecology had found that there was insufficient information to draw any conclusions but decided to defer development of TMDLs for logging-related pollution for another 10 years, to 2019. Then in its 2014 *Annual 319 Plan*, Ecology reported on the status of the Clean Water Act Assurances Milestones. Among actions not completed or "off track" was a 2010 milestone to examine the effectiveness of the Type N (non-fish bearing) logging rules to protect water quality and to assess the progress of bringing logging roads into compliance with best practices. In short, Washington cannot rely on its TMDL program to satisfy the Additional Management Measures for forestry because Washington has indefinitely deferred conducting TMDLs for streams impacted by logging and related practices.

**Pesticides and Threatened and Endangered Species**

65. Washington has no Additional Management Measures that protect water quality and designated uses from pesticides. In seven biological opinions issued between November 2008 and January 2015 pursuant to Section 7(a) of the ESA, NMFS found that certain pesticides


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used according to EPA-approved labels jeopardize the continued existence of threatened and endangered salmonid species and/or result in the destruction or adverse modification of their designated critical habitat in Washington. Similarly, after consulting on EPA's national Pesticide General Permit, which covers pesticide applications on federal facilities and tribal lands in Washington State, NMFS identified the presence of at least one threatened or endangered species in 33 of Washington's counties for which discharges of pesticides without additional mitigating measures would either jeopardize the species or adversely modify its critical habitat. EPA has not incorporated the mandatory reasonable and prudent alternatives from these opinions into its licensing and labeling requirements under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), nor does Washington have regulations that comply with the opinions.

**Urban Stormwater Runoff**

66. Ecology considers stormwater runoff to be the "Number 1 water pollution problem" in Washington's urban areas. Stormwater is precipitation that flows over impervious surfaces causing changes in hydrology and water quality. It often contains pollutants such as oil and grease, nutrients and bacteria from failed septic systems and pet wastes, sediment, lawn fertilizers, and chemicals and pesticides from vehicles, gardens, and roofs. Such stormwater is highly toxic to threatened and endangered salmonids, disrupting feeding, interfering with predator avoidance, suppressing the immune system, and depressing growth rates of juveniles.

67. In 2002, EPA and NOAA issued guidance discussing the overlap between the Coastal Nonpoint Programs required by CZARA and EPA's Phase I and II stormwater regulations, which require NPDES permits for many point source discharges of stormwater. While urban stormwater subject to NPDES permitting is excluded from CZARA requirements, all other stormwater—including stormwater runoff associated with watershed protection, site


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development, new and operating onsite disposal systems, pollution prevention efforts, and the planning, siting and development of roads and bridges—remains subject to state Coastal Nonpoint Programs.

68. Washington's Coastal Nonpoint Program is woefully deficient in addressing urban stormwater. It relies on Washington's Puget Sound Water Quality Management Plan, which directs all non-NPDES permitted local governments in western Washington to adopt the Stormwater Management Manual for Western Washington; however, the stormwater manual is neither enforceable nor applicable outside the Puget Sound area.

**Failing Septic Systems**

69. Septic systems serve approximately 1.4 million suburban and rural Washingtonians. Failing septic systems can contaminate surface waters with bacteria, viruses, and other pollutants, thereby contaminating fish and shellfish, making water unsafe for swimming and drinking, and leading to fishing, shellfishing, and beach closures. In addition, conventional septic systems are not designed to remove nitrogen, which contributes to low levels of dissolved oxygen in Puget Sound.

**Livestock and Concentrated Animal Feeding Operations**

70. Livestock are a significant source of nonpoint source pollution. As of 2014, Washington had 388 registered commercial cow dairies comprised of 102 large dairies, 134 medium dairies, and 152 small dairy farms, many of which are in Whatcom and Yakima counties.

71. Livestock near surface waters causes contamination from manure, low dissolved oxygen levels caused by nutrient and sediment loading, increased temperatures from loss of streamside vegetation and the widening and shallowing of streams, increased turbidity and suspended solids from erosion and sediment runoff, and changes in pH caused by erosion.


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72. Ecology considers many of Washington's dairies to be nonpoint sources of pollution, but it has few if any provisions for reducing nonpoint source pollution from dairies. The Washington legislature moved regulation of the dairy program from Ecology to the Washington State Department of Agriculture on July 1, 2003 through passage of the Dairy Nutrient Management Act. Subsequently, in 2010, Ecology prepared a draft manual of BMPs for livestock, but never finalized it. Since then, water quality data from the Nooksack watershed has demonstrated a marked increase in bacterial pollution found in waters, demonstrating the water quality effects of this regulatory change.

F. Despite The Serious And Widespread Harm Caused by Nonpoint Source Water Pollution, EPA and NOAA Have Failed to Perform Their Mandatory Duties Under CZARA, The CWA, and The ESA.

73. Notwithstanding the obvious deficiencies in Washington's Coastal Nonpoint Program, EPA and NOAA have not issued a final decision approving or disapproving Washington's Coastal Nonpoint Program, as required by CZARA.

74. Notwithstanding the obvious deficiencies in Washington's Coastal Nonpoint Program, since 1998 EPA has not withheld from Washington the portions of CWA Section 319 funds required by 16 U.S.C. § 1455b(c)(4). Between 2004 and 2017, EPA instead awarded Washington approximately $49,013,000 in CWA Section 319 funds.

75. Notwithstanding the obvious deficiencies in Washington's Coastal Nonpoint Program, since 1998 NOAA has not withheld from Washington the portions of CZMA Section 306 grant funds required by 16 U.S.C. § 1455b(c)(3). Between 1998 and 2017, NOAA instead awarded Washington approximately $40,701,000 in CZMA Section 306 funds.

76. EPA's failure to withhold the required amount of CWA Section 319 funds from Washington, and NOAA's failure to withhold the required amount of CZMA Section 306 funds


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from Washington, has contributed to Washington's delay in meeting all conditions for final approval of its Coastal Nonpoint Program.

77. EPA and NOAA acknowledge that nonpoint source pollution in Washington has widespread and adverse impacts on aquatic species listed under the ESA. And EPA and NOAA exercised their discretion in fully funding Washington's Coastal Nonpoint Program since 2011. Notwithstanding those facts, EPA and NOAA have never consulted under Section 7(a)(2) of the ESA to determine whether the continued full funding of Washington's Coastal Nonpoint Program jeopardizes listed species or adversely modifies designated critical habitat.

78. Similarly, even though EPA exercised its discretion in approving Washington's Section 319 Plan, and in finding that Washington had made "satisfactory progress" in implementing that plan, EPA has never consulted under Section 7(a)(2) of the ESA to determine whether those decisions jeopardize listed species or adversely modify designated critical habitat.

## VI. CLAIMS FOR RELIEF

### FIRST CLAIM FOR RELIEF

(Against all Defendants)

Violation of 16 U.S.C. § 1455b and the Administrative Procedure Act:
Failure to Finally Approve or Disapprove Washington's Program

79. Plaintiff hereby incorporates by reference all of the preceding paragraphs.

80. CZARA requires EPA and NOAA to disapprove a state's Coastal Nonpoint Program if it does not meet applicable criteria and guidance.

81. EPA and NOAA have not issued a final decision approving or disapproving Washington's Coastal Nonpoint Program. A final decision approving or disapproving Washington 's Coastal Nonpoint Program is final agency action that can be compelled under the APA, 5 U.S.C. § 706(1).


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82. Defendants' failure to issue a final decision approving or disapproving Washington's Coastal Nonpoint Program constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the APA.

SECOND CLAIM FOR RELIEF

(Against the U.S. Department of Commerce and the National Oceanic and Atmospheric Administration)

Violation of 16 U.S.C. § 1455b(c)(3) and the Administrative Procedure Act: NOAA's Failure to Withhold the Required Portions of CZMA Grant funds

83. Plaintiff hereby incorporates by reference all of the preceding paragraphs.

84. NOAA has found that Washington failed to submit an approvable Coastal Nonpoint Program. Nonetheless, NOAA has failed to withhold CZMA grant funds from Washington as required by CZARA, 16 U.S.C. § 1455b(c)(3). Unless relief is granted in this lawsuit, NOAA will continue failing to withhold the required portions of CZMA grant funds from Washington, in violation of 16 U.S.C. § 1455b(c)(3).

85. The withholding of CZMA grant funds is final agency action that can be compelled under the APA, 5 U.S.C. § 706(1).

86. NOAA's failure to withhold CZMA grant funds as required by 16 U.S.C. § 1455b(c)(3) constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the APA.

87. Alternatively, NOAA's 2011, 2012, 2013, 2014, 2015, 2016, and 2017 CZMA grants to Washington, as well as any additional grants made during the pendency of this lawsuit, are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and otherwise in violation of the APA, 5 U.S.C. § 706(2), because among other things they do not comply with CZARA or defendants' policies.



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THIRD CLAIM FOR RELIEF

(Against the U.S. Environmental Protection Agency)

Violation of 16 U.S.C. § 1455b(c)(4) and the Administrative Procedure Act:
EPA's Failure to Withhold the Required Portions of CWA Grant Funds

88. Plaintiff hereby incorporates by reference all of the preceding paragraphs.

89. EPA has found that Washington failed to submit an approvable Coastal Nonpoint Program. Nonetheless, EPA has failed to withhold CWA grant funds from Washington as required by CZARA, 16 U.S.C. § 1455b(c)(4). Unless relief is granted in this lawsuit, EPA will continue failing to withhold the required portions of CWA grant funds from Washington, in violation of 16 U.S.C. § 1455b(c)(4).

90. The withholding of CWA grant funds is final agency action that can be compelled under the APA, 5 U.S.C. § 706(1).

91. EPA's failure to withhold CWA grant funds as required by 16 U.S.C. § 1455b(c)(4) constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the APA.

92. Alternatively, EPA's 2011, 2012, 2013, 2014, 2015, 2016, and 2017 CWA grants to Washington, as well as any additional grants made during the pendency of this lawsuit, are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and otherwise in violation of the APA, 5 U.S.C. § 706(2), because among other things they do not comply with CZARA or defendants' policies.

FOURTH CLAIM FOR RELIEF

(Against the U.S. Environmental Protection Agency)

Violation of 33 U.S.C. § 1329 and the Administrative Procedure Act:
EPA's Arbitrary and Capricious Approval of Washington's Nonpoint Management Program

93. Plaintiff hereby incorporates by reference all of the preceding paragraphs.


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94. Under CWA Section 319(b)(2), state nonpoint source management programs must include, *inter alia*, each of the following:

A. an identification of the BMPs and measures to reduce pollutant loadings from each category and subcategory of nonpoint sources;

B. an identification of the programs to achieve implementation of the BMPs; and

C. a schedule containing annual milestones for utilization of the program implementation methods and implementation of the BMPs, which provides for utilization of the BMPs at the earliest practicable date. 33 U.S.C. § 1329(b)(2)(A), (B), (C).

95. Washington's final *Water Quality Management Plan to Control Nonpoint Sources of Pollution* identifies how it will create a *process* to identify BMPs for agricultural nonpoint pollution, but does not identify BMPs by categories of nonpoint sources or programs to achieve implementation of any identified BMPs, as required by CWA Section 319(b)(2)(A), (B).

96. Washington's final Section 319 Plan does not includes a schedule, containing annual milestones, that demonstrates it will utilize identified BMPs and program implementation methods, which together will provide for utilization of the BMPs at the earliest practicable date, as required under CWA Section 319(b)(2)(C).

97. EPA approved Washington's final Section 319 Plan on August 21, 2015.

98. EPA's approval of Washington's program is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and otherwise in violation of the APA, 5 U.S.C. § 706(2).

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FIFTH CLAIM FOR RELIEF

(Against the U.S. Environmental Protection Agency)

Violation of 33 U.S.C. § 1329(h)(8) and the Administrative Procedure Act:
EPA's Arbitrary and Capricious Finding of "Satisfactory Progress"

99. Plaintiff hereby incorporates by reference all of the preceding paragraphs.

100. Upon approval of a state Section 319 Plan, EPA must make grants to assist the state in implementing its program. 33 U.S.C. § 1329(h)(1).

101. EPA may not grant funds to implement a state's Section 319 Plan unless EPA has determined the state has made "satisfactory progress" in the preceding fiscal year in meeting the schedule for implementing BMPs and the programs to achieve their implementation, as required under CWA Section 319(b)(2)(C). 33 U.S.C. § 1329(h)(8).

102. On September 15, 2015, EPA found, pursuant to 33 U.S.C. § 1329(h)(8), that Washington's 2014 Annual Report demonstrated that Ecology had made "satisfactory progress" in implementing Washington's Section 319 Plan during 2014. On July 26, 2016, EPA found, pursuant to 33 U.S.C. § 1329(h)(8), that Ecology had made "satisfactory progress" in implementing Washington's Section 319 Plan during 2015. And again on July 11, 2017, EPA found, pursuant to 33 U.S.C. § 1329(h)(8), that Ecology had made "satisfactory progress" in implementing Washington's Section 319 Plan during 2016.

103. EPA's 2015, 2016, and 2017 satisfactory progress findings, as well as any additional satisfactory progress findings made during the pendency of this lawsuit, are arbitrary and capricious because, *inter alia*, EPA based its findings on Washington's 2015 Section 319 Plan, which contains no schedule for implementing BMPs and no identified BMPs.

104. Notwithstanding 33 U.S.C. § 1329(h)(8), EPA awarded Section 319 grant funds to Washington in 2015, 2016, and 2017. Those grants to Washington, as well as any additional


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grants made during the pendency of this lawsuit, are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and otherwise in violation of the APA, 5 U.S.C. § 706(2), because among other things they did not comply with the CWA.

SIXTH CLAIM FOR RELIEF

(Against all Defendants)

Violation of 16 U.S.C. § 1536(a)(2):
Failure to Consult on the EPA's and NOAA's Authorization and Funding of Washington's Nonpoint Source Pollution Management Programs

105. Plaintiff hereby incorporates by reference all of the preceding paragraphs.

106. Section 7 of the ESA requires federal agencies to insure that any action they take, authorize or fund will not jeopardize any species listed as threatened or endangered under the ESA or destroy or adversely modify any critical habitat designated for such species. Additionally, Section 7 of the ESA requires federal agencies to consult with the agencies that implement the ESA to ensure they are meeting their substantive obligations under Section 7 of the ESA.

107. EPA and NOAA have violated ESA Section 7 by failing to consult on the CZMA Section 306 and CWA Section 319 grants the agencies made to Washington in 2011, 2012, 2013, 2014, 2015, 2016, and 2017, as well as on any additional grants made during the pendency of this lawsuit, and by failing to insure those grants will not jeopardize any listed species or destroy or adversely modify any designated critical habitat.

108. Additionally, EPA has violated ESA Section 7 by failing to consult on its August 21, 2015 authorization and related funding of Washington's CWA Section 319 Plan, and its September 15, 2015, July 26, 2016, and July 11, 2017 satisfactory progress findings, as well as any additional satisfactory progress findings made during the pendency of this lawsuit, and by


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failing to insure that those decisions will not jeopardize any listed species or destroy or adversely modify any designated critical habitat.

## VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Declare that EPA and NOAA have violated CZARA, 16 U.S.C. § 1455b, by unlawfully withholding or unreasonably delaying final approval or disapproval of Washington's Coastal Nonpoint Program;

B. Order EPA and NOAA to finally approve or disapprove Washington's Coastal Nonpoint Program within ninety days of a judgment in this case;

C. Declare that NOAA has violated CZARA, 16 U.S.C. § 1455b(c)(3), by failing to withhold, or unlawfully withholding or unreasonably delaying the withholding of, CZMA grant funds from Washington;

D. Order NOAA to withhold the required portions of CZMA grant funds from Washington until EPA and NOAA find that Washington has submitted an approvable Coastal Nonpoint Program;

E. Declare that EPA has violated CZARA, 16 U.S.C. § 1455b(c)(4), by failing to withhold, or unlawfully withholding or unreasonably delaying the withholding of, CWA grant funds from Washington;

F. Order EPA to withhold the required portions of CWA grant funds from Washington until EPA and NOAA determine that Washington has submitted an approvable Coastal Nonpoint Program;

G. Declare that EPA violated the CWA, 33 U.S.C. § 1329(b), in approving Washington's CWA Section 319 plan;



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H. Declare that EPA violated the CWA, 33 U.S.C. § 1329(h)(8), in concluding that Washington made satisfactory progress in the preceding fiscal year in meeting the schedule for implementing BMPs and the programs to achieve their implementation.

I. Order EPA to withhold funds as required by 33 U.S.C. § 1329(h)(8) until Washington has made satisfactory progress based on an approved Section 319 Plan with a schedule to implement identified BMPs.

J. Declare that EPA and NOAA have violated ESA Section 7 by failing to consult on their actions related to Washington's Coastal Nonpoint Program and Section 319 Plan.

K. Order EPA and NOAA to complete ESA Section 7 consultation on their actions related to Washington's Coastal Nonpoint Program and Section 319 Plan.

L. Declare, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, that Plaintiff is the prevailing party; that the position of the government in this action was not substantially justified; and that there are no special circumstances that make an award of costs and reasonable attorneys' fees to Advocates unjust;

M. Award Advocates its reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation, under the Equal Access to Justice Act, 28 U.S.C. § 2412, and Section 11 of the Endangered Species Act, 16 U.S.C. § 1540; and

N. Grant Advocates such additional relief as the Court deems just and proper.

Respectfully submitted this 23rd day of January 2018.

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*Attorneys for Plaintiff Northwest Environmental Advocates*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 23, 2018, I electronically filed the foregoing PLAINTIFF'S SECOND AMENDED AND SUPPLEMENTAL COMPLAINT and this Certificate of Service with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the attorneys of record.

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THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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|---|---|
| NORTHWEST ENVIRONMENTAL ADVOCATES,<br><br>Plaintiff,<br>v.<br><br>U.S. DEPARTMENT OF COMMERCE, *et al.*,<br><br>Defendants. | CASE NO. C16-1866-JCC<br><br>ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS |

This matter comes before the Court on Defendants' motion to dismiss (Dkt. No. 21). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS in part and DENIES in part Defendants' motion to dismiss for the reasons explained herein.

## I. BACKGROUND

Plaintiff Northwest Environmental Advocates ("NWEA") asserts that the U.S. Environmental Protection Agency ("EPA") and the National Oceanic and Atmospheric Administration ("NOAA"), in working with the State of Washington, failed to meet their obligations under the Clean Water Act ("CWA"), the Coastal Zone Management Act ("CZMA"), and the Endangered Species Act ("ESA") to protect Washington's coastal waters and the creatures that live in its waters from nonpoint source pollution. (Dkt. No. 18 at 1–2.) NWEA

requests this Court order the agencies to do so. (*Id*. at 32–33.)

CWA addresses sources of pollution in the waters of the United States through a model of shared responsibility. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Within this scheme, CWA Section 319 addresses nonpoint sources (e.g. runoff). It requires states to develop and implement a Nonpoint Management Program ("CWA Nonpoint Program"). 33 U.S.C. § 1329. Under Section 319, EPA's role is limited to approving each state's Nonpoint Program, assessing whether a state is making satisfactory progress towards the Program's implementation schedule, and making grants ("CWA Assistance Grants") to partially fund the Program. *Id*.

The Coastal Zone Reauthorization Amendments of 1990 ("CZARA"), 16 U.S.C. § 1455b represent a portion of CZMA. CZARA provides a separate, but distinct Coastline Nonpoint Pollution Management Program ("Coastal Nonpoint Program") to CWA's Nonpoint Program. Its focus is on coastal areas. Any state with a Coastal Zone Management Program must include a Coastal Nonpoint Program. 16 U.S.C. § 1455b(a)(1). A state's Coastal Nonpoint Program must be approved both by EPA and NOAA, the latter of which does so on behalf of the U.S. Department of Commerce. (Dkt. No. 18 at 6.) Like CWA Section 319's Nonpoint Program, once a state submits an approvable Coastal Nonpoint Program, the state is eligible to receive federal grants under CZMA ("Coastal Assistance Grants") to assist it in its implementation. 16 U.S.C. § 1455b(h)(2)(B).

The Administrative Procedure Act ("APA") allows persons to sue a government agency if harmed by the agency's failure to comply with its statutory mandate. *Sackett v. E.P.A.*, 566 U.S. 120, 125 (2012). The APA only applies to the extent a remedy would not otherwise exist for the impacted person. 5 U.S.C. § 704. Suit can be brought under the APA against agencies who "unlawfully with[o]ld or unreasonably delay[]" actions required by law, or take actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1), (2)(A). Neither CWA Section 319 nor CZARA provide a cause of action for violations of the Acts. Therefore, such claims must be brought under the APA.

The ESA, on the other hand, contains its own cause of action. 16 U.S.C. § 1540(g). This provision provides a direct cause of action for any violation of the Act. *Id*. The ESA was established to protect and conserve species threatened with extinction. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 651, (2007). Section 7 requires federal agencies taking discretionary action that may jeopardize the existence of listed species or adversely affect critical habitat of such species to consult with the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") before taking action. 16 U.S.C. § 1536(a)(2); *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998). Generally, action may only be taken if FWS and NMFS determine that it will not jeopardize the existence of such species or its critical habitat. 16 U.S.C. § 1536(b)(4).

NWEA asserts its members have been harmed by EPA and NOAA's inaction and the agencies' unlawful actions. First, the agencies failed to make a final CZARA approval decision on Washington's Coastal Nonpoint Program (Claim #1). (Dkt. No. 18 at 27–28.) Next, the agencies failed to withhold required amounts from Washington's CWA Assistance Grants and Coastal Assistance Grants (Claims #2–3). (*Id*. at 28–29.) In addition, the EPA acted arbitrarily and capriciously when it approved Washington's 2015 CWA Nonpoint Program update despite clear evidence that the Program did not meet relevant CWA Section 319 requirements (Claim #4). (*Id*. at 29–30.) EPA also acted arbitrarily and capriciously when it determined Washington made satisfactory progress towards its CWA Nonpoint Program implementation schedule and awarded resulting CWA Assistance Grants to Washington in 2015 and 2016 despite clear evidence that such progress had not been made (Claim #5). (*Id.* at 30–31.) Finally, the agencies failed to engage in required ESA consultation when taking such actions (Claim #6). (*Id*. at 31–32.)

NWEA seeks the following relief: (a) declarations that EPA and NOAA violated CZARA in failing to definitively rule on Washington's Coastal Nonpoint Program, violated CWA in approving Washington's CWA Nonpoint Program, and violated the ESA in failing to

engage in required consultation; (b) order EPA and NOAA to make a definitive ruling on Washington's Coastal Nonpoint Program and reconsider the adequacy of Washington's 2015 CWA Nonpoint Program update based on appropriate criteria; (c) order NOAA and EPA to withhold the required amounts from CWA Assistance Grants and Coastal Assistance Grants until such time as the agencies provide definitive approval for Washington's Coastal Nonpoint Program; (d) order EPA to withhold all CWA nonpoint funding until such time as EPA has determined, using appropriate criteria, that Washington has made satisfactory progress in implementing its CWA Nonpoint Program; and (e) order EPA and NOAA to engage in required consultation before taking further actions. (*Id.* at 27–33.)

Defendants move to dismiss all claims pursuant to Rule 12(b)(1). (Dkt. No. 21 at 3.) Should that challenge fail, Defendants move pursuant to Rule 12(b)(6) to dismiss all but two of NWEA's four ESA claims. (*Id.* at 31.)

## II. DISCUSSION

### A. This Court Has Subject Matter Jurisdiction

Federal courts must dismiss a complaint lacking subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The burden of establishing subject matter jurisdiction falls on the party asserting it. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). If a moving party factually attacks a district court's subject matter jurisdiction, the nonmoving party must put forward such "evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). Otherwise, "[t]he district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor" and then determining whether they are legally sufficient to invoke jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (party seeking relief need plead sufficient facts to allow the court to draw a reasonable inference that defendant is liable for alleged misconduct). Defendants

claim to be making a factual challenge to NWEA's standing, but present no evidence to support such a challenge. (Dkt. No. 21 at 14.); *see St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (facial challenge requires evidence demonstrating that subject matter jurisdiction is lacking). Therefore, the court will assess NWEA's standing on the basis of its legal sufficiency.

NWEA must sufficiently plead, through plausible facts, that (1) it has suffered a particularized and concrete injury, (2) that is fairly traceable to the challenged conduct, (3) which is likely to be redressed by a favorable decision of this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). In addition, NWEA, as an association, must demonstrate that (1) its members would otherwise have standing to bring suit individually, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim nor the relief requested requires the participation of individual members to the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

NWEA describes itself as a non-profit organization that works to "protect and restore water quality and fish habitat in the Northwest." (Dkt. No. 18 at 3.) It claims that its members "reside near, visit, use, and/or enjoy rivers, streams, and other surface waters in Washington State, including Washington's coastal areas." (*Id*. at 3.) NWEA further claims that its members have a "specific interest in the full and proper implementation of the laws passed to control water pollution and protect wildlife" and have "interests in complete implementation of environmental laws." (*Id*. at 5–6).

NWEA correspondingly alleges that its members have been injured as a result of Defendants' failure to take required actions and in arbitrarily and capriciously taking other actions required by CZARA, CWA, and ESA. Specifically, NWEA claims Defendants have failed to provide Washington the incentive mandated through CZARA and CWA to reduce Washington's sources of nonpoint pollution by withholding portions of Program Assistance Grants as required by law. (*Id*. at 4.) NWEA further alleges that Defendants failed to engage in required consultation under the ESA. (*Id*. at 5.) NWEA claims that, as a result of Defendant's

failures, its members have suffered from reduced quality of the water they work in, recreate in, and enjoy, and harmful impacts to wildlife that NWEA's members work with, observe, study, and enjoy. (*Id*. at 4–5.)

Defendants attack subject matter jurisdiction on the basis of standing. (Dkt. No. 21 at 15.) Defendants do not focus their attack on whether NWEA has organizational standing, nor do they meaningfully argue that its members have not suffered a particularized injury from nonpoint sources of pollution in Washington waters. (Dkt. No. 35 at 2.) Defendants limit their attack to issues of causation and redressability. (*Id*. at 16.)

1. Claims #1–5: Standing

Defendants' primary argument is that neither CZARA nor CWA provides a regulatory mechanism to force states to manage nonpoint pollution and, therefore, Defendants are wholly reliant on Washington taking action to redress NWEA's harms. (Dkt. No. 21 at 17, 20, 22.) Defendants claim that on this basis, NWEA cannot establish causation or redressability because the Court cannot compel Washington to act. (*Id*.)

Defendants cite *Am. Canoe Ass'n, Inc. v. U.S. E.P.A.*, 30 F. Supp. 2d 908, 914–15 (E.D. Va. 1998), in support of this assertion. (Dkt. No. 21 at 23.) But *American Canoe* is not binding on this Court. Nor is it persuasive, given the decision in *Alaska Ctr. for Env't v. Browner*. *See* 20 F.3d 981, 984 (9th Cir. 1994) (partial reliance on a state's actions under CWA to address nonpoint source pollution will not destroy standing when Congress "already determined that involvement of the third party is an effective tool for achieving water quality standards in waters impacted by non-point source pollution."). *Id.* at 984. This case is analogous to *Alaska Center*.

Furthermore, NWEA alleges a *procedural* injury for Claims 1–5. (Dkt. No. 18 at 5.) A plaintiff incurs a procedural injury when an agency fails to follow required procedures. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). A plaintiff need first show "that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1225 (9th

Cir. 2008). Once a plaintiffs does so, "'the causation and redressability requirements are relaxed.'" *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (quoting *Salmon Spawning & Recovery All.*, 545 F.3d at 1226 (9th Cir. 2008)).

Defendants first dispute whether NWEA has sufficiently plead that a procedural right exists under CWA Section 319 and CZARA. (Dkt. No. 35 at 4.) But they fail to adequately support this assertion. CWA Section 319 and CZARA clearly contain procedural requirements for EPA and NOAA to follow in reviewing and approving Nonpoint Programs and making available resulting grant funds. *See* 33 U.S.C. § 1329(d)(1) (EPA "shall either approve or disapprove" a state's CWA Section 319 Nonpoint Program), (h)(8) ("no [CWA Assistance] [G]rant may be made . . . unless the Administrator determines that such State made satisfactory progress"); 16 U.S.C. § 1455b(c)(1) (EPA and NOAA "shall jointly review the [state's Coastal Nonpoint] [P]rogram" which "shall be approved" if the agencies determine that the Program "meet[s] the requirement of this section"), (c)(3) (the agencies "shall withhold" Program funds if "an approvable [P]rogram as required by this section" has not been submitted by the state), (c)(4) (same). These provisions are sufficient to establish NWEA's procedural rights under CWA Section 319 and CZARA. *See Salmon Spawning*, 545 F.3d at 1225.

Defendants' remaining argument against procedural injury is similarly unpersuasive. They describe NWEA's Claims 1–5 as a "a speculative prediction that [Defendants'] actions will encourage [Washington] to act." (Dkt. No. 21 at 17.) But NWEA need only show that the procedural step the agency failed to take "*could* protect [its] economic interests." *Salmon Spawning*, 545 F.3d at 1226; *see also Ctr. for Biological Diversity v. Envtl. Prot. Agency*, 861 F.3d 174, 184 (D.C. Cir. 2017) (procedural deficiency need only be "connected to the substantive result."). NWEA has met this burden. NWEA plead that EPA and NOAA's failure to fulfill its obligations under CWA and CZARA "subvert[ed] and render[ed] ineffective the statutes Congress adopted to protect water quality, aquatic species, and drinking water supplies from nonpoint sources of water pollution." (Dkt. No. 18 at 2.) It further plead that its members

"regularly use these waters and adjacent lands and have definite future plans to continue to use and enjoy these waters for recreational, subsistence, scientific, aesthetic, spiritual, commercial, educational, employment, conservation . . . study, and photography, and recreational" purposes, and that its members would "derive more benefits from their use of Washington's coastal waters if Defendants properly implemented the laws Congress adopted to reduce nonpoint source water pollution." (*Id*. at 4.) The Court accepts these allegations as true at this point in the proceeding. *Leite*, 749 F.3d at 1121 (9th Cir. 2014).

The Court DENIES Defendants' motion to dismiss Claims #1–5 based on a lack of subject matter jurisdiction.

2. Claim #6: Standing

Defendants' standing argument for NWEA's final claim is largely the same as the preceding claims: NWEA failed to plead a sufficient connection between the ESA consultation requirement and NWEA's injuries so as to satisfy even its reduced burden to demonstrate causation and redressability. (Dkt. No. 21 at 25.) But again, NWEA need only plead that had Defendants complied with their consultation obligations, such consultation *could* protect NWEA's interests in listed species and their critical habitat. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1044 (9th Cir. 2015) (finding that plaintiff had standing to bring an ESA Section 7 claim against a federal agency even though state action played a significant role in the ultimate outcome). NWEA directly ties Defendants' procedural deficiency to its injury, which stems from increased levels of nonpoint pollution in Washington's waters that, in turn, negatively impact local populations of threatened and endangered species such as Upper Columbia River steelhead and Southern Resident killer whales. (Dkt. No. 18 at 14–16.) This is sufficient to meet NWEA's burden for establishing a procedural injury associated with its ESA Section 7 claim at this stage in the proceeding.

The Court DENIES Defendants' motion to dismiss Claim #6 due to a lack of subject matter jurisdiction.

**B. NWEA Asserts Claims Upon Which Relief Can be Granted**

A defendant may move for dismissal when a plaintiff "fails to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Under Rule 12(b)(6), the Court accepts all factual allegations in the complaint as true and construes them in the light most favorable to the nonmoving party. *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007). However, to survive a motion to dismiss, a plaintiff must cite facts supporting a "plausible" cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 672 (internal quotations omitted). Although the Court must accept as true a complaint's well-pleaded facts, "conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper motion to dismiss." *Vasquez*, 487 F.3d at 1249 (quotation omitted). "Dismissal for failure to state a claim is appropriate only if it appears beyond doubt that the non-moving party can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quotation omitted).

1. Claim #1: Failure to Render a Final Decision on Washington's Coastal Nonpoint Program

NWEA asserts that CZARA affirmatively requires EPA and NOAA to disapprove a state's Coastal Nonpoint Program if it does not meet applicable criteria. (Dkt. No. 18 at 27.) NWEA further asserts that EPA and NOAA routinely fail to fulfill this obligation through a practice of conditionally approving state Coastal Nonpoint Programs. (*Id*. at 10–11.)

Under this practice, when a state submits a Coastal Nonpoint Program not meeting applicable criteria, the agencies note the deficiencies in the program, identify conditions that must be satisfied before full approval can occur, and conditionally approve an otherwise deficient program. (*Id*. at 10.) NWEA claims this practice is intended to circumvent having to reduce Program Assistance Grants to otherwise ineligible recipients. (*Id*.)

NWEA further asserts Washington's Program is deficient, thereby requiring disapproval, in that it fails to address the following considerations: critical coastal areas, agricultural and forestry nonpoint source pollution, pesticide pollution, failing septic and urban stormwater runoff, and the effects of livestock and concentrated animal feeding operations. (*Id*. at 20.) At this stage in the proceeding, this Court takes NWEA's allegations as true. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). The Court concludes that NWEA has sufficiently plead deficiencies in Washington's Coastal Nonpoint Program.

Where NWEA's Claim #1 fails is not in its allegations of deficiencies, but in its interpretation of the relevant statute. Agencies clearly have a statutory mandate to *approve* submitted Coastal Nonpoint Programs meeting the applicable criteria. The statute reads as follows: "Within 6 months after the date of submission by a State . . . the [agencies] shall jointly review the program. The program shall be approved if" the agencies conclude that the program "meet[s] the requirements of this section." 16 U.S.C. § 1455b(c)(1). But nothing in the statute mandates that EPA and NOAA affirmatively *disapprove* a program not meeting applicable criteria. *Id.* Therefore, no legal basis exists for this court to order the agencies to definitively act on Washington's Coastal Nonpoint Program where they are not required by the statute to do so.

Claim #1 fails to state a claim for which relief can be granted. The Court GRANTS Defendants' motion to dismiss Claim #1 on this basis.

2. Claims #2–3: Failure to Withhold Required Amounts From Washington's CWA Assistance Grants and Coastal Assistance Grants

NWEA asserts that because EPA and NOAA have not definitively approved Washington's Coastal Nonpoint Program, the agencies must withhold amounts from CWA Assistance Grants and Coastal Assistance Grants to the State. (Dkt. No. 18 at 28–29) (citing 16 U.S.C. § 1455b(c)(3), (4)). Defendants counter that an "approval with . . . conditions constitutes

approval of Washington's Coastal Nonpoint Pollution Control Program." (Dkt. No. 21 at 31.)

Defendants' argument is untenable under the plain language of the statute. The agencies have not determined that "the program . . . meet[s] the requirements of the section." 16 U.S.C. § 1455b(c)(1). Absent this determination, CZARA is clear. The agencies "shall withhold" the required amounts from Washington's CWA Assistance Grants and Coastal Assistance Grants. 16 U.S.C. § 1455b(c)(3), (4). EPA and NOAA have failed to do so. They have not finally approved Washington's Coastal Nonpoint Program, while awarding upwards of $83 million in Program Assistance Grants to Washington through 2016. (Dkt. No. 18 at 26.) None of the grants were reduced by the required statutory amount. (*Id.*) On this basis, the agencies have failed to meet their statutory obligation.

The Court DENIES Defendants' motion to dismiss Claims #2–3 for failure to state a claim for which relief can be granted.

3. Claim #4: Approval of Washington's 2015 Update to its CWA Nonpoint Program

EPA originally approved Washington's CWA Nonpoint Program in 1989. (Dkt. No. 18 at 18.) NWEA challenges Washington's 2015 update to its Program. (*Id.* at 30.) NWEA asserts that EPA approved the 2015 update even though the updated program did not satisfy program criteria. (*Id.*) Defendants counter that an update to a CWA Nonpoint Program is not subject to the program criteria articulated by CWA Section 319. (Dkt. No. 21 at 33–34.)[1]

The statutory text does not support Defendants' argument. CWA Section 319 clearly

[1] Defendants also assert that this is not an actionable claim under the APA because there is no law to apply to the update. (Dkt. No. 35 at 17–18) (citing *Heckler v. Cheney*, 470 U.S. 821, 830 (1985). But as discussed below, the law to apply to the update is clear—the standards articulated in CWA Section 319. *See* 33 U.S.C. § 1329(b)(2).

indicates that program requirements apply to "[e]ach management program proposed for implementation." 33 U.S.C. § 1329(b)(2). Washington's 2015 program update was "proposed for implementation." *Id.*; (*see* Dkt. No. 18 at 18, 19, 31.) Therefore, the update is subject to the same standards as the original program—those articulated by CWA Section 319. See 33 U.S.C. § 1329(b)(2)(A)–(F). Nor is Defendants' argument plausible. An updated program could reasonably be interpreted to be a new program. Section 319 Program requirements apply to a new program. 33 U.S.C. § 1329(b)(2).

The Court DENIES Defendants' motion to dismiss Claim #4 for failure to state a claim for which relief can be granted.

4. Claim #5: Satisfactory Progress Determinations for Washington's CWA Nonpoint Program

CWA Section 319 precludes EPA from making CWA Assistance Grants to states who fail to make satisfactory progress towards the implementation schedule contained within a CWA Nonpoint Program. 33 U.S.C. § 1329(h)(8). NWEA challenges the grants made to Washington in 2015 and 2016 based on a lack of progress in implementing its Program. (Dkt. No. 18 at 31.) According to NWEA, Washington did not have sufficient nonpoint pollution control practices in place to protect water quality during those years, and EPA was aware of this deficiency. Therefore, EPA's satisfactory progress determinations were arbitrary and capricious and the grants were unlawful. (*Id*. at 19, 30–31.) Defendants' have no meaningful rebuttal, other than to rely on an extension of their argument for Claim #4—that the 2015 update does not present a standard for which EPA can be held accountable for purposes of satisfactory progress determinations. (Dkt. No. 21 at 34.) The Court previously dismissed Defendants' argument for

Claim #4 and, by extension, similarly dismisses the argument for purposes of Claim #5.[2]

The Court DENIES Defendants motion to dismiss claim #5 for failure to state a claim for which relief can be granted.

5. Claim #6: Failure to Engage in ESA Section 7 Consultation

NWEA's final claim is comprised of four subclaims. Each represents a distinct agency action for which NWEA asserts that ESA Section 7 consultation was required but did not occur: (1) EPA's approval of Washington's 2015 update to its CWA Nonpoint Program; (2) EPA's 2015 and 2016 satisfactory progress determinations for Washington's CWA Nonpoint Program; (3) EPA's approval of the full amount of 2015 and 2016 CWA Assistance Grants to Washington; and (4) NOAA's approval of the full amount of Coastal Assistance Grants, despite the lack of an approvable Coastal Nonpoint Program. Defendants' move to dismiss only the second and fourth subclaims. (Dkt. No. 21 at 35–38.)

Regarding the second subclaim, Defendants argue that EPA's 2015 and 2016 satisfactory progress determinations were retrospective assessments of Washington's progress towards the goals articulated in its CWA Nonpoint Program. (Dkt. No. 21 at 38.) As such, Defendants assert that EPA had no discretion when making its satisfactory progress determinations to prospectively benefit listed species. (*Id*. at 37–38.) On this basis, Defendants assert the progress determinations do not meet the second prong of *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012). The second prong of *Karuk Tribe's* provides that ESA Section 7 consultation is only required when the agency "had some discretion to influence or change the activity for the benefit

[2] Nor is the Court persuaded by Defendants' argument that the issue is moot as to previous Section 319 grants. These are acts capable of repetition yet could avoid review. *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774 (9th Cir. 2012).

of the protected species." *Id.* at 1021. The Court disagrees with Defendants' position, as it relies upon a false premise that EPA has no discretion in the factors it considers in making its CWA Section 319 progress determinations. In fact, EPA has great discretion in determining how satisfactory progress is measured. It has exercised this discretion, for example, both in the promulgation of related regulations, *see* 40 C.F.R. §§ 35.260–.268, and informal guidance (Dkt. No. 25, Ex. A at 70). Furthermore, this discretion must be viewed in light of Washington's CWA Nonpoint Program objectives, which include "initiatives to [s]upport Salmon Recovery in Washington" and other measures directly aimed at improving the health of threatened and endangered species. (Dkt. No. 25 at 21.) On this basis, EPA's progress determinations could prospectively benefit listed species. That is all that is required to trigger an ESA Section 7 consultation requirement. *See* 16 U.S.C. § 1536(a)(2).

Regarding the fourth subclaim, the Court holds above that Defendants' obligation to reduce Coastal Assistance Grants for unapproved Coastal Nonpoint Programs is nondiscretionary. *See* discussion *supra* Section II.B.2. Therefore, as is also described above, ESA Section 7 consultation is not required when reducing Coastal Assistance Grants by the statutory amount. *See Karuk Tribe of Cal.*, 681 F.3d at 1024.

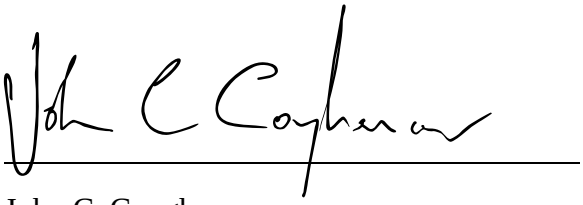
The Court DENIES Defendants motion to dismiss the second subclaim but GRANTS Defendants' motion to dismiss the fourth subclaim for failure to state a claim for which relief can be granted.

## III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss (Dkt. No. 21) is GRANTED as to Claim #1 and the fourth subclaim of Claim #6. These claims are dismissed with prejudice because, as a matter of law, NWEA will be unable to state a claim for which relief can be

granted. Defendants motion is DENIED as to claims #2, 3, 4, 5, and subclaims 1-3 of Claim #6.

DATED this 19th day of September, 2017.



John C. Coughenour
UNITED STATES DISTRICT JUDGE

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| NORTHWEST ENVIRONMENTAL ADVOCATES,<br><br>Plaintiff,<br>v.<br><br>U.S. DEPARTMENT OF COMMERCE, *et al.*,<br><br>Defendants,<br><br>WASHINGTON STATE,<br><br>Defendant-Intervenor. | CASE NO. C16-1866-JCC<br><br>ORDER |

This matter comes before the Court on Plaintiff's motion for partial summary judgment (Dkt. No. 93-1) and Defendants' cross-motion for partial summary judgment (Dkt. No. 108). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES Plaintiff's motion and GRANTS Defendants' cross-motion for the reasons explained herein.

## I. BACKGROUND

The Court previously articulated background information and summarized the associated statutory schemes at issue in this case and will not repeat that information here. (*See* Dkt. Nos.

39, 56, 58, 79, 84.) Plaintiff and Defendants have filed cross-motions for partial summary judgment (Dkt. Nos. 93-1, 108) solely as to Claims #2 and #3 from Plaintiff's Second Amended and Supplemental Complaint (Dkt. No. 74 at 28–29) consistent with a stipulated briefing schedule (Dkt. Nos. 87, 103). Plaintiff brings these claim pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, seeking judicial review of agency actions.

Plaintiff alleges that the U.S. Environmental Protection Agency ("EPA") and the National Oceanic and Atmospheric Administration ("NOAA") failed to withhold required amounts from annual grants the agencies make to Washington to reduce and manage Washington's nonpoint sources of water pollution. (*Id*. at 28–29.) The grants are made pursuant to Section 319 of the Clean Water Act ("CWA"), 33 U.S.C. § 1329(h)(1), and Section 306 of the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1455(a). NOAA and EPA are required to withhold certain amounts from those grants if Washington fails to "submit an approvable [Section 306] program." 16 U.S.C. § 1455b(c)(3). It is undisputed that NOAA has yet to finally approve Washington's Section 306 program. (*See generally* Dkt. No. 108.)

Plaintiff asserts that because Washington has not submitted an approvable Section 306 program, NOAA and EPA have failed to meet their statutory obligations to withhold amounts from Washington's CWA Section 319 and CZMA Section 306 grants for years beginning no later than 2002 and potentially as early as 1996. (Dkt. No. 93-1 at 17–31.) Plaintiff asks the Court to set aside prior grants and compel Defendants to withhold required amounts from future grants until Washington submits an approvable program. (*Id*. at 31.) Defendants contend that Plaintiff lacks standing to assert Claims #2 and #3, that these claims are barred by the statute of limitations, that APA review does not apply to the type of agency action at issue in Claims #2 and #3, and that even if APA review does apply, the agencies have not unreasonably delayed withholding grant funds. (Dkt. No. 108 at 12–27.)

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## II. DISCUSSION

### A. Legal Standard

The APA provides for judicial review of agency actions for any person "adversely affected or aggrieved" by a "final agency action for which there is no other adequate remedy in a court." 5. U.S.C. §§ 702, 704. Where questions before the Court are purely legal, the Court can resolve an APA challenge on a motion for summary judgment. *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). The Court's role is to determine whether, as a matter of law, evidence in the administrative record supports the agency's decision. *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985).

### B. Standing

As a threshold matter, the Court must ensure it has subject matter jurisdiction, a key component of which is Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). "Constitutional standing concerns whether the plaintiff's personal stake in the lawsuit is sufficient to make out a concrete 'case' or 'controversy' to which the federal judicial power may extend under Article III, § 2." *Pershing Park Villas Homeowners Ass'n v. United P. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000). The burden falls on the party asserting standing. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). At the summary judgment stage, a plaintiff cannot rest on "mere allegations [of standing], but must set forth by affidavit or other evidence specific facts" to support it. *Gerlinger v. Amazon.com Inc., Borders Group, Inc.*, 526 F.3d 1253, 1255–56 (9th Cir. 2008). "A plaintiff's basis for standing 'must affirmatively appear in the record.'" *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1228 n.5 (9th Cir. 2008) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986)).

Defendants previously moved to dismiss on the basis that Plaintiff lacks Article III standing. (Dkt. No. 21 at 36.) The Court denied the motion after finding that Plaintiff adequately pled sufficient facts that, if proven, demonstrate standing. (Dkt. No. 39 at 6–8.) Defendants

reassert their standing argument here (*see* Dkt. No. 108 at 12), which the Court will reconsider[1] in light of "the manner and degree of evidence required at th[is] successive stage[] of the litigation." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013).

Generally, to establish Article III standing, Plaintiff must present sufficient evidence to demonstrate the following: (1) a particularized and concrete injury, (2) that is fairly traceable to the challenged conduct, (3) that is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560–61.[2] However, this evidentiary burden is reduced for plaintiffs alleging a procedural injury. Such plaintiffs "'must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.'" *Salmon Spawning*, 545 F.3d at 1226 (emphasis in original) (quoting *Defenders of Wildlife v. U.S. E.P.A.*, 420 F.3d 946, 957 (9th Cir. 2005)); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (a person "who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

1. Procedural Injury

Plaintiff alleges solely a procedural injury for purposes of Claims #2 and #3. (*See generally* Dkt. Nos. 93-1, 109.) Specifically, Plaintiff alleges that NOAA and EPA's failure to withhold funds from Washington's CZMA Section 306 and CWA Section 319 grants pursuant to the Coastal Zone Reauthorization Amendments of 1990 ("CZARA"), 16 U.S.C. § 1455b,

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[1] Reconsideration is not barred by the law of the case doctrine, as the doctrine is "not an absolute bar to reconsideration of matters previously decided." *See Jenkins v. Cty. of Riverside*, 398 F.3d 1093, 1094 n.2 (9th Cir. 2005). Notably, the parties' evidentiary burdens have changed since the Court's prior ruling. Further, "the concerns implicated by the issue of standing—the separation of powers and the limitation of this Court's power to hearing cases or controversies under Article III of the Constitution—trump the prudential goals of preserving judicial economy and finality." *Public Interest Research Group v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116–19 (3d Cir. 1997).

[2] Defendants concede that, to the extent Plaintiff meets the requirements described above, it also meets the requirements for organizational standing. (Dkt. No. 111 at 5 n.1); *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 181 (2000). Therefore, the Court need not address the issue of organizational standing.

represents a procedural injury. (*Id*.) "To establish a procedural 'injury in fact, [a plaintiff] must allege . . . that (1) the [agency] violated certain procedural rules; (2) these rules protect [a plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests.'" *San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1232 (9th Cir. 2017) (alterations in original) (quoting *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 949 (9th Cir. 2006)); *see, e.g.*, *Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 918 (9th Cir. 2018) (applying same standard); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (same).

The Supreme Court first considered a procedural injury as a basis for standing in *Lujan*. 504 U.S. at 572. The injury flowed from the Endangered Species Act's ("ESA") citizen-suit provision, 16 U.S.C. § 1540(g), as applied to ESA's section 7(a)(2) interagency consultation requirement. *Id*. Since then, courts have considered a variety of alleged procedural injuries in the environmental context. Generally, those injuries resulted from an agency's failure to meet procedural requirements designed to inform that agency's later substantive determination. *See, e.g.*, *Summers*, 555 U.S. at 496–97; *Cal. ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dept. of the Int.*, 767 F.3d 781, 790 (9th Cir. 2014); *Salmon Spawning*, 545 F.3d at 1225–26; *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 970; *Envtl. Def. Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 867 (9th Cir. 2003).

Defendants argue that because NOAA and EPA's withholding requirement does not inform further action on the part of those agencies, the agencies' withholding obligation cannot be a procedural requirement. (Dkt. Nos. 108 at 13–14, 111 at 5–8.) The Court disagrees. While this case is not an "archetypal procedural injury" case, where "the same actor [is] responsible for the procedural defect and the injurious final agency action," this does not preclude a finding that the agencies' withholding obligation is procedural. *Natl. Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005). CZARA splits responsibilities between state and federal actors. NOAA and EPA are responsible for the procedural requirements—withholding grant funds from

states who have not yet submitted approvable programs. 16 U.S.C. §1455b(c)(3), (4). States are responsible for the substantive requirements—developing and implementing approvable programs to manage nonpoint sources of pollution. 16 U.S.C. §1455b(a)(1); 33 U.S.C. § 1329(b)(1).

For example, in *Natl. Parks*, the "ultimate source of injury [was] two steps removed from the alleged procedural defect." 414 F.3d at 5. EPA was responsible for the procedural act—determining whether a proposed power plant would "have an adverse impact" on air quality—and a state agency was responsible for the substantive act—permitting the power plant in accordance with the Clean Air Act, 42 U.S.C. § 7401 *et seq. Id*. at 4. Even though EPA's decision to withdraw its adverse impact determination did not directly harm the *Natl. Parks* plaintiffs' interests in clean air, the court found that the plaintiffs had a concrete interest in ensuring EPA's reasoned approach to such a determination. 414 F.3d at 5. This case is analogous in that NOAA and EPA's withholding obligations are similarly removed from Plaintiff's interest in the improved management of nonpoint source pollution. Yet, like in *Natl. Parks*, this level of attenuation does not transform the agencies' withholding obligation into a substantive requirement.

However, a finding that NOAA and EPA's withholding obligation is, indeed, a procedural one does not end the standing analysis. "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers*, 555 U.S. at 496. Plaintiff must put forth sufficient evidence to demonstrate that CZARA's withholding obligations protect Plaintiff's concrete interests and that it is reasonably probable that the agencies' failure to withhold threatens those interests. *San Luis & Delta-Mendota Water Auth.*, 848 F.3d at 1232.

The "concrete interest test" requires "a geographic nexus between [a plaintiff] and the location suffering an environmental impact." *Citizens for Better Forestry*, 341 F.3d at 971. Plaintiff provides uncontroverted evidence satisfying this requirement. Specifically, Plaintiff

provides affidavits from its members demonstrating their concrete interests in the quality of Washington's coastal waters. (*See* Dkt. Nos. 28 at 3, 29 at 4, 30 at 6, 31 at 5, 32 at 3) (describing members' use of Washington's shorelines and waters for spiritual balance and solace, to recreate, beachcomb, fish, crab, gather shellfish, birdwatch, and whale watch). Plaintiff also provides citations to the record and extra-record evidence[3] showing that its members' interests would benefit from the improved management of nonpoint sources of pollution. *See* AR[4] WA319-002797 (describing the following demonstrated harms to Washington's shorelines and coastal waters from nonpoint sources of water pollution: "sediment erosion . . . elevated bacteria levels in rivers and streams and in coastal nearshore areas . . . contamination and closure of shellfish harvest areas"); (Dkt. Nos. 92-2 at 14, 92-3 at 6) (describing demonstrated harms to local salmanoid and non-salmanoid priority species from nonpoint sources of pollution); AR CZ0011527 (describing demonstrated harms to Southern Resident Killer Whales from nonpoint sources of pollution).

But a concrete interest is not enough. "'[T]he redress[a]bility requirement is not toothless in procedural injury cases' . . . [p]rocedural rights 'can loosen ... the redressability prong,' not eliminate it." *Friends of Santa Clara River*, 887 F.3d at 918 (9th Cir. 2018) (quoting *Salmon Spawning*, 545 F.3d at 1227; *Summers*, 555 U.S. at 497). Plaintiff must show that it is *reasonably probable* that NOAA and EPA's failure to withhold funds threatens Plaintiff's concrete interests. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011). This is where Plaintiff's standing argument fails. Plaintiff provides no evidence that its interests are threatened by the agencies' failure to withhold funds. (*See generally* Dkt. Nos. 93-1, 109.) Instead, Plaintiff relies

[3] The Court takes judicial notice of extra-record evidence Plaintiff presents from agency websites to the extent it goes to the issue of jurisdiction. *N.W. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997).

[4] References preceded by "AR" are to Bates-numbered documents in the administrative record submitted by Defendants in three installments. (*See* Dkt. Nos. 48, 49, 53, 61, 63, 88, 89, 90) (notices of filing administrative record, including amendments).

on congressional intent and speculates as to how Washington will respond to NOAA and EPA's withholding, if mandated by the Court. (*See* Dkt. Nos. 93-1 at 15–17, 109 at 15–18.) Congressional intent, without some quantum of evidence, is not sufficient. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 185 (2000); *Alaska Ctr. for Env. v. Browner*, 20 F.3d 981, 984 (9th Cir. 1994). Nor is "conjecture about the behavior of other parties." *See San Luis & Delta-Mendota Water Auth.*, 848 F.3d at 1233.

Whereas Defendants provide evidence that withholding grant funds is likely to increase, rather than reduce, harm to Plaintiff's concrete interests. Defendants point to the actions of Oregon's Coastal Management Program once NOAA began withholding 30% of Section 306 grant funding in 2015 after NOAA made a final determination that the state failed to submit an approvable Section 306 program. *See* AR CZ0013614–15. The state's Coastal Management Program eliminated "two-plus positions" and "all planning assistance and technical assistance grants to local governments." AR CZ0013135. Local government's "capacity to conduct development reviews and to enforce regulations that protect riparian and wetland resources" was significantly reduced. AR CZ0013138. Plaintiff provides no evidence to suggest that a similar result will not occur in Washington.

Plaintiff has failed to provide sufficient evidence to support its assertion that NOAA and EPA's failure to withhold funds from Washington's CZMA Section 306 and CWA Section 319 grants represents a redressable procedural injury. Absent another basis to demonstrate standing as to Claims #2 and #3, and Plaintiff alleges none (*see generally* Dkt. Nos. 93-1, 109),[5] the Court does not have subject matter jurisdiction to adjudicate these claims. Accordingly, the Court will not reach Defendants' other contentions in its motion for summary judgment. (*See generally* Dkt. No. 108 at 20–27.)

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[5] Plaintiff does not assert that it has standing for Claims #2 and #3 based on a substantive, rather than a procedural, injury. (*See generally* Dkt. Nos. 74, 93-1, 109.)

## III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for partial summary judgment as to Claims #2 and #3 (Dkt. No. 93-1) is denied and Defendants' cross-motion for partial summary judgment as to Claims #2 and #3 (Dkt. No. 108) is GRANTED. The claims are dismissed without prejudice.

DATED this 12th day of July 2018.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

Case No. 18-35291

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NORTHWEST ENVIRONMENTAL ADVOCATES,

Plaintiff–Appellee,

WASHINGTON CATTLEMEN'S ASSOCIATION and
WASHINGTON STATE FARM BUREAU FEDERATION,

Intervenor-Applicants-Appellants,

v.

U.S. DEPARTMENT OF COMMERCE, et al.,

Defendants–Appellees.

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# INTERVENOR-APPLICANTS-APPELLANTS' OPENING BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Intervenor-Applicants-Appellants Washington Cattlemen's Association and Washington State Farm Bureau Federation, both Washington-based nonprofit corporations, hereby state that no parent corporation or any publicly held corporation owns 10% or more of either organization's stock.

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## I. INTRODUCTION.

This appeal raises the issue of fairness – whether a proposed intervenor can be denied intervention after having met all of the criteria under Fed. R. Civ. P. 24. District courts must grant intervention as of right pursuant to Fed. R. Civ. P. 24(a)(2) "if four criteria are met: timeliness, an interest relating to the subject of the litigation, practical impairment of an interest of the party seeking intervention if intervention is not granted, and inadequate representation by the parties to the action." *California Dept. of Toxic Substances Control v. Commercial Realty Projects, Inc*. 309 F.3d 1113, 1119 (9th Cir. 2002). Here, as discussed more fully below, the district court's order denying intervention is inherently flawed in several respects. However, two fundamental prevailing errors taint the entire order denying intervention.

First, at the time appellants filed their motion to intervene, both the State of Washington and appellants were on equal footing as *non-parties* to the case, and both simultaneously moved to intervene on the same day and requested to become intervenor party-defendants. Yet, the district court ignored the plain language of Rule 24. Rather than properly and fairly consider both motions, the district court granted the State of Washington's pending motion to intervene, which was filed the same day as appellants' motion to intervene. Three weeks later, the court used the State's presence as an "existing party" to deny appellants' motion. Second, the

district court contradicts itself by expressly recognizing appellants' significant protectable interests on the one hand, but then later disregards those interests and conflates the intervention criteria with "adequacy of representation."

The district court was required to allow appellants in the case as intervenors as of right under Fed. R. Civ. P. 24(a), and to address any housekeeping concerns by using judicial discretion to order reasonable limits, if any, on participation. 7C Charles A. Wright, *et al.,* FEDERAL PRACTICE AND PROCEDURE § 1922 (3rd ed. 2007) (given the nature of intervention by right, courts typically only impose reasonable conditions of a housekeeping nature). Instead, the court used the existence of a non-party to find adequate representation, recognized and then disregarded appellants' interests, and unfairly denied the motion to intervene. For the reasons set forth below, the district court's order denying intervention should be reversed, and the matter remanded with instructions to allow appellants to intervene as party-defendants.

## II. STATEMENT OF JURISDICTION.

### A. Basis for Subject Matter Jurisdiction in the District Court.

Plaintiff asserts jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 2201 (declaratory judgment), § 2202 (further relief), and 16 U.S.C. § 1540(g) (Endangered Species Act citizen suit provision).

### B. Basis for Jurisdiction in the Ninth Circuit.

This appeal arises out of the district court's March 3, 2018 order denying intervention by proposed defendant-intervenors Washington Cattlemen's Association ("WCA") and the Washington State Farm Bureau Federation ("WFB") ("proposed intervenors") under Fed. R. Civ. P. 24. Denial of intervention is a final decision immediately appealable under 28 U.S.C. § 1291. *United States v. City of Oakland*, 958 F.2d 300, 302 (9th Cir. 1992); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987).

### C. Timeliness of Appeal.

The appeal is timely under Fed. R. App. P. 4(a)(1) because the notice of appeal was filed on April 13, 2018, *see* ER 10, within 60 days after entry of the order being appealed. ER 117; Fed. R. App. P. 4(a)(1)(B) (where one of the parties in the case is a United States agency).

## II. ISSUES PRESENTED FOR REVIEW.

This appeal arises out of the district court's order denying intervention to proposed intervenors in a lawsuit filed by plaintiff against three federal agencies. ER 1. The gist of plaintiff's case alleges that the federal agencies should defund the State of Washington's Coastal Nonpoint Pollution Management Program and its statewide Clean Water Act Nonpoint Program due to various alleged deficiencies. The declaratory and injunctive relief plaintiff seeks will impair the

State's ability to administer important programs that control and prevent nonpoint source water pollution. ER 116-17. Further, the relief plaintiff seeks will interfere with the intended beneficiaries of these funds – which include proposed intervenors' thousands of rural farmers and ranchers who help the State develop, design, and implement on-the-ground management practices pursuant to the challenged nonpoint pollution control programs. *Id.*; ER 5, 51-62.

Here, proposed intervenors met their burden of establishing protectible interests sufficient to intervene and the lack of adequate representation, yet the district court denied their motion. Proposed intervenors thus appeal and raise the following issues:

1. Whether proposed intervenors are entitled to intervene as of right under Fed. R. Civ. P. 24(a);

2. Whether proposed intervenors' protectible interests as recognized by the district court are distinct from the broader interests of the State of Washington in receiving and distributing those funds;

3. Whether the State of Washington, who moved to intervene the same day as proposed intervenors, was an "existing party" for determining if proposed intervenors were adequately represented in the litigation;

4. Whether Article III standing is required for intervention where proposed intervenors seek intervention solely to defend and not to assert independent claims; and

5. Whether the district court abused its discretion in denying permissive intervention under Fed. R. Civ. P. 24(b).

## III. STATEMENT OF THE CASE.

This is an appeal from an order denying intervention to proposed defendant-intervenors Washington Cattlemen's Association ("WCA") and Washington State Farm Bureau Federation ("WFB") in a lawsuit filed by plaintiff Northwest Environmental Advocates against the U.S. Department of Commerce, the National Oceanic and Atmospheric Administration ("NOAA"), and the Environmental Protection Agency ("EPA"). ER 1. Plaintiff's Complaint was filed on December 7, 2016 and raises six claims involving Washington's Coastal Nonpoint Source Program and statewide Water Quality Management Plan to Control Nonpoint Sources. ER 156 (Dkt. 1); ER 119-52. The Complaint challenges the propriety of continuing federal funding for the State of Washington's regulation of nonpoint source ("NPS") pollution under both programs. *Id*.

Washington's statewide plan is governed by Section 319 of the Clean Water Act ("CWA"), and its Coastal NPS program is governed by Section 6217 of the Coastal Zone Act Reauthorization Amendments ("CZARA") and Section 306 of

the Coastal Zone Management Act ("CZMA"). Plaintiff asserts claims under the Coastal Zone Act Reauthorization Amendments, 16 U.S.C §§ 1455b, 1455b(c)(3), 1455(c)(4), *see* ER 110-11 (Claims 2-3), the Clean Water Act, 33 U.S.C. § 1329, *see* ER 112-15 (Claims 4-5), and the Endangered Species Act, 16 U.S.C. § 1536(a)(2). ER 115-16 (Claim 6).

The Complaint was amended on March 3, 2017, and on April 7, 2017, federal defendants filed a motion to dismiss for failure to state a claim. ER 158 (Dkt. 21). On September 19, 2017, the district court granted in part, and denied in part, federal defendants' motion to dismiss. ER 159 (Dkt. 39). The court dismissed Claim 1 asserting that CZARA requires EPA and NOAA to disapprove a state's Coastal Nonpoint Program if it does not meet applicable criteria, because 16 U.S.C. § 1455b(c)(1) does not contain such a mandate. ER 159 (Dkt. 39 at 10). The district court also dismissed the fourth subclaim of Claim 6 alleging that ESA Section 7 consultation was required before NOAA's approved the full amount of Coastal Assistance Grants, despite the asserted lack of an approvable Coastal Nonpoint Program. ER 159 (Dkt. 39 at 14). The district court denied the motion to dismiss as to all other claims. *Id*.

On October 31, 2017, the district court denied federal defendants' motion for reconsideration. ER 161 (Dkt. 56). The court set a trial date of February 4, 2019. ER 161 (Dkt. 55). The proposed pretrial order is due January 25, 2019, trial briefs

are due January 31, 2019, and the discovery cutoff is 120 days prior to trial. *Id.* Dispositive motions are due 90 days before trial. *Id.* Federal defendants filed the first part of the administrative record and their Answer on October 24, 2017. ER 160 (Dkt. 49, 50). The second part of the administrative record was filed on November 29, 2017. ER 161 (Dkt. 62).

On January 5, 2018, and with no briefing schedule on the merits yet established, proposed intervenors and the State of Washington separately moved on the same day to intervene as defendants. ER 161 (Dkt. 66, 67). Given that the district court did not immediately rule on these motions, the State of Washington was not yet an existing party at the time proposed intervenors filed their motion to intervene. *Id*. Significantly, plaintiff filed its response on January 22, 2018, indicating it did not oppose intervention by either party, in light of assurances made by proposed intervenors that they would comply with existing briefing schedules. ER 162 (Dkt. 73). One week later on January 29, 2018, the district court granted the State of Washington's motion to intervene, without ruling on proposed intervenors' motion. ER 163 (Dkt. 79); ER 162 (Dkt. 66, 67).

Federal defendants responded to proposed intervenors' motion on February 5, 2018, indicating that they opposed intervention as of right under Fed. R. Civ. P. 24(a), but that they did not oppose permissive intervention under Fed. R. Civ. P. 24(b) if intervention was limited to the remedy phase. ER 163 (Dkt. 80). The

district court delayed ruling on proposed intervenors' motion for another month and ultimately issued an order on March 7, 2018, denying intervention.[1] ER 1-9, 163 (Dkt. 84).

In denying intervention, the district court found that proposed intervenors had direct interests that would be practically impaired with respect to Claims 2-3 (failure to withhold CZMA and CWA grant funds), but that the State had an "identical" interest that precluded participation by proposed intervenors. ER 4-6. The court found "adequate representation" by the State even though the State was not even a party at the time proposed intervenors moved to intervene. ER 4-6, 163 (Dkt. 79); ER 162 (Dkt. 66, 67). The court found that proposed intervenors did not have a significantly protectable interest with respect to Claims 4-5 (arbitrary approval of statewide Section 319 program and arbitrary finding of "satisfactory progress" in implementing the program), and that "existing government entities"

[1] After the court denied intervention by WFB and WCA, proposed intervenors filed a motion for partial stay of proceedings to defer action on the remedy until their appeal was resolved. Dkt. 95. The parties conferred on the motion for partial stay and agreed to a stipulation for WFB and WCA to appear as *Amici Curiae* on the issue of remedy only, and WFB and WCA agreed to withdraw their motion for partial stay. Dkt. 98, 100. On May 9, 2018, WFB and WCA filed a brief on the issue of remedy as *amici*. Dkt. 104. The Ninth Circuit has recognized that intervention is not the same as *amicus* status, and that when a non-party has a protectable interest that may be impaired by the outcome of a lawsuit, becoming an intervenor is the only sufficient means for that non-party to defend that interest. *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 400 (9th Cir. 2002).

adequately represented their interests. ER 8. The district court also summarily denied proposed intervenors' alternative request for permissive intervention under Fed. R. Civ. P. 24(b). In denying permissive intervention, the court concluded that proposed intervenors were adequately represented, had failed to plead protectible interests, and "would be likely to cause undue delay in the litigation." ER 9.

Proposed intervenors filed a timely notice of appeal on April 13, 2018.[2] ER 10-14, 118 (Dkt. 94).

## IV. SUMMARY OF ARGUMENT.

Proposed intervenors WFB and WCA are trade associations that represent thousands of rural farmers and ranchers throughout the State of Washington who are directly impacted by water quality projects and the development and implementation of best management practices to address nonpoint sources throughout Washington under the challenged NPS programs. Plaintiff seeks to invalidate and halt funding for NPS programs. ER 52, 58. WFB is the primary co-chair on the Washington Department of Ecology's Water Quality Advisory Committee, which is tasked with creating the exact water quality measures plaintiff

[2] Subsequent to the notice of appeal, on July 12, 2018, the district court granted federal defendants' motion for summary judgment and dismissed Claims 2-3 without prejudice, concluding that plaintiff lacked standing. Dkt. 112. On July 30, 2018, plaintiff moved for reconsideration, and briefing on plaintiff's motion for reconsideration will continue through August 20, 2018. Dkt. 114.

is challenging in the lawsuit. ER 17-18. WCA sits on the committee as well. *Id*. For years, WFB and WCA have been assisting in developing management measures for the agricultural category of NPS pollution, which are necessary and become part of the Section 319 requirements for an approved NPS program. ER 5, 8, 17 & n.1, 18-20, 53-54. Yet, the court denied intervention, despite proposed intervenors' practical and economic interests in the outcome of this litigation.

The district court erred in several respects. First, in denying intervention as of right on Claims 2-3 (failure to withhold CZMA and CWA grant funds), the district court recognized proposed intervenors' specific protectible interests, however, the court erred in concluding that those interests are "wholly eclipsed by Washington's identical interest" in ensuring that the federal grants continue. ER 6. The court erred because the State was not even an existing party in the case as required by Rule 24 when proposed intervenors moved to intervene. Further, the State has broader governmental interests, and the district court misapplied the law by speculating that the State provided adequate representation.

Second, in denying intervention as of right on Claims 4-5 (arbitrary approval and arbitrary finding of "satisfactory progress" for statewide Section 319 program), the district court erred in concluding that proposed intervenors lacked an interest sufficient to intervene, and, readdressing its reasoning as to Claims 2-3, that existing government entities provided adequate representation. ER 7-8. The court

erred by narrowly characterizing proposed intervenors as advocating solely for "viable economic management" of their members' farms and ranches. These economic interests are not represented by existing parties. Proposed intervenors' declarations clearly explain that their members are composed of thousands of rural, family-owned businesses who strive to maintain the health, productivity, and quality of their land and water to support the economic viability of their farms and ranches. Moreover, they also have aesthetic and environmental interests and unique on-the-ground experience in developing the very water quality guidance that plaintiff attacks.

Third, the district court erred in requiring that proposed intervenors demonstrate an interest tantamount to Article III "standing," which is not required to intervene as a defendant in a federal question case.

Finally, the court abused its discretion in denying proposed intervenors' alternative request for permissive intervention under Rule 24(b) by relying on erroneous legal conclusions.

The district court's order denying intervention is contrary to the liberal policy in favor of intervention and misinterprets Rule 24. The decision creates far too high of a hurdle for intervention in this lawsuit about NPS pollution, which plaintiff alleges is caused in large part by farms and ranches. The order should be

reversed and the matter remanded with instructions to allow proposed intervenors to intervene as party defendants.

## V. STANDARD OF REVIEW.

The Ninth Circuit reviews *de novo* the district court's denial of intervention as a matter of right under Fed. R. Civ. P. 24(a)(2). This Court construes Rule 24 "liberally" in favor of intervention. *Arakaki v. Cayetano*, 324 F.3d 1078, 1082-83 (9th Cir. 2003). Moreover, in the Ninth Circuit, courts must accept as true all well-pleaded, non-conclusory allegations in a motion to intervene and supporting documents. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

The Ninth Circuit generally reviews a district court's denial of permissive intervention under Fed. R. Civ. P. 24(b) for abuse of discretion. *League of United Latin Am. Citizens v. Wilson* (*LULAC*), 131 F.3d 1297, 1307 (9th Cir. 1997). Where denial is premised "on an erroneous interpretation of law," however, review is *de novo*. *See Mineworkers' Pension Scheme v. First Solar Inc.*, No. 16-16937, 2018 WL 494118, at *2 (9th Cir. Jan. 22, 2018) (citing *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999)).

# VI. ARGUMENT.

## A. Proposed Intervenors are Entitled to Intervene as of Right as to Claims 2-3 to Ensure Continued Funding for Washington State's Clean Water Act and Coastal Assistance Grants.

### 1. Standard for intervention as of right.

In the Ninth Circuit, applicants are entitled to intervene as of right under Fed. R. Civ. P. 24(a) when: (1) their motion is timely; (2) they have a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action could impair or impede their ability to protect their interest; and (4) the existing parties might not adequately represent their interests. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011); *see also Berg*, 268 F.3d at 817-24. In evaluating Rule 24(a)(2), the Ninth Circuit follows "practical and equitable considerations" and construes the Rule broadly in favor of proposed intervenors. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc) (citing *United States v. City of L.A.*, 288 F.3d 391, 397 (9th Cir. 2002); *Berg*, 268 F.3d at 818)). The Ninth Circuit has explained that:

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues.

*United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (internal quotations marks and citations omitted).

**2. Proposed intervenors have significant protectable interests.**

In denying intervention as of right as to Claims 2-3 (failure to withhold CZMA and CWA grant funds), the district court recognized proposed intervenors' protectible interests, but the court erred in concluding that those interests are "wholly eclipsed by Washington's identical interest" in ensuring that the federal grants continue. ER 6.

An applicant has a "significant protectable interest" in an action if: (1) it asserts an interest protected under some law, and (2) there is a 'relationship' between its interest and the plaintiff's claims." *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002). The relationship is met "if the resolution of the plaintiff's claims actually will affect the applicant." *Id*. The "interest" test is not a clear-cut or bright-line rule. No specific legal or equitable interest must be established. *Citizens for Balanced Use*, 647 F.3d at 897. The interest requirement is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *City of Los Angeles*, 288 F.3d at 397-98; *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).

Courts generally construe this rule broadly. A "liberal policy . . . serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court." *Forest Conservation Council v. U.S. Forest Serv*., 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (internal quotation marks omitted).

Proposed intervenors represent thousands of Washington farmers and ranchers that are subject to NPS regulation. ER 58-59. The agencies' regulatory decisions being challenged here have direct practical, economic, and legal implications on the ability of proposed intervenors' members to use their lands for farming and ranching.

The Washington Cattlemen's Association ("WCA") represents the interests of cattle producers on legal and legislative issues pertaining to the use of natural resources at the local, state, and federal levels. ER 58 ¶¶ 2-3 (Declaration of Sarah Ryan in Support of Motion to Intervene by WCA) (Dkt. 67-5). WCA was founded in 1926 and is supported through a grassroots network of individual livestock operators and county cattlemen's organizations. ER 58 ¶ 3. WCA's membership includes 26 affiliated county organizations and approximately 1,400 individual members engaged in cattle ranching. *Id*. Its members include those that depend on

the ability to access riparian water rights and divert and use water appropriation rights. *Id*. WCA works to promote a sustainable environment, promotes good soil and clean water, and seeks to protect the water rights of its members and economic viability of their ranchlands. *Id*. ¶ 3. WCA is significantly involved representing its regulated members before state regulator, the Washington Department of Ecology ("Department of Ecology") on topics of pollution control, water quality standards, and best management practices. *Id*.

Water is an indispensable input for livestock production, and all WCA members depend on the ability to use water rights and access water. ER 59 ¶ 5. For example, water is used to irrigate grasslands; to produce other types of feed; for direct consumption by livestock; to clean facilities; and in "downstream" uses such as feedlots, dairy production, or wool processing. *Id*. WCA's members use best management practices, or "BMPs" designed to minimize soil loss and NPS water pollution. *Id*. ¶ 6. Depending on the ranch, ranchers rotate cattle among pastures to maintain forage and ground cover, distribute cattle away from streams with developed water sources and salt, and control cattle numbers to match the productive capacity of the pastures. *Id*. WCA members also sit on the Agriculture and Water Quality Advisory Committee, which is a committee developed by the Department of Ecology to consider interests of private regulated entities that are not the same as the government regulatory agency. *Id*. WCA membership

provided the Department of Ecology with recommendations for the publication, Clean Water and Livestock Operations: Assessing Risks to Water Quality. *Id*. WCA is currently involved in the process to develop BMPs by the Department of Ecology. ER 53-55; ER 59 ¶ 4. WCA participates in the Department of Ecology regulatory process to help protect the economic viability of its member ranches and obtain workable approaches to maintaining water quality. ER 59 ¶ 4.

The Washington State Farm Bureau Federation ("WFB") represents the economic interests of 46,000 farm and ranch families in Washington. ER 52 ¶¶ 3, 5 (Declaration of Evan Sheffels in Support of Motion to Intervene by WFB) (Dkt. 67-4). The WFB's purpose is to analyze the problems faced by its members and to formulate action to achieve educational improvement, economic opportunity, and social advancement while maintaining productive, economically viable farms and ranches for future generations. *Id.* ¶ 3. The 46,000 member families of WFB want to maintain the health, productivity, and quality of their land and water. *Id*. ¶ 5. Many members have benefitted from the availability of funding through the Section 319 grant program which is the target of this lawsuit. *Id*. Like WCA, the WFB works with multiple environmental and conservation entities, including the Natural Resources Conservation Service, the Department of Ecology, and conservation districts to establish comprehensive BMPs. ER 53 ¶ 6.

Both WCA and WFB are deeply invested in developing practical NPS controls pursuant to the CWA and CZMA so that state and federal agencies will consider the unique interests of their members to achieve reasonable and practical pollution control in a manner that will not bankrupt ranchers and farmers. ER 58-60 ¶¶ 4, 6-9; ER 54 ¶ 10. Proposed intervenors have directly benefitted from the Section 319 grant program—as funds are distributed by the Department of Ecology to municipalities, counties, conservation districts, and other organizations to implement NPS control measures at the site-specific level. ER 58-61 ¶¶ 3, 5, 10; ER 53-54 ¶¶ 6-9.

Plaintiff's Claims 2-3 seek to halt federal grant funding to the State's Coastal NPS Program and its statewide Clean Water Act NPS Program, which directly threatens the interests of proposed intervenors' members in viable, economic management of their farms and ranches, in funding for efforts to reduce NPS pollution, in adopting reasonable and effective BMPs, and their members' interests in participating in the development of, and reliance on, watershed total maximum daily loads ("TMDLs") as a means to address NPS pollution. ER 52-55 ¶¶ 5-9, 11; ER 58-61 ¶¶ 4, 6-10. Plaintiff seeks a declaration that EPA and NOAA have violated CZARA, 16 U.S.C. § 1455b, by unlawfully withholding or unreasonably delaying final approval or disapproval of Washington's Coastal Nonpoint Program, and by failing to disapprove Washington's program and failing

to withhold grant funds to the State. ER 110-12, 116-17 ¶¶ 79-92, Prayer for Relief ¶¶ A, C (Sec. Am. Compl.) (Dkt. 74). This relief would immediately halt CWA and CZMA grant funds for those programs.

As explained in the Declarations of Sarah Ryan and Evan Sheffels, enjoining and defunding implementation of the interim State's Coastal Nonpoint Pollution Control Program and the 2015 CWA Nonpoint Control Program will directly impact proposed defendant-intervenors and their members' agricultural and livestock operations. Proposed intervenors are involved in the implementation of the CWA Nonpoint Program by participating in the TMDL process in many watersheds throughout Washington, and by working to develop and implement BMPs to control nonpoint pollution. ER 53-54 ¶¶ 6, 11; ER 59-61 ¶¶ 6, 9. Proposed intervenors have an interest in an economically viable regulatory scheme, and they are in a better position to understand the financial and economic implications of various regulatory measures than the parties. ER 53-55 ¶¶ 6-11; ER 59-60 ¶¶ 6-8. Proposed intervenors also benefit from funding of NPS programs throughout the State, and the funding has helped to implement farm practices to improve water quality through the Farmed Smart certification program and for riparian planting. ER 53-55 ¶¶ 6-9; ER 8-9 ¶¶ 8-9.

Proposed intervenors have an interest in seeing that continued grant funding is available to the Department of Ecology so that its members can continue to

directly benefit from the State NPS programs. For example, proposed intervenors have relied on federal funding to improve their management practices to protect water quality through education, review and certification of farming practices, and cost-share practices. ER 53-55 ¶¶ 6-9; ER 8 ¶ 9.

Proposed intervenors' concerns regarding clean water control strategies and regulation of their land-use practices under the CZARA and CWA provide a sufficient interest to intervene. For example, this Court held the City of Phoenix, an NPDES permit holder, had a "protectable interest" in an action by the Sierra Club against EPA concerning the City's permit. *See Sierra Club v. EPA*, 995 F.2d 1478, 1482 (9th Cir. 1993). Sierra Club sought, among other things, to require EPA to develop water quality standards for toxic pollutants and incorporate them into the City's NPDES permit. *Id*. at 1480–81. The Ninth Circuit explained:

> In practical terms, the Sierra Club wanted the court to order the EPA to change the City's NPDES permits, in order to reduce the amount of pollutants from . . . wastewater treatment plants . . . . Because the Act protects the interests of a person who discharges pollutants pursuant to a permit, and the City of Phoenix owns such permits, the City has a "protectable" interest. *These permits may be modified by control strategies issued as a result of this litigation, so the City's protectable interest relates to the litigation*.

*Id*. at 1481, 1485–86 (emphasis added).

In another water quality case bought by the same plaintiff as this case, the court held that a coalition of regulated entities was entitled to intervene as of right in an action challenging Oregon total maximum daily loads (TMDLs) approved by

EPA pursuant to CWA Section 303(d), 33 U.S.C. § 1313(d). *See Nw. Entl. Advocates v. U.S. EPA*, Case No. 3:12-cv-1751 (D. Or. Jan. 27, 2014) (Order Granting Motion to Intervene) (Dkt. 49 at 5) ("Any modification of the TMDLs would almost certainly result in modified wasteload allocations for [industry intervenors] . . . , likely increasing their costs in complying with the CWA.").

Like *Sierra Club* and *Nw. Entl. Advocates*, proposed intervenors have significant protectable interests in the imposition of best management practices on their lands, farms, and ranches. These agricultural practices will be more stringently regulated if plaintiff's challenges succeed. This, in turn, will require proposed intervenors to install more expensive, and possibly technically or economically infeasible, nonpoint controls; increase the cost of agricultural and livestock operations; reduce livestock numbers and producers' ability to irrigate their land; and reduce funding for education, implementation, and monitoring of nonpoint BMPs. ER 52-54 ¶¶ 5-9; ER 59-60 ¶¶ 6-9.

Because proposed intervenors have significant protectable interests in the law regarding NPS pollution control, they satisfy the interest prong of the intervention standard. For Claims 2-3, the district court agreed that proposed intervenors had significant protectible interests that would be impaired by the litigation:

> Federal Agencies argue that Proposed Intervenors' interests would not be practically impaired or impeded by NWEA's action

> "because their interests . . . could be (if at all) only indirectly affected by the outcome of this case based on actions the State of Washington may or may not take." (Dkt. No. 80 at 4.) The Court disagrees. Though Proposed Intervenors' interests depend on Ecology's initial receipt of federal funds, Federal Agencies concede that *Proposed Intervenors "are precisely the types of entities who are eligible to receive funding to implement the State's nonpoint source control program[s]* . . . funded in part by federal grants under the CZMA and CWA." (Dkt. No. 80 at 9.)[.]

ER 5-6. However, despite this finding that proposed intervenors' interests are protectible and would be practically impaired without proposed intervenors participating in the case, the court held that their interest in Claims 2–3 "is wholly eclipsed by Washington's identical interest in ensuring the grants continue." ER 6 (emphasis added). That ruling ignores that the State of Washington was not an "existing party" when proposed intervenors filed their motion to intervene and misinterprets the minimal burden to show that an existing party may not adequately represent proposed intervenors' interest.[3]

[3] The district court did not find, nor could it, that plaintiff, EPA, or NOAA Fisheries adequately represented the interests of proposed intervenors. The Ninth Circuit has explained: "[t]he requirement of the Rule [24(a)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *In Legal Aid Society of Alameda v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980).

### 3. The State was not an "existing party" under Fed. R. Civ. P. 24(a) and could not adequately represent proposed intervenors as a matter of law.

The State could not adequately represent proposed intervenors as a matter of law, because both the State and proposed intervenors moved to intervene on the same day. ER 162 (Dkt. 66, 67). In granting the State's motion and then using the presence of the State to deny intervention on the basis of adequate representation, the district court misapplied Rule 24(a).

Fed. R. Civ. P. 24(a) provides that "[o]n timely motion, the court must permit anyone to intervene who" meets the requirements of subsection (a)(2) "unless *existing parties* adequately represent that interest." (emphasis added). At the time proposed intervenors moved to intervene, the only existing parties were plaintiff and federal defendants. The State of Washington was not an existing party at the time the motion was filed because its motion to intervene had not been ruled upon.[4] ER 163 (Dkt. 79); ER 162 (Dkt. 66, 67); *see also Spangler*, 552 F.2d

[4] The status of becoming a party through intervention is not something that happens merely by filing a motion and requires specific findings. In *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977), the Ninth Circuit held "[i]f the court has for some reason permitted persons who are not parties to the suit to participate in some stage of the proceedings, this will rarely, if ever, suffice to eliminate the necessity of formal intervention for these persons to become parties in their own right."

at 1328-30 (9th Cir. 1977) (proposed intervenor is not "proper party" until motion to intervene is granted).

The plain language referring to the "existing party" for evaluating adequacy of representation "is to be determined by a litigation's 'condition *at the time of the application to intervene*.'" *Pierson v. United States*, 71 F.R.D. 75, 80 (D. Del. 1976) (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 403 (1967) (emphasis added)); *accord Marie v. Robert Moser, M.D.* 2014 WL 7272565, * 3 (D. Kan. 2014); *In re Charter Co.*, 50 B.R. 57, 63 (Bkrtcy. W.D. Tex. 1985); *see also* AM. JUR. 2D PARTIES § 169, 2018 (same); 25 Fed. Proc., L. Ed. § 59:335 (2018).

Thus, the district court erred in determining that the State provided adequate representation sufficient to defeat intervention as of right on Claims 2-3 because the State was not an existing party when proposed intervenors filed their motion. If courts did not have to determine the issue of adequacy of representation at the time the motion to intervene was filed, district courts could simply choose which parties they wanted to intervene as a matter of right by delaying ruling, thus frustrating the policies behind Rule 24. This goes against the role of the judiciary as a neutral arbitrator of the law and is contrary to the purpose for which intervention was intended.

**4. The court misapplied the law in concluding that the State's interest is identical.**

The court also misapplied the law in finding the State's interest was "identical" to proposed intervenors. ER 6. In its motion to intervene, the State identifies its interest as "its *ability to implement nonpoint source pollution control programs* to protect Washington's waters." ER 66 (emphasis added) (Dkt. 66 at 4). The State also identified the need for federal grant funding to avoid "impairing Washington's *interest 'to maintain the highest possible standards* to insure the purity of all waters of the state . . . . RCW 90.48.010.'" ER 66 (Dkt. 66 at 6). The State argued in favor of its motion to intervene, and the district court agreed, that the existing federal defendants did not adequately represent the State's interests because federal "[d]efendants represent a *national interest* in implementing the Clean Water Act and CZARA." *Id*.; ER 163 (Order Granting Washington State's Motion to Intervene) (Dkt. 79).

In denying proposed intervenors' motion, the district court recognized that although federal funds are initially distributed to the Department of Ecology, they are subsequently distributed to municipalities and other organizations "to support a network of water quality programs that depend on execution by their members." ER 5. The district court outlined examples of the programs that directly impact proposed-intervenors' members, such as educational outreach, review and certification of farming practices, technical and financial assistance, cost-share

practices, training, and the Conservation Reserve Enhancement Program, which pays WFB member landowners to plant shrubs and improve stream conditions. *Id*. Proposed intervenors are in a better position to add perspectives on all of these issues than the parties. The district court concluded that:

> In light of the structure with which Ecology administers CZMA and CWA grants, Proposed Intervenors' fear—that injunctive relief in favor of NWEA will have a "direct, immediate, and harmful effect" upon their interests—is reasonable. *See Forest Conservation Council*, 66 F.3d at 1494. *Proposed Intervenors provide specific, concrete examples of programs that directly affect their members* . . . .

ER 5-6 (emphasis added).

The district court's ruling that the State adequately represented proposed intervenors' interests because the State has "identical" interests is erroneous, because the court acknowledges elsewhere in its opinion that proposed intervenors have their own unique interests. There are key distinctions between WFB's and WCA's local interests compared to the State's broader, statewide interests. As noted above, the State has described its broader policy interest in receiving federal funding in order to implement its NPS programs as an effort to avoid impairing "*the highest possible standards*" for water purity and water quality. ER 67-68. Proposed intervenor WFB, in contrast, represents "the social and economic interests of 46,000 farm and ranch families in Washington State" who "want to maintain the health, productivity, and quality of *their land and water*." ER 52 ¶ 5 (emphasis added). Proposed intervenor WCA similarly represents about 1,400

ranchers who implement effective methods to control NPS pollution by implementing practices that will reduce soil erosion and improve stream temperatures. ER 61 ¶ 10. Eliminating federal funding is contrary to the interests of WCA's members in reducing NPS pollution "to maintain the *quantity and quality of water for their domestic needs* and to support the ranch operations."[5] *Id.* (emphasis added). These interests are clearly different than the State's *broader* governmental interest in implementing its NPS programs in furtherance of the statutory policy of achieving the "highest possible" water purity and quality under RCW 90.48.010.

Despite recognizing proposed intervenors' interests as protectable, the district court erred in concluding that the State's interest is "*identical*." *Id.* (emphasis added). The court reasoned that any specialized or unique perspectives in how guidance should be developed "do not rebut Washington's comparable (and likely superior) Ecology-related expertise." *Id.* Citing to *Prete v. Bradbury*, 438 F.3d 949, 958-59 (9th Cir. 2006), the court indicated that it would be speculative that the Department of Ecology lacks comparable experience to any specialized knowledge offered by the WFB and WCA. *Id.* In making this finding, the court

[5] Proposed intervenors' unique interests include economic financial interests in their ranches and farms, and interests in practical regulation of water quality in balance with their viable operations and the health and productivity of their private lands. ER 51-62.

erred by misapplying the law of presumptions and the standard for viewing the evidence and nonconclusory allegations submitted in support of intervention.

Speculating that the Department of Ecology has comparable knowledge and experience about farming and ranching, and disregarding proposed-intervenors' declarants who describe their interests as including promoting the health and quality of their land and water using practices designed to protect soil and water resources in a financially and practically feasible manner, rather than to the "highest possible standards," misapplies intervention law. "[A] district court is required to accept as true the non-conclusory allegations made in support of an intervention motion. *Berg*, 268 at 819. "This rule requiring acceptance of the proposed intervenor's well-pleaded allegations makes particular sense where, as in this case, the propriety of intervention must be determined before discovery." *Id.* at 819-20.

WFB and WCA submitted the only evidence in this case that they have unique on-the-ground experience and financial and economic perspectives in developing water quality guidance. WFB is a primary co-chair along with the Department of Ecology on the State's Agriculture and Water Quality Advisory Committee. ER 17. This Advisory Committee, on which representative WCA is also a member, addresses critical issues such as the process to develop clean water

guidance for nonpoint sources for agriculture.[6] ER 18. The fact that WFB co-chairs, and WCA sits on, the State's Advisory Group formed to develop guidance for agriculture interests shows that they not only have an interest sufficient for intervention as of right, but that they have key, unique perspectives in how guidance should be developed to improve water quality from agricultural runoff. *Id*. They sit on the committee tasked with creating the exact water measures plaintiff challenges under both NPS programs. *Id*. The case seeks to halt funding used for further development and implementation of agricultural BMPs. ER 116-17 §§ VII(H), (I) (Sec. Am. Compl.) (Dkt. 74).[7]

The State and federal defendants, in turn, submitted *no evidence* that proposed intervenors lack unique perspectives not shared by the State or federal defendants. The only evidence on this issue is that WFB and WCA have been assisting in developing agriculture-related management measures, which become

[6] WFB would not need to be on the committee if the Department of Ecology shared the identical interests as proposed intervenors and adequately represented those interests.

[7] Plaintiff's Complaint requests the court to: "Declare that EPA violated the CWA, 33 U.S.C. § 1329(h)(8), in concluding that Washington made satisfactory progress in the preceding fiscal year in meeting the schedule for implementing BMPs and the programs to achieve their implementation," and "Order EPA to withhold funds as required by 33 U.S.C. § 1329(h)(8) until Washington has made satisfactory progress based on an approved Section 319 Plan with a schedule to implement identified BMPs." ER 117 (Sec. Am. Compl. §§ VII(H), (I) (Dkt. 74).

part of the Department of Ecology's NPS program and are necessary to Section 319 requirements for an approved NPS program. ER 18, 53-55, 59-61. Thus, contrary to the district court's determination, it is speculative and contrary to this record to conclude that the Department of Ecology's experience and specialized knowledge *is* comparable or superior, as the district court erroneously concluded. ER 6. Such a conclusion begs the question of why the Department of Ecology would have proposed intervenors co-chair and sit on the Agricultural and Water Quality Advisory Group in the first place if the State already possessed comparable or superior knowledge and experience to develop guidance and understood the practical, economic, and financial implications of those measures as they are implemented on-the-ground.[8] In view of the evidence, proposed intervenors have that unique perspective and experience and rebutted any presumption to the contrary, particularly under the liberal standard in Rule 24.

[8] A presumption of adequate representation may be rebutted if applicants and federal defendants "do not have sufficiently congruent interests." *Berg*, 268 F.3d at 823 (finding that the Fish and Wildlife Service could not be expected to protect proposed intervenors' private interests); *see also National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977) ("We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interests of the petitioners in intervention, a task which is on its face impossible . . . [T]his kind of conflict satisfies the minimal burden of showing inadequacy of representation.").

For these reasons, the district court's decision denying intervention as of right as to Claims 2-3 misapplied the law and should be reversed.

### B. Proposed Intervenors are Entitled to Intervene as of Right as to Claims 4-5 to Ensure Continuation of Section 319 Funds.

The district court also erred in concluding that proposed-intervenors lacked an interest sufficient for intervention under Claims 4-5. These claims allege that EPA unlawfully approved Washington's statewide plan without identifying BMPs, identifying programs to achieve implementing BMPs, and a schedule for using BMPs (Claim 4), *see* ER 112-13; and that EPA issued grant funds by unlawfully determining that the State had made "satisfactory progress" in implementing Section 319 (Claim 5). ER 114-15. For relief, plaintiff seeks to halt funding under Section 319 for implementation of BMPs. ER 117 ¶ I (Prayer for Relief).

Section 319 funds support a variety of important water quality projects impacting agriculture, including BMP implementation projects, Farm Certification, on-site septic system projects, stormwater projects, and wastewater facility projects. ER 43-44. Halting Section 319 funds would adversely affect proposed defendant-intervenors and their members' agricultural and livestock operations. ER 61 ¶ 10. Section 319 funds are used to help educate WCA's members about effective methods to control NPS pollution, implement practices that reduce soil erosion and improve stream temperatures, and conduct effectiveness monitoring as to which practices are proving most effective. *Id*. Eliminating these funds is

contrary to the interests of WCA members in developing BMPs that are effective and financially feasible, and reducing NPS pollution to maintain the "quantity and quality of water for their domestic needs and to support the ranch operations." *Id*.

**1. The court misapplied the law in relying on Article III "standing" authority.**

In denying intervention as of right on Claims 4-5, the district court erred in concluding that proposed intervenors lacked an interest sufficient to intervene, even though it found qualifying interests sufficient for intervention on Claims 2-3. ER 5. In concluding that proposed intervenors lack an interest under the Clean Water Act sufficient for intervention, the court relied on *Alaska Center for the Environment v. Browner*, 20 F.3d 981, 984 (9th Cir. 1994). ER 7. However, that case did not involve intervention but addressed *standing*, which is not required as a condition to intervene as a defendant in a federal question case. *See, e.g., Freedom from Religion Found., Inc. v. Geithner,* 644 F.3d 836, 844 (9th Cir. 2011) ("Where the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away"). Here, proposed intervenors did not attempt to assert any counter- or cross-claims in their proposed Answer, *see* ER 72-83, 117 (Dkt. 67-2), and the court erred in relying on *Browner*.[9]

[9] In referencing *Browner*, the district court states that proposed intervenors lack "special solicitude." ER 7. However, *Browner* never speaks to a "special solicitude" in connection with the plaintiff's interests in that case. The Supreme Court does use the term "special solicitude" in *Massachusetts v. E.P.A.*, 549 U.S.

The Supreme Court has held that demonstrating standing is only required when the relief sought from the intervenors is different than that of the existing parties. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). However, no court since *Laroe Estates* has held that intervenors need to establish standing when simply intervening as party defendants.[10] Thus, the district court erred in relying on authority requiring Article III standing.

### 2. The court erred in misstating the nature and scope of proposed intervenors' interest as solely economic.

The court also erred in misstating the breadth of proposed intervenors' interests in stating that:

> Here, Proposed Intervenors bring suit not to "protect the public health or welfare, enhance the quality of water, and serve the purposes of [the CWA]," § 1313(c)(2)(A), but to protect their interest in "viable, economic management of their farms and ranches." (Dkt. Nos. 67 at 6, 74 at 6–7).

497, 520 (2007), but it does so in the context of relaxed standing requirements when a state sues the federal government.

[10] Even if standing were required, which it is not, "[a] dollar of economic harm is still an injury-in-fact for standing purposes." *Czyzewski v. Jevic Holding Corp.*, —— U.S. ——, 137 S. Ct. 973, 983, 197 L.Ed.2d 398 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.' "); *see, e.g.*, *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1029 (8th Cir. 2014) (alleged "economic harm —even if only a few pennies each—is a concrete, nonspeculative injury.").

ER 7. Characterizing proposed intervenors interest as solely "economic" is plainly in error.

Although proposed intervenors submitted declarations supporting their members' interests in maintaining viable, economic farms and ranches, they also provided testimony that "46,000 member families of WFB want to maintain the *health, productivity, and quality of their land and water*," and that they participate in programs under Section 319 grant funding "*designed to improve water, air, and soil quality; improve wildlife habitat; reduce carbon output; and improve economic viability and sustainability*." ER 52-53 ¶¶ 5-6 (emphases added). WFB members also have participated in a Section 319 program that restores and protects streamside habitat for salmon. ER 53-54 ¶ 9. WFB's members are not solely advocating economics, but for balance in feasible water quality measures to protect soil and water consistent with their viable farms and ranches.[11] WFB members also have aesthetic and environmental interests as well to protect the health of

[11] "Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public." *Forest Conservation Council v. U.S. Forest Serv.* ., 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated by Wilderness Soc. v. U.S. Forest Serv*., 630 F.3d 1173 (9th Cir.2011) (quoting 3B MOORE'S FEDERAL PRACTICE, ¶ 24.07[4] at 24–78 (2d ed.1995)); *see also See Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1000–01 (8th Cir. 1993) (finding that, because the county's and landowners' "local and individual interests" were not shared by the general state citizenry, the State would not adequately represent those interests).

where the live, farm and ranch. *Id*. ¶ 10; *see also* ER 58 ¶ 4 (testimony of WCA that "a sustainable environment with good soil and clean water is a pre-condition to our members' livelihood").

The district court's narrow view that proposed intervenors have solely an "economic" interest is contrary to *Berg*, 268 F.3d at 819, which held that "[c]ourts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections." *Id*. The court's characterization fails to recognize the multiple interests of WFB and WCA and their members in the financial and economic management of their own lands, the protection of water, air, and soil quality, the health of their lands, maintenance of water rights, and strong desire to achieve water quality protection cost-efficiently. The district court's narrow finding is unsupported and should be reversed because it ignores the breadth of proposed intervenors' interests.

### 3. The court erred in concluding that "existing government entities" provide adequate representation.

In denying intervention as of right on Claims 4-5, the district court also erred in concluding that "existing government entities will adequately represent their shared "ultimate objective: that the Federal Agencies' determinations be upheld under the relevant statutes." ER 8. This characterization essentially means private parties could never intervene in environmental cases challenging federal agency

decisions, a position soundly rejected by this Court in *Wilderness Society* (en banc). As discussed above, federal defendants represent a national interest in implementing the CWA and CZARA. The State intervened to protect its interests in achieving the "highest possible standards to insure the purity of all waters of the state" under RCW 90.48.010. And the State was not even an existing party when the motion to intervene was filed for purposes of this analysis. While it is true that proposed intervenors have an interest in seeing the continuation of grant funds, proposed intervenors have narrower interests in the litigation not shared by either the State or federal defendants.

As recognized by the Ninth Circuit, inadequate representation may be found where parties to the suit are representing broader interests, while the parties seeking intervention hold narrower interests. *See Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 (in defending against broad injunction, Forest Service might not adequately represent interests of city and state where Forest Service was required to represent broader view than more narrow, parochial interests of state and county), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir 2011)).

Further, if proposed intervenors have multiple interests and one or more of these interests are *not* shared by the existing parties, representation will likely be inadequate. The proper inquiry focuses on whether *all* of prospective intervenors'

interests affected by a lawsuit are represented by the existing parties. *See* Fed. R. Civ. P. 24. Advisory Comm. Note to 1966 Amend (emphasis added).

While proposed intervenors do share a broad interest in ensuring the continuation of grant funds to the Department of Ecology, their interests diverge with regard to both the scope and impact of this case. Whereas Washington has a broader interest in the continuation of Section 319 grants for implementing water quality projects across the entire state of Washington, proposed intervenors have a much narrower interest in the continuation of grants to help carry out programs that impact water quality relating to agricultural activities. Proposed intervenors also have an interest in an economically viable regulatory scheme and are in a better position to understand the financial and economic implications of various regulatory measures than the parties.

Prospective intervenors need only show that their interests "may not" be adequately represented. *Berg*, 268 F.3d at 822. A presumption of adequate representation can be rebutted where the intervenors' interests are narrower and more focused. The Court looks to differences in the scope of intervenors' and the existing parties' interests or in their respective stakes in the litigation. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086-87 (9th Cir. 2003); *accord Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (citing *Arakaki*,

324 F.3d at 1086); *Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (presumption rebutted where interests were not "sufficiently congruent").

In *Citizens for Balanced Use,* this Court held that, although three environmental groups and the U.S. Forest Service shared the ultimate objective of upholding an order restricting recreation on public lands, their reasons and incentives for doing so differed. The intervenor groups sought much broader restrictions on permissible uses within the study area compared to the Forest Service position, that "narrower restrictions" would comply with its statutory mandate. *Citizens for Balanced Use*, 647 F.3d at 898–99. The Court held that those differences did not merely concern litigation strategy but demonstrated "fundamentally differing points of view . . . on the litigation as a whole," warranting intervention. *Id.*

Similarity, the scope of proposed intervenors' interest here is much narrower and more focused than that of federal defendants or the State. Where the federal defendants and State want the highest standards of water quality regulation across Washington, proposed intervenors are concerned with excessive regulation, the economic viability of their farming and ranching operations, the protection of water and soil quality, the health of their private lands, and the maintenance of water rights, including water quality and quantity. Because the reasons and incentives of proposed intervenors to participate uniquely differ from those of the

existing parties, it is difficult to see how the existing parties could provide adequate representation even in light of a shared ultimate objective.

Thus, proposed intervenors have rebutted any presumption of adequacy and should be granted intervention as a matter of right. The court erred in concluding that "existing" parties adequately represent their interests.

### C. Alternatively, the District Court Abused its Discretion in Denying Permissive Intervention.

District courts have broad discretion to grant permissive intervention. Fed. R. Civ. P. 24(b)(2). So long as an applicant's motion is timely and its claim or defense shares a common question of law or fact with the main action, a court may grant permissive intervention.[12] *Id*. In this case, proposed intervenors assert "a claim or defense in common with the main action." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2003).

In *Kootenai Tribe*, the court permitted environmental groups to intervene under Rule 24(b) where they asserted "defenses of the Roadless Rule directly responsive to the claim for injunction," *id*. at 1110, along with "an interest in the use and enjoyment of roadless lands, and in the conservation of roadless lands, in

[12] In ruling on proposed intervenors' motion, the district court concluded that "Proposed Intervenors timely moved to intervene." ER 4. No party argued that the motion was untimely, and timeliness is not an issue on appeal. *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990).

the national forest subject to the Roadless Rule . . . .” *Id*. at 1110-11. Proposed intervenors seek to participate as defendants in this case regarding the use and conservation of farm and range lands subject to plaintiff’s claims. They seek to defend the underlying action, in which plaintiff seeks an order preventing the use of funds to implement conservation measures on their lands and imposing stringent BMPs. This raises common questions of fact and law regarding whether the agencies have complied with CZARA, CWA, and the ESA.

In denying proposed intervenors’ alternative request for permissive intervention, the district court reasoned that the “[e]xisting parties will adequately represent the interests of Proposed Intervenors in Claims #2-3, Proposed Intervenors have failed to plead protectable interests for Claims #4-6, and further intervention would be likely to cause undue delay in the litigation.” Proposed intervenors fully incorporate by reference their arguments above, including that they are not adequately represented in Claims 2-3, and that they have significant protectible interests in Claims 4-6.

As for the district court’s statement that “further intervention would be likely to cause undue delay in the litigation,” this assertion is unsupported by any evidence in the record and, in fact, is flatly contradicted. Nowhere in the final order does the district court discuss, analyze, or provide any reason for this statement, and it is wholly unsupported. *See* ER 1-9. In their motion to intervene

and supporting declarations, proposed intervenors provided the following assurances:

> The proposed intervenors will abide by any schedule agreed to by the parties and ordered by the Court. . . . Proposed intervenors do not intend to delay the litigation, will not file a motion to dismiss, and rely on the motion previously filed by federal defendants. *Id*.

ER 42, 55. Plaintiff did not oppose the motion to intervene and specifically relied on this assurance. ER 162 (Dkt. 73). Moreover, in analyzing the delay issue, the question is whether existing parties may be prejudiced by the delay *in moving to intervene*, "not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change." *Smith v. Marsh*, 194 F.3d 1045, 1051 (9th Cir. 1999). The district court did not make any findings that allowing intervention would prejudice the parties. *Petrol Stops Nw. v. Cont'l Oil Co*., 647 F.2d 1005, 1010 (9th Cir. 1981) ("perhaps the most important factor in determining the timeliness of a motion to intervene as of right"), *cert. denied*, 454 U.S. 1098 (1981). Thus, the court applied the wrong legal standard.

A district court's determination of the timeliness of a motion to intervene is reviewed for abuse of discretion. *LULAC*, 131 F.3d at 1302. "An abuse of discretion occurs if the district court bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997). Here, the district court's finding that "further intervention would be likely to cause

undue delay in the litigation" is unsupported by the record, contrary to proposed intervenors' assurances, and applies the wrong legal standard for evaluating delay.

For the foregoing reasons the district court's decision denying permissive intervention is unsupported, constitutes an abuse of discretion, and should be reversed.

## VII. CONCLUSION.

For the foregoing reasons, proposed intervenors respectfully request that this Court reverse the order of the district court denying intervention, and remand with instructions to allow intervention to defend this case on the merits.

DATED: August 13, 2018

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## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants certify that they know of no related cases pending in this Court.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the type-volume limitation of Rule 32(a)(7)(B) is met, as this brief contains 10,760 words, excluding the portions of the brief exempted by Rule 32(f).

This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and (6), as this brief was prepared using a proportionately spaced typeface with the Microsoft Word processing program, in 14-point, Times New Roman font.

DATED: August 13, 2018

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## CERTIFICATE OF SERVICE

I, Caroline Lobdell, hereby certify that on August 13, 2018, I caused the foregoing **INTERVENOR-APPLICANTS–APPELLANTS' OPENING BRIEF** to be served upon counsel of record through the Court's electronic service system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: August 13, 2018 /s/ Caroline Lobdell

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No. 18-35291

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL ADVOCATES,
an Oregon non-profit corporation,

Plaintiff – Appellee,

WASHINGTON CATTLEMEN'S ASSOCIATION and
WASHINGTON STATE FARM BUREAU FEDERATION,

Interested Party – Appellants,

v.

U.S. DEPARTMENT OF COMMERCE; et al.,

Defendants – Appellees,

*On Appeal from the U.S. District Court for the Western District of Washington*
*Case No. 2:16-cv-01866-JCC (Hon. John C. Coughenour)*

# ANSWERING BRIEF FOR THE DEFENDANTS-APPELLEES

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## INTRODUCTION

Plaintiff-appellee Northwest Environmental Advocates (Plaintiff) brought suit against the National Oceanic and Atmospheric Administration (NOAA) and the United States Environmental Protection Agency (EPA) alleging violations of the Coastal Zone Management Act (CZMA), Clean Water Act (CWA), and Endangered Species Act (ESA). Plaintiff challenged those agencies' review and funding of plans and programs developed by the State of Washington to manage nonpoint source pollution. The State filed a motion to intervene of right and by permission to defend its plans and programs. That same day, organizations representing agricultural interests, who support the State's plans, filed a separate motion to intervene. The district court granted the State's motion, which was unopposed, but denied intervention to proposed agricultural intervenors on the ground that the State already adequately represents their interests in defending federal approval of the state plans as to some claims, and also on the ground (for other claims) that the industry groups did not identify a protectable interest.

As demonstrated below, the district court did not err in denying intervention of right, and it did not abuse its discretion in denying permissive intervention.

## STATEMENT OF JURISDICTION

(a) Plaintiff invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331, for claims arising under three federal statutes, namely, the CZMA, the CWA, and the ESA. The district court held, in an interlocutory order, that it lacks jurisdiction over some claims because Plaintiff does not have Article III standing. *Northwest Envtl. Advocates v. U.S. Dep't of Commerce*, 322 F. Supp. 3d 1093, 1100 (W.D. Wash. 2018), *reconsideration denied*, 2018 WL 4027085 (W.D. Wash. Aug. 23, 2018). That order is not final and is not at issue in this appeal. The federal agencies believe that the district court lacks jurisdiction over the remaining claims due to Plaintiff's lack of Article III standing. That issue remains to be litigated on summary judgment and is not part of this appeal either.

(b) The district court's order denying the motion to intervene of right was a final order, providing this Court with jurisdiction to review that order under 28 U.S.C. § 1291. *See Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 896 (9th Cir. 2011). The Court also has jurisdiction to review the denial of permissive intervention for whether the district court abused its discretion. *See League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1307-08 (9th Cir. 1997) (*LULAC*).

(c) The district court entered the order denying the motion to intervene on March 7, 2018. Intervenor-Applicants-Appellants' Excerpts of Record (ER) 1-9. A notice of appeal was filed on April 13, 2018, or 37 days later. ER:10-11. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B)(ii).[1]

## ISSUES PRESENTED

1. Whether the district court erred by denying intervention of right under Federal Rule of Civil Procedure 24(a).

2. Whether the district court abused its discretion by denying permissive intervention under Federal Rule of Civil Procedure 24(b).

## STATEMENT OF THE CASE

### A. Statutory background

#### 1. Clean Water Act

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the Act takes a two-pronged approach. First, the Act prohibits the

[1] The possibility that Plaintiff might appeal the dismissal of its claims after final judgment prevents this appeal from being moot. *See Canatella v. California*, 404 F.3d 1106, 1109 n. 1 (9th Cir. 2005) (holding that entry of judgment in the underlying litigation does not moot an appeal from the denial of intervention, if one party pursues an appeal in the underlying litigation); *LULAC*, 131 F.3d at 1301 n.1 (same with respect to interlocutory order in the underlying litigation that had not yet become a final judgment).

"discharge of any pollutant by any person" except in compliance with the terms of the Act, including compliance with permits issued by the EPA or by states through federally approved programs. *Id.* § 1311(a). The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). A "point source," in turn, is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, [or] channel . . . from which pollutants are or may be discharged." *Id.* § 1362(14).

By contrast with the permitting system for point-source discharges, the Act largely leaves the regulation of diffuse runoff to the states. "Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation" under the Act. *Environmental Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 841 n.8 (9th Cir. 2003). Section 319 of the Act required that states, after notice and opportunity for public comment, prepare and submit to EPA a "management program" that a state will implement in the four years after program submission "for controlling [nonpoint source] pollution" and improving water quality within the state. 33 U.S.C. § 1329(b)(1). Management programs shall identify, among other things, "best management practices [BMPs] and measures" for reducing nonpoint source pollution, programs for implementing those measures, and a

"schedule containing annual milestones" of implementation. *Id.* § 1329(b)(2). States were required to submit their management programs to EPA by August 4, 1988. *Id.* § 1329(c)(2).[2]

Once a state submits its management program, EPA "shall either approve or disapprove" the program; if no action is taken for 180 days, the program is "deemed approved." *Id.* § 1329(d)(1). EPA then "shall make grants" to states seeking assistance implementing their approved programs. *Id.* § 1329(h)(1). No grants may be made, however, to states that received funds in a preceding year unless EPA determines that a state has "made satisfactory progress" that year in meeting the schedule found in the state's program. *Id.* § 1329(h)(8). States submit annual reports to EPA on their progress in meeting the schedule of milestones under section 1329(b)(2). *Id.* § 1329(h)(11).

### 2. Coastal Zone Management Act

Congress enacted the CZMA to promote "the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). The "coastal zone" extends inland from the shorelines "to the extent necessary to control shorelands, the uses of which have a direct and significant

[2] Beyond these requirements for the initial programs, nothing in the text of the CWA requires that states provide updates to these initial submissions or that such updates follow any specific requirements. *Cf.* 33 U.S.C. § 1329(b)(1) (referring only to the program the state proposes to implement "in the first four fiscal years after submission" of the program to EPA).

impact on the coastal waters." *Id.* § 1453(1). "The key to more effective protection and use . . . of the coastal zone," Congress found, was to "encourage the states to exercise their full authority" in developing programs and policies for land-use decisions. *Id.* § 1451(i). Accordingly, Section 306 of the Act authorizes the Secretary of Commerce, acting through NOAA, to "make grants to any coastal state" to administer coastal zone management programs that the Secretary has reviewed and approved. *Id.* § 1455(a).

In 1992, Congress reauthorized the Act and directed states with approved management programs to prepare and submit to NOAA and to EPA for their approval a program for controlling coastal nonpoint source pollution. *Id.* § 1455b(a)(1). The programs "shall be coordinated closely" with programs developed under Section 319 of the CWA and shall "serve as an update and expansion" of those programs as they relate to land and water uses affecting coastal waters. *Id.* § 1455b(a)(2). To gain approval, coastal nonpoint programs shall provide for the implementation of management measures to protect coastal waters generally. *Id.* § 1455b(b). Programs must also include identification of land uses and critical coastal areas, management measures to achieve and meet water quality standards, technical assistance, public participation, administrative coordination, and boundary modification provisions. *Id.* § 1455b(b)(1)-(7). If NOAA or EPA finds that a state failed to

submit an approvable coastal nonpoint program, each agency "shall withhold" approximately 30 percent of the grant funding available under their respective statutes until such a program is submitted. *Id.* § 1455b(c)(3)(D), (4)(D).

### B. Statement of facts

Washington submitted its nonpoint source management program to EPA under CWA Section 319, and the agency approved it in October 1989. ER:101. In August 2015, EPA approved an update to Washington's nonpoint program. ER:113. In September 2015, EPA determined that Washington's annual report demonstrated "satisfactory progress" during the prior year, and it awarded Washington grant funding. ER:114. EPA made similar determinations of "satisfactory progress" in 2016 and 2017 and awarded Washington grant funds during those years as well. *Id*.

Washington submitted its coastal nonpoint pollution control program to the agencies in September 1995. ER:102. The agencies approved that program with conditions in June 1998. ER:103; *see also* 63 Fed. Reg. 37,094, 37,094-95 (July 9, 1998). NOAA has awarded Washington grant funds in multiple years under CZMA section 306. ER:111.

### C. The current litigation

Plaintiff filed suit in the federal district court for the Western District of Washington alleging six claims: EPA and NOAA unlawfully delayed making

a final decision whether to disapprove Washington's coastal nonpoint source pollution management program (Claim 1), ER:110-111; NOAA (Claim 2) and EPA (Claim 3) unlawfully failed to withhold grant funds from Washington absent approval of the coastal nonpoint program, ER:111-12; EPA acted arbitrarily and capriciously by approving Washington's nonpoint source pollution management program under the Clean Water Act (Claim 4), ER:112-13, and by determining that Washington was making "satisfactory progress" toward implementing best management practices as part of that program (Claim 5), ER:114-15; and the agencies violated the ESA by failing to consult with the appropriate wildlife-resource agencies when taking or withholding the actions at issue in the other claims (Claim 6), ER:115-16.

Plaintiff seeks a declaration that the agencies violated the pertinent statutes. ER:116-17. Additionally, it seeks injunctions directing the agencies to make the determinations allegedly withheld, to withhold funds from Washington until lawful determinations of program approval and satisfactory progress are made, and to consult with expert wildlife agencies. *Id*. Plaintiff's complaint does not seek any injunctive relief requiring the State to change its programs or preventing it from implementing its programs.

On the government's motion, the district court dismissed Claim 1 for failure to state a claim because "nothing in the [CZMA] mandates that EPA

and NOAA affirmatively disapprove a program not meeting applicable criteria." *Northwest Envtl. Advocates v. U.S. Dep't of Commerce*, 283 F. Supp. 3d 982, 991 (W.D. Wash. 2017) (emphasis omitted). The court found "no legal basis" for ordering the agencies to act on Washington's coastal nonpoint program. *Id.* In addition, the court dismissed one of the "subclaims" composing Claim 6, the challenge to NOAA's lack of consultation under the ESA before approving the full amount of coastal assistance grants absent an unconditionally approved coastal nonpoint program. *Id.* at 993. Because NOAA's obligation to reduce the grants for disapproved coastal nonpoint programs was "nondiscretionary," the court held that consultation was not required. *Id.* (citing *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1024 (9th Cir. 2012)). The district court denied the agencies' motion for reconsideration. 2017 WL 4957870 (W.D. Wash. Oct. 31, 2017).

On January 5, 2018, approximately 13 months after Plaintiff brought suit, the State of Washington filed a motion to intervene, which no party opposed. ER:63-70. That same day, nonprofit corporations representing farming and ranching interests—Washington Cattlemen's Association and Washington State Farm Bureau Federation—also filed a motion to intervene. ER:38-55. The court granted the federal agencies an extension of time to respond to proposed intervenors' motion. ER:162. Plaintiff responded to the

intervention requests on January 22, 2018, stating that it did not oppose either motion. ER:36-37. The court granted Washington intervention of right on January 29, 2018. ER:34-35. On February 5, 2018, the agencies responded to proposed intervenors' intervention motion, opposing their request. ER:23-32.

The court denied intervention. As to Claims 2 and 3, the court held that proposed intervenors' interests were adequately represented by the State. ER:6. For Claims 4 and 5, the court held both that the proposed intervenors' interest fell short of the "direct, non-contingent, substantial and legally protectable" interest required by the rule, and also that their interest was adequately represented by the State and the federal agencies. ER:7-8 (internal quotation marks omitted). The court also denied intervention on Claim 6. ER:8. Finally, the court exercised discretion to deny permissive intervention based on its prior reasoning and because intervention would unduly delay the litigation. ER:9. Subsequent to the filing of this appeal (and upon the stipulation of the parties), the district court allowed proposed intervenors to file a brief as amici curiae limited to the issue of the proper remedy when the parties briefed cross-motions for partial summary judgment. *See* D. Ct. Dkt. Entries 98, 99, 104.

## SUMMARY OF ARGUMENT

The district court did not err in denying intervention of right, and it did not abuse its discretion in denying permissive intervention.

1. The proposed intervenors, an organization of farmers and ranchers, sought to intervene in this challenge to federal approval of state pollution plans on the ground that they have a direct interest in the regulation of nonpoint source water pollution and in continuing federal grants to the State from which they benefit when some funds are redirected to assist their members in developing strategies to control such pollution on their property. Those interests do not provide the basis for intervention of right for three reasons.

*First*, with regard to Claims 2 through 5, any impact from this litigation on proposed intervenors' interests in the substance of the state plan and in continued funding of the state plans is merely speculative. Nonpoint source regulation is left to the states, and the substance of Washington's regulation is not at issue in this suit. Although federal grant funds to the State might be diminished if Plaintiff prevails in the suit, intervenor would only be affected under two hypothetical scenarios: if the State chooses to continue seeking federal funding by adopting more stringent nonpoint regulations favored by Plaintiff and opposed by intervenor, in response to a future court order; or if the State cannot make up the lack of federal funding with other sources of money. The contingency of both scenarios precludes a finding that proposed

intervenors have a protectable interest supporting intervention of right or that their interest would be impaired directly by the disposition of this suit.

*Second*, the federal agencies and the State adequately represent any protectable interest in continuing the grant funds and in upholding the underlying federal decisions. Proposed intervenors fail to make the very convincing showing necessary to overcome the presumption that the governments adequately represent their interest here. Proposed intervenors also fail to show that the district court erred in taking into account changed circumstances—in particular, Washington's successful intervention to defend federal approval of its regulatory plans—in deciding the motion to intervene.

*Third*, proposed intervenors have forfeited any argument regarding denial of intervention as to Claim 6 by failing to raise that issue in their opening brief.

2. The district court did not abuse its discretion in denying permissive intervention. The court correctly rested its reasoning on the same considerations as for denying intervention of right, as well as the additional ground that intervention would unduly delay the litigation. Because proposed intervenors fail to demonstrate that the district court's conclusion was an abuse of discretion, the order denying intervention should be affirmed in its entirety.

## STANDARD OF REVIEW

The denial of intervention of right is reviewed de novo. *See LULAC*, 131 F.3d at 1302. Denial of permissive intervention is reviewed for abuse of discretion. *Id.* at 1307. The Court may affirm on any ground supported by the record. *See Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 860 n.17 (9th Cir. 1995). "Whether, as a prudential matter, [the Court] should do so depends on the adequacy of the record and whether the issues are purely legal." *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, 828 F.2d 586, 590 (9th Cir. 1987); *see also*, *e.g.*, *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998) (affirming the denial of intervention on a ground that the district court did not reach).

## ARGUMENT

## THE DISTRICT COURT'S ORDER DENYING INTERVENTION SHOULD BE AFFIRMED.

### I. The district court correctly denied intervention of right.

Proposed intervenors seek intervention under Federal Rule of Civil Procedure 24(a), which provides:

> On timely motion, the court must permit anyone to intervene who . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated 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.

This Court has set forth a four-part test to determine whether a non-party is entitled to intervene of right:

> (1) the application must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court.

*LULAC*, 131 F.3d at 1302 (citing *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996)).

The federal agencies do not dispute that proposed intervenors' motion to intervene was timely. Accordingly, this appeal focuses on whether proposed intervenors have a significantly protectable interest that may be impaired by the disposition of the suit, and whether their interest is adequately represented by others in the suit. In answering these questions, the proper focus is on Claims 2-5. The district court dismissed Claim 1 before the appeal, *see supra* pp. 8-9, and proposed intervenors forfeited their argument about Claim 6, *see infra* p. 41.

### A. Proposed intervenors' interests are too contingent to be protectable and in any event, their interests would not be practically impaired as the direct result of this suit.

Prospective intervenors contend (at 18-20) that they benefit from the federal grant funds, which are distributed by the State to their members, and

which Plaintiff seeks to enjoin in this suit. They further contend (at 21) that they have significant protectable interests "in the imposition of best management practices on their lands, farms, and ranches," and that those practices "will be more stringently regulated if plaintiff's challenges succeed." The federal agencies do not dispute that proposed intervenors have an interest in receiving some funding from the State to implement nonpoint source pollution control measures on their members' property and that they also have an interest in the State's substantive regulation of their nonpoint source pollution. Nevertheless, the former interest is contingent on how the State might respond to a loss of federal funds, and the latter is not directly implicated by the Plaintiff's claims. Assuming that the interests are protectable, they would not be directly impaired by the outcome of this litigation.[3]

To satisfy the rule's "interest" requirement, a proposed intervenor's interest must be "direct, non-contingent, substantial and legally protectable."

[3] Although the district court disagreed with the federal government's argument that proposed intervenors' interests would not be practically impaired as to some of the Plaintiff's claims, ER:5, this Court may affirm the district court's order on any ground fairly supported by the record, *see Janicki Logging Co. v. Mateer*, 42 F.3d 561, 564 (9th Cir. 1994). Doing so is appropriate here because the issues are purely legal and can be readily determined on the existing record. *See Golden Nugget, Inc.*, 828 F.2d at 590; *cf. Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995) ("Because the record is sufficiently developed on these issues [of practical impairment and inadequacy of representation], which present questions of law subject to de novo review, we may address them.").

*Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981); *see also*, *e.g.*, *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (upholding the denial of intervention by electricity wholesalers "claiming a right to intervene based on a contingent, unsecured claim against a third-party debtor," an electricity retailer challenging a state utility commission's decision preventing the recovery of costs incurred during a retail-rate freeze); *Forest Conservation Council*, 66 F.3d at 1494 (holding that if the relief sought "will have direct, immediate, and harmful effects upon a third party's legally protectable interests," the interest test is met).

Relatedly, the rule's impairment requirement may also be understood in terms of the directness of the suit's outcome on intervenor's asserted interest: "if an absentee would be *substantially* affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (brackets omitted, emphasis added) (quoting Fed. R. Civ. P. 24 advisory committee notes). An applicant meets the impairment requirement if the relief sought in the suit "would *necessarily* result in practical impairment" of the applicant's interest. *Sierra Club v. EPA*, 995 F.2d 1478, 1486 (9th Cir. 1993) (internal quotation marks omitted, emphasis added). However, a mere "possibility" that a court's decision "could affect" the applicants' interests "is

too tenuous to entitle them to intervene of right." *In re Benny*, 791 F.2d 712, 721 (9th Cir. 1986).

Contrary to proposed intervenors' contentions (at 21), neither more stringent regulation of nonpoint source pollution nor loss of federal grant money supplementing the state funds available to proposed intervenors' members would *necessarily* result if Plaintiff succeeds on its claims. With regard to the asserted interest in avoiding more stringent regulation, this case does not concern what substantive regulations must be imposed upon private property owners to reduce nonpoint source pollution. Any such requirements would be determined by state, not federal law. *See*, *e.g.*, *Environmental Def. Ctr.*, 344 F.3d at 841 n.8 (stating that "nonpoint source pollution . . . is not subject to federal regulation" under the CWA). As the district court stated in its partial summary judgment order: "States are responsible for the substantive requirements—developing and implementing approvable programs to manage nonpoint sources of pollution." 322 F. Supp. 3d at 1098 (citing 16 U.S.C. § 1455b(a)(1); 33 U.S.C. 1329(b)(1)).

Nobody in this case could reasonably contend otherwise. Plaintiff does not seek to have the State's plans and programs set aside or enjoined. *See generally* ER:110-17 (second amended complaint). No property owned by proposed intervenors' members is directly at issue in the case. Rather, the case

focuses principally on the *federal* approval of the State's submissions—specifically, whether EPA rationally concluded that the State demonstrated "satisfactory progress" for its nonpoint source management program; and whether the federal agencies were required to conclude that the State failed to submit an approvable *coastal* nonpoint source program. If the federal agencies' conclusions were arbitrary, the issue is whether they have a mandatory, nondiscretionary duty to withhold funding.

Were the federal agencies to lose on summary judgment and be required to withhold federal grant funds, the substance of the state plans would not necessarily change. As an initial matter, it is not a foregone conclusion that the district court will enter any relief that affects the prospective intervenors' interests whatsoever. If the district court holds the agency's decisions to be arbitrary and capricious in violation of the APA, then it should remand the matter to the federal agencies for reevaluation of their conclusions, to explain them more fully based on the record before the federal agencies at that time. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("[I]f the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"); *see also Pension Benefits Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (stating

that "remanding to the agency" for a fuller explanation of the agency's reasoning at the time of the agency action "is in fact the preferred course").

In such a hypothetical situation, the district court could choose to exercise its equitable discretion not to set aside the agency's decisions or to enter declaratory or injunctive relief, even if it holds the agency's decisions to be deficient. *See*, *e.g.*, *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (declining, on equitable grounds, to vacate EPA regulation during remand); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (declining to vacate agency decision despite finding a "significant procedural error").

Of course, any analysis by the federal agencies on remand would be informed by whatever legal and factual analysis the district court's orders might provide. *See LTV Corp.*, 496 U.S. at 654 (stating that the APA requires an agency to "take whatever steps it needs to provide an explanation that will enable the [reviewing] court to evaluate the agency's rationale at the time of decision"). Nevertheless, proposed intervenors are incorrect to assume that the district court will necessarily *dictate* the terms on which the agencies may extend funds. Although Plaintiff asserts some claims seeking a mandatory injunction to compel an agency official to take action that has been allegedly withheld or delayed, even in that context courts may "not . . . direct the

exercise of judgment or discretion" by the agency. *Miguel v. McCarl*, 291 U.S. 442, 451 (1934); *see also*, *e.g.*, *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004) (*SUWA*) ("[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be."). In addition, a district court order directing the *State* to conform its nonpoint source programs to federal funding requirements would likely exceed the court's authority. *Cf. Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010) ("If a less drastic remedy (such as partial or complete vacatur of [an agency's challenged] decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted.").

With regard to proposed intervenors' interest in continued funding for the State's program, even if the Plaintiff prevails and the district court enjoins the federal agencies from awarding federal grant funds to the State, that would not "necessarily result" in the State's changing its manner of substantive regulation or control of nonpoint source pollution to conform with the court's interpretation of federal funding requirements. *Sierra Club*, 995 F.2d at 1486 (internal quotation marks omitted). Instead, the State could choose to compensate for any lost federal funding of the nonpoint source programs by

resorting to other sources of *state* funds. The state could also avoid subjecting itself to conditions and opportunities available under the CZMA altogether by terminating its coastal program, as Alaska did. *See* 76 Fed. Reg. 39,857 (July 7, 2011).

Precisely how the State would respond in such a situation requires speculation, and thus it is an insufficient basis on which to conclude that proposed intervenors' interests might be practically impaired as a direct, proximate result of the disposition of this suit. *See Donnelly*, 159 F.3d at 411 (denying intervention by male employees in Title IX suit by female coworkers, where the "possibility" that requested relief might cause discrimination was "so tenuous" as to make intervention "inappropriate"); *In re Benny*, 791 F.2d at 721 (denying intervention for out-of-circuit bankruptcy judges in a challenge to the constitutionality of statutes extending their terms, where this Court's ruling would be only persuasive authority in other circuits).

Proposed intervenors' interests would be affected only if the State cannot find another nonfederal funding source for its nonpoint source programs. Proposed intervenors assume that the district court will issue an order influencing the State to adopt more stringent management measures that Plaintiff requests. But as the district court explained in holding that Plaintiff lacks standing to pursue some of its claims, such an assumption merely

"speculates as to how Washington will respond to NOAA and EPA's withholding, if mandated by the Court." 322 F. Supp. 3d at 1099. In other words, whatever practical impact proposed intervenors might experience would be proximately caused not by this suit, but by the independent decisions of the State. That contingency supports a conclusion that any such interest would not, as a practical matter, be impaired by the suit's disposition.

This Court's decision in *Sierra Club*, on which proposed intervenors rely (Br. 20-21), is readily distinguished. There, the Sierra Club sued EPA under the CWA for declaratory and injunctive relief: "The relief sought would *require* the EPA to change the terms of permits issued to the City of Phoenix for two of its wastewater treatment plants." 995 F.2d at 1480 (emphasis added). This Court reversed a district court order denying intervention after holding that the City had a protectable interest that might be impaired by the suit: "the lawsuit would affect the use of real property owned by the intervenor by requiring the defendant to change the terms of permits it issues to the would-be intervenor, which permits regulate the use of that real property. These interests are squarely in the class of interests traditionally protected by law." *Id.* at 1483. By contrast, the present case does not directly concern the land and water rights owned by proposed intervenors' members, and it would not require the State

or the federal agencies to change any terms according to which the State regulates or controls proposed intervenors' activities.

The district court's finding that proposed intervenors lack a protectable interest that may be impaired by the suit's disposition finds support in the relationship between Rule 24(a)(2) and Rule 19's provision for mandatory joinder. As stated in the Advisory Committee Notes to the 1966 Amendment to Rule 24: "Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication; where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by disposition of the action, he ought to have a right to intervene." *See also Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 134 n.3 (1967) (citing Advisory Committee Notes, including the reference to Rule 19); *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (comparing Rule 19's "Joinder for Persons Needed for Just 'Adjudication'" with Rule 24(a)'s "interest" requirement); *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (relying on *Nuesse v. Camp* as basis for "interest" analysis); *McDonald v. Means*, 309 F.3d 530, 541 (9th Cir. 2002) (stating that the interest question is "similar" under both rules).

Rule 19, like Rule 24, requires a "legally protected interest." There is, however, "'no precise formula for determining whether a particular nonparty should be joined under Rule 19(a).'" *Northern Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986) (quoting *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982) (per curiam)) (holding that miners who had submitted mining plans to National Park Service were not necessary parties to an action to enjoin mining in parks until environmental impact statements were prepared). Although a "crucial premise of mandatory joinder" under Rule 19(a) is that the absent party possess "an interest in the pending litigation that is 'legally protected,'" the Court has "developed few categorical rules informing this inquiry." *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 970 (9th Cir. 2008). Moreover, the "'interest must be more than a financial stake, and more than speculation about a future event.'" *Id.* (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)). Indeed, even "an interest that 'arises from terms in bargained contracts' may be protected, but [this Court has] required that such an interest be 'substantial.'" *Id.* In the Rule 19 context and more generally in other contexts, the term "legal right" implicates a relatively narrow scope of interests: "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a

statute which confers a privilege." *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 137 (1939).

Based on the plain language of Rule 24(a), and because the rules are related, the proper analysis under Rule 24(a) is informed by whether a court *must* join the entity under Rule 19: whether, if the entity did not itself seek to intervene in the lawsuit, the court would find that it must join the entity on the motion of one of the parties, even if the entity had not chosen to participate in the lawsuit. Here, the answer to that question is "no."

Finally, proposed intervenors contend (at 32-33) that the district court erred in determining that they lacked an interest to support intervention on Claims 4 and 5 because the court cited a case concerning Article III standing rather than intervention. *See* ER:7 (citing *Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 984 (9th Cir. 1984)). We agree with proposed intervenors that this Court's case law does not require them to demonstrate Article III standing before obtaining intervention in this case. *Compare Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011) ("In general, an applicant for intervention need not establish Article III standing to intervene."), *with In re Volkswagen Litig.*, 894 F.3d 1030, 1043-44 (9th Cir. 2018) (holding that an "intervenor of right must have Article III standing in order to pursue relief that is different from

that which is sought by a party with standing" (quoting *Town of Chester v. Laroe Estates*, Inc., 137 S. Ct. 1645, 1651 (2017))).

Nevertheless, the district court's primary holding on the issue was that "Proposed Intervenors' interest 'falls far short of the direct, non-contingent, substantial and legally protectable interest required for intervention as a matter of right'" on Claims 4 and 5. ER:7 (internal quotation marks omitted). The court supported that proposition with citation to *Southern California Edison Company*, which supports a conclusion that proposed intervenors' interest does not satisfy Rule 24 more broadly for intervention on *any* of the claims in the suit. *See supra* p. 16. The court's reference to the "special solicitude" afforded states in the Article III standing context (ER:7) therefore does not prevent the Court's from affirming the denial of intervention.

In sum, proposed intervenors' interests do not support intervention of right because they are contingent on future actions by the State, and in any event, they would not be impaired as a direct outcome of the suit.

### B. Proposed intervenors' interests will be adequately represented by the federal agencies and by the State.

#### 1. Proposed intervenors fail to make a "very compelling showing" to overcome the presumption that the representation is adequate.

This Court considers three factors in determining whether a proposed intervenor is adequately represented by a present party to the action:

> [1] whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; [2] whether the present party is capable and willing to make such arguments; and [3] whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect.

*California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). The "most important factor" is "how the [intervenor's] interest compares with the interests of existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). "Where the party and the proposed intervenor share the same 'ultimate objective,' a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a 'compelling showing' to the contrary.'" *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 951 (9th Cir. 2009) (quoting *Arakaki*, 324 F.3d at 1086). In those circumstances, "differences in litigation strategy do not normally justify intervention." *Arakaki*, 324 F.3d at 1086 (citing *United States v. City of Los Angeles,* 288 F.3d 391, 402 (2002)). A similar presumption arises "when the government is acting on behalf of a constituency that it represents . . . . In the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Id.* (internal quotation marks and citation omitted); *accord Prete v. Bradbury*, 438 F.3d 949, 957 (9th Cir. 2006).

At issue in this case is the legality of federal approval of state pollution plans and subsequent federal provision of grants to the State in support of the plans. Proposed intervenors agree (at 37) that they "share" with the agencies "a broad interest in ensuring the continuation of grant funds" distributed to the State. Hence, there cannot be any reasonable dispute that the "presumption of adequacy of representation applies," and that a "compelling showing" is required to conclude otherwise. *Perry*, 587 F.3d at 951. Nevertheless, proposed intervenors contend that their desire for an "economically viable regulatory scheme," Br. 37, protecting their private land, water rights, and agricultural operations from "excessive regulation" provides a "uniquely differ[ent]" interest from the State and the federal agencies sufficient to provide a basis for intervention of right. Br. 38-39. For several reasons, however, proposed intervenors have failed to make the "compelling showing" necessary to overcome the presumption.

*First*, proposed intervenors fail to identify any legal arguments that the federal or state government agencies are unlikely to make, or are incapable of or unwilling to make, in defending the suit. *Tahoe Reg'l Planning Agency*, 792 F.2d at 778. Indeed, the federal agencies have already filed two dispositive motions, resulting in the dismissal of some of the claims in this case. As discussed above (pp. 8-9), the district court dismissed Claim 1 for failure to

state a claim. The court held that "nothing in the [CZMA] mandates that EPA and NOAA affirmatively disapprove a [coastal nonpoint] program not meeting applicable criteria," and therefore "no legal basis exists for [the] court to order the agencies to definitely act" on the State's coastal nonpoint program. 283 F. Supp. 3d at 991. In addition, after this appeal was filed, the district court dismissed Claims 2 and 3 because it held that Plaintiff lacks Article III standing. 322 F. Supp. 3d at 1100, *reconsideration denied*, 2018 WL 4027085. The federal agencies' motions practice, as reflected in the district court's foregoing orders, "amply illustrates [the existing defendants'] intention to mount a vigorous defense" of the challenged decisions. *Perry*, 587 F.3d at 952.

By contrast, the Court in *Legal Aid Society v. Dunlop*, 618 F.2d 48 (9th Cir. 1980)—a decision on which proposed intervenors rely, Br. 22 n.3—remanded an order denying intervention because the district court there "misconstrued its required inquiry into adequacy of representation" by failing to account for the "minimal" burden required to show that the representation "may be" inadequate. 618 F.2d at 50 (quoting *Trbovich v. UMW*, 404 U.S. 528, 538-39 & n.10 (1972)). Significantly, however, *Legal Aid Society* does not address the presumption of adequacy that this Court recognized in later cases, as discussed above (p. 27). *See*, *e.g.*, *City of Los Angeles,* 288 F.3d at 402; *Forest Conservation Council*, 66 F.3d at 1499. Additionally, the fact that the United States in *Legal*

*Aid Society* "took a contrary position to the [proposed intervenor] on a critical discovery issue and then withdrew its appeal from the order granting partial summary judgment" provided a basis for questioning the adequacy of representation in the case that is lacking here. 618 F.2d at 50.

Here, rather than identify any legal arguments that the federal or state agencies are unlikely or unwilling to make, proposed intervenors rely principally on their economic and policy differences with the agencies, to wit: proposed intervenors' members own private land, businesses, and water rights whose economic aspects they know better than the government; and proposed intervenors also dislike excessive regulation. Even taking all of those assertions as true, however, proposed intervenors fail to demonstrate that any of the private viewpoints they hold are "*necessary* elements to the proceeding." *Arakaki*, 324 F.3d at 1086 (emphasis added); *see also Perry*, 587 F.3d at 954 (denying intervention even though the existing parties "may not defend [the suit] in the exact manner that the [intervenor] would"). As explained above (pp. 17-18), this suit will not determine the substantive content of any regulations over nonpoint source pollution because the federal statutes leave that topic to the states, *Environmental Def. Ctr.*, 344 F.3d at 841 n.8, and because Congress may not coerce the states to prescribe a particular course of regulation, *see National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012)

(invalidating statutory provision that threatened the loss of over 10 percent of a state's overall budget if funding conditions were not accepted).

Just as Rule 19 provides important parallels to Rule 24 when examining whether an intervenor asserts a protectable interest, *see supra* pp. 23-25, so it does when determining whether existing representation is adequate. *Cf. Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) ("In assessing an absent party's necessity under Fed. R. Civ. P. 19(a), the question whether that party is adequately represented parallels the question whether a party's interests are so inadequately represented by existing parties as to permit intervention of right under Fed. R. Civ. P. 24(a)."). Where federal officials and an absent party share a common interest in defending a federal agency action favorable to the absent party, the federal agency generally will be deemed an adequate representative of the absent party's interests for Rule 19 purposes. *See*, *e.g., Alto,* 738 F.3d at 1128 (Assistant Secretary–Indian Affairs Disenrollment Order granting precisely the relief sought by an absent Indian tribe); *Washington*, 173 F.3d at 1167 (promulgation of regulations allocating fishing rights to absent tribes); *Southwest Ctr. for Biological Diversity*, 150 F.3d at 1154 (adoption of plan for use of stored water, including to benefit absent tribe).

So, too, should it be under Rule 24. Both proposed intervenors and the federal agencies want to affirm the agencies' decisions and continue providing grant funds to the State. There is no reason to believe that the federal agencies are unlikely to make all arguments that can reasonably be made in defense of the federal decisions.

Proposed intervenors' reliance (at 37-38) on *Citizens for Balanced Use v. Montana Wilderness Association*, 647 F.3d 893 (9th Cir. 2011), is misplaced. There, the Court granted intervention to conservation groups seeking to defend an interim order restricting motorized vehicle use on a national forest. The Forest Service had issued the order "only reluctantly in response to successful litigation by [the same intervenors]." *Id.* at 900. As this Court held, that "fact alone demonstrates that the Forest Service might not put forth as strong an argument in defense of the Interim Order" as would intervenors. *Id.* Additionally, the Service appealed the district court decision compelling it to issue the interim order, "add[ing] substantial weight" to the intervenor's showing. *Id.* Based on the "peculiar circumstances" in that case, the Court allowed intervention after it was unable to conclude that the Service would undoubtedly make, or was capable of making, or willing to make, all of the intervenors' arguments. *Id.* at 900-01. The narrow, fact-specific holding in *Citizens for Balanced Use* provides little support for intervention here.

Although proposed intervenors contend (at 35) that the district court failed to recognize their "multiple interests" in "the protection of water, air, and soil quality," and "the health of their lands," they share those interests with the federal agencies and with the State. The federal agencies implement similar statutory goals and policies, including recognizing the "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "to plan the development and use . . . of land and water resources," 33 U.S.C. § 1251(b); *see also id.* § 1251(a)(7) (concerning the development of "programs for the control of nonpoint sources of pollution"); *id.* § 1251(g) (declaring national policy that a state's authority to allocate water quantities "shall not be superseded, abrogated or otherwise impaired by this chapter"); 16 U.S.C. § 1452 (declaring national policies for the coastal zone).

Similarly, the State has declared a public policy "to maintain the highest possible standards to insure the purity of all waters of the state consistent with . . . protection of wild life, birds, game, fish, and other aquatic life." Wash. Rev. Code § 90.48.010. That policy, like the national policies codified in federal statutes, coincides with the proposed intervenors' desire to "maintain the health, productivity, and quality of their land and water." Br. 26 (quoting ER:52).

Proposed intervenors contend that the State and the federal agencies will fail to advocate for regulation that is "financially and practically feasible" for ranchers. Br. 28. But, as explained above, the *substance* of state regulation is not at issue here, let alone its feasibility. In any event, proposed intervenors' contention ignores statutory policies to which the State and the federal agencies adhere. For example, the CZMA's policy of encouraging states to develop and implement management programs seeks to achieve "wise use" of the coastal zone by "giving full consideration" not only to ecological values but to "the needs for compatible economic development." 16 U.S.C. § 1452(2); *see also id.* § 1455b(g)(5) (providing that management measures identified in agency guidance for controlling nonpoint pollution in coastal areas will be "economically achievable"). The CZMA further provides that coastal programs should "encourage the participation and cooperation of the public . . . in carrying out the purposes of this chapter," *id.* § 1452(4), and should help simplify procedures to expedite government decisionmaking, *id.* § 1452(2)(G).

Similarly, the State's policy seeks to insure that the high quality of water is consistent not only with wildlife protection but also with "the industrial development of the state, and to that end require[s] the use of all known available and *reasonable* methods by industries and others to prevent and control the pollution of the waters of the state." Wash. Rev. Code § 90.48.010

(emphasis added); *see also id.* § 90.66.030 (recognizing the public benefit that "will result from providing for the use of [irrigation] water on family farms").

Proposed intervenors are incorrect in arguing (at 35-36) that a finding of adequate representation here "essentially means private parties could never intervene" in challenges to federal agency action, contrary to *Wilderness Society v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011). Where a plaintiff challenges a federal regulation or the terms of a discharge permit, intervention by a regulated entity such as the permit holder may often be appropriate. *Compare Sierra Club*, 995 F.2d at 1480 (reversing denial of intervention by city in suit that "would require the EPA to change the terms of permits issued to the City"), *with Montana v. EPA*, 137 F.3d 1135, 1142 (9th Cir. 1998) (upholding denial of intervention by irrigation districts and individual irrigators in challenge to EPA's decision to treat Indian tribe as a state that could set its own water quality standards). Here, however, proposed intervenors hold no discharge permits; their property interests are not directly at stake; as discussed above (pp. 17-18), the substance of the State's regulation of nonpoint source pollution is not at issue. A conclusion that the federal agencies and the State adequately represent proposed intervenors' interests is consistent with *Wilderness Society*'s "case-by-case" approach to evaluating intervention. 630 F.3d at 1179.

Nor are proposed intervenors correct in arguing (27-30) that the district court erred in failing to hold that their "unique on-the-ground experience and financial and economic perspectives in developing water quality guidance" rebut any presumption that the agencies have sufficient expertise to represent proposed intervenors' interests. Br. 28. This Court, however, has recognized that "it will often be the case that a private party has greater first hand knowledge of the impact of legislation on private individuals than the government. Such knowledge . . . is not sufficient *by itself* to support intervention as of right in this case." *Prete*, 438 F.3d at 958 n.13 (emphasis in original).

Here, as in *Prete*, the proposed intervenors "may have some specialized knowledge" about on-the-ground processes, but "they provided no evidence to support their speculation that the [government] lacks comparable expertise." *Id.* at 958. That expertise can reasonably be inferred from the fact that the legislatures have delegated to the agencies the responsibility to administer the pertinent programs, as well as the fact that the State developed, and the federal agencies approved, the programs. *See also*, *e.g.*, 33 U.S.C. § 1329(f) (authorizing EPA to "provide technical assistance" to states in developing nonpoint source pollution management programs); 16 U.S.C. § 1455b(d) (authorizing same from NOAA and EPA for coastal nonpoint programs).

### 2. The Court should reject proposed intervenors' bright-line rule that the State may not be considered an "existing party" due to the timing of when its motion to intervene was granted.

Proposed intervenors argue (at 23-24) that because the State had not yet been granted intervention at the time that proposed intervenors filed their motion, the district court erred by treating the State as one of the "existing parties" to the case within the meaning of Rule 24(a). That argument should be rejected. Because the State had been granted intervention and therefore was a party at the time the court entered its order denying proposed intervenors' motion, the court did not err in relying on the State to adequately represent proposed intervenors' interests.

Nothing in the text of the Rule specifies *at what point in time* the "parties" that might adequately represent an applicant's interests, and thereby preclude intervention, must be "existing." Nor does this Court's case law compel the approach urged by proposed intervenors. Rather, this Court has recognized the judiciary's ability to account for developments occurring after the filing of a motion to intervene when determining whether intervention of right is warranted. For example, "[w]hen the potential scope of an action is narrowed by amended pleadings or court orders, or when an existing party expressly and unequivocally disclaims the right to seek certain remedies, the court may consider the case as restructured rather than on the original pleadings in ruling

on a motion to intervene." *City of Los Angeles*, 288 F.3d at 399 (discussing *Donnelly*, 159 F.3d at 410-11); *see also Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349, 354 (9th Cir. 1974) (holding that the Court's contemporaneous disposition of related appeals "undercuts the basis of the district court's ruling" that intervention was untimely). Thus, *Donnelly* denied intervention in reliance on statements by the plaintiffs *at oral argument* unequivocally waiving their right to remedies they had requested in their complaint, in which would-be intervenors claimed a protectable interest. *Id.* at 410-11.

Adopting the bright-line rule suggested by the proposed intervenors would be inconsistent with the flexibility typically found in the intervention context. *See id.* at 409 ("In determining whether intervention is appropriate, we are guided primarily by practical and equitable considerations."); *cf. City of Los Angeles*, 288 F.3d at 398 (the "'interest' test is not a clear-cut or bright-line rule"); *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 862 (9th Cir. 2016) (same for timeliness test). In addition, adequacy of representation is also a factor in considering permissive intervention, *see* Fed. R. Civ. P. 24(b); in that context, the proposed rule runs counter to this Court's practice when remanding denials of permissive intervention for abuse of discretion, whereby it authorizes district courts to account for events that have transpired during the appeal. *See*, *e.g.*, *City of Los Angeles*, 288 F.3d at 404-05 (holding that a

remand to reassess permissive intervention request denied at the onset of a case "does not require the district court to turn back the clock or rescind the consent decree" it entered after the appeal commenced).

Indeed, preventing courts from considering parties as "existing" where they had not been granted intervention at the time another group's motion is filed could unduly limit the discretion that courts ordinarily enjoy in managing their dockets. Consider, for example, an organization that files a motion to intervene that is unopposed; on day two, every member of that organization files separate motions to intervene on their own behalf. The existing defendants file oppositions to the flurry of later motions. Under proposed intervenors' approach, the district court could not, on day three, grant the unopposed motion by the group and deny the rest of the motions on the grounds of adequate representation because the organization would not be considered an "existing party" on the second day, when the members filed their motions. The more efficient outcome for the district court to manage the litigation would be precluded under proposed intervenors' approach.

Although proposed intervenors (at 24) cite three district court decisions in support of their position, none of them is on point. The cited cases do not concern the status of another party applying for intervention. Rather, they hold that courts need not speculate how future litigation will play out when

determining that representation is adequate. *See Marie v. Moser*, Civ. No. 14-2518, 2014 WL 7272565, at *3 (D. Kan. Dec. 18, 2014) ("This Court need not speculate about the course of this litigation or the prospects of additional litigation . . . ."); *In re Charter Co.*, 50 B.R. 57, 63 (Bankr. W.D. Tex. 1985) (holding that debtor adequately represented interests of unsecured creditors in proceedings that debtor brought against a secured creditor, notwithstanding evidence that unsecured creditors "might not be adequately represented if [the debtor] does not go forward in the action"); *Pierson v. United States*, 71 F.R.D. 75, 80 (D. Del. 1976) (holding that when determining representation was adequate, court did not have to consider possibility that plaintiff might settle, where "there is nothing to suggest that settlement is even a possibility"). Significantly, none of the cases addresses events occurring between when a motion is filed and when it is granted, much less holds that courts may not consider such events in determining adequate representation. Finally, even under proposed intervenors' rule, the federal agencies would still adequately represent proposed intervenors' interests for the reasons discussed above (pp. 26-36).

In sum, intervention of right was correctly denied because proposed intervenors' interests would be adequately represented by the State and by the federal agencies.

### C. Proposed intervenors forfeit their appeal as to the denial of intervention on Claim 6.

Proposed intervenors do not challenge the denial of intervention as to the ESA allegations, Claim 6, in their opening brief on appeal. Accordingly, they forfeit their appeal as that argument and may not raise it for the first time in their reply brief. *See Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1167 (9th Cir. 1997). Under Federal Rule of Appellate Procedure 28(a)(8)(A), an appellant's principal brief must provide the "contentions and the reasons for them," as to why the district court erred, with appropriate citations to authorities and the record. Although they mention the ESA in passing (Br. 40), proposed intervenors fail to "clearly and distinctly" develop an argument about intervention on Claim 6 in their appellate brief, as is required by Rule 28. *Avila v. L.A. Police Dep't*, 758 F.3d 1096, 1101 (9th Cir. 2014); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (a "bare assertion" of error does not preserve a claim). This Court therefore need not consider the propriety of their intervention on Claim 6.

* * *

Proposed intervenors failed to demonstrate that they are entitled to intervention of right. The district court's order may be affirmed on either of two principal grounds: that proposed intervenors' interests are too contingent

to be protectable and would not be directly impaired by the suit; or that their interests are adequately represented by the federal agencies and by the State.

## II. The district court did not abuse its discretion in denying permissive intervention.

Rule 24(b) provides: "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B), (3). "A court may grant permissive intervention where the applicant for intervention shows . . . the motion is timely; and the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *LULAC*, 131 F.3d at 1308 (internal quotation marks, citation, numbering omitted); *see also Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) (clarifying requirements).

The court may consider other factors, including: "the nature and extent of the intervenors' interest," "the legal position they seek to advance, and its probable relation to the merits of the case," "whether the intervenors' interests are adequately represented by other parties," and "whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal

questions presented." *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). A district court has "broad discretion" to deny permissive intervention. *McDonald*, 309 F.3d at 541.

The district court rested its denial of permissive intervention on its prior rulings of adequate representation and lack of a protectable interest, and also on the reason that "further intervention would be likely to cause undue delay in the litigation." ER:9. The first two grounds are correct (and, more broadly, extend to all claims at issue) for the reasons explained above (pp. 14-40). *See United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 756 (9th Cir. 1993) (denying permissive intervention on the grounds of adequate representation).

Proposed intervenors also argue (at 40-41) that the district court's finding that intervention would likely delay the litigation is unsupported by the record, citing *Smith v. Marsh*, 194 F.3d 1045, 1051 (9th Cir. 1999), for the contention that the correct standard of measuring delay focuses only on "the delay in moving to intervene" rather than whether the intervention itself would change the character of the suit. Br. 41. Apart from the fact that the statement proposed intervenors purportedly quote from *Smith* does not appear in that case, *Smith* concerned the timeliness of intervention, which is undisputed here. In addition to timeliness, permissive intervention requires consideration of "whether the intervention will unduly delay or prejudice the adjudication of

the original parties' rights." Fed. R. Civ. P. 24(b)(3). Even if those factors warrant intervention, however, a court may exercise discretion to deny permissive intervention on any number of grounds, including considerations of "judicial economy" more broadly. *Venegas v. Skaggs*, 867 F.2d 527, 531 (9th Cir. 1989), *aff'd*, 495 U.S. 82 (1990); *see also Donnelly*, 159 F.3d at 412 (stating that *Spangler*'s factors are "nonexclusive").

Although proposed intervenors represented that they would abide by certain conditions—such as following agreed upon schedules and not filing a motion to dismiss—accommodating another set of parties in the proceedings, (both in briefing of right and at any hearings) naturally expands the proceedings. Unlike nonparties, moreover, intervenors may attempt to pursue appeals that the other parties choose to forego. To be sure, other legal doctrines such as Article III standing and appellate finality may constrain intervenors' ability to obtain full review of such decisions on appeal. *See*, *e.g.*, *Diamond v. Charles*, 476 U.S. 54, 62-63 (1986) (standing); *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004) (finality under 28 U.S.C. § 1291). Nevertheless, the fact that the parties might have to litigate the propriety of such an appeal before the matter can be adjudicated to conclusion provides additional support for the conclusion that the litigation might be delayed by intervention.

Intervenors (at 39-40) rely on *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2003), as supporting permissive intervention. *Kootenai* concerned intervention by organizations asserting "defenses of the [agency's challenged] Rule directly responsive to the claim for injunction" that the challengers to the rule had sought. *Id.* at 1110. This Court upheld permissive intervention based on the district court's explanation that "intervention will contribute to the *equitable* resolution" of the case. *Id.* at 1111 (emphasis added). Any support *Kootenai* provides for granting permissive intervention, therefore, is limited to the appropriateness of equitable relief—a question that becomes relevant only if Plaintiff prevails on the merits. As already mentioned (p. 10), proposed intervenors filed an amicus brief limited to the issue of the proper remedy when the parties briefed cross-motions for partial summary judgment, and the federal agencies do not object to similar *amicus* participation limited to the remedy issue.

In sum, the district court did not abuse its discretion in denying permissive intervention.

## CONCLUSION

For the foregoing reasons, the district court's order denying the motion to intervene should be affirmed.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for defendants-appellees is aware of no related cases that are pending in this Court.

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Signature of Attorney or Unrepresented Litigant: s/ Brian C. Toth

Date: Oct 29, 2018

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9th Circuit Case Number(s) 18-35291

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No. 18-35291

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NORTHWEST ENVIRONMENTAL ADVOCATES,

Plaintiff-Appellee,

v.

WASHINGTON CATTLEMEN'S ASSOCIATION and WASHINGTON STATE FARM BUREAU FEDERATION,

Intervenor-Applicants-Appellants,

v.

U.S. DEPARTMENT OF COMMERCE, *et al.*,

Defendants-Appellees.

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# RESPONSE BRIEF OF APPELLEE NORTHWEST ENVIRONMENTAL ADVOCATES

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*Attorneys for Plaintiff-Appellee Northwest Environmental Advocates*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Northwest Environmental Advocates submits that it has no parent corporations and no publicly issued stock shares or securities. No publicly held corporation holds stock in the organization.

Dated this 29th day of October, 2018.

_s/Paul A. Kampmeier_____
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KAMPMEIER & KNUTSEN, PLLC

*Attorneys for Appellee Northwest Environmental Advocates*

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# TABLE OF AUTHORITIES

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**Regulations**

**Other Authorities**

Pursuant to Federal Rule of Appellate Procedure 28(b), Plaintiff-Appellee Northwest Environmental Advocates ("NWEA") submits this brief in response to the Opening Brief of Intervenor-Applicants-Appellants Washington Cattlemen's Association and Washington State Farm Bureau Federation (collectively "WCA").

## COUNTER STATEMENT OF JURISDICTION

NWEA agrees this Court has jurisdiction under 28 U.S.C. § 1291 and agrees the District Court has jurisdiction under 28 U.S.C. § 1331. NWEA states in addition that the District Court also has jurisdiction under 16 U.S.C. § 1540(g). *See* Excerpts of Record ("ER") 86.

## COUNTER STATEMENT OF THE ISSUE

WCA's issue number four is not before this Court. *See* WCA Br. at 5. The District Court did not evaluate or rule on WCA's standing in denying WCA intervention. ER 1–9. Nor was the District Court required to do so. Accordingly, this case does not present the questions (1) whether WCA demonstrated standing or (2) whether WCA must demonstrate standing to intervene.

## COUNTER STATEMENT OF THE CASE

The Clean Water Act Section 319 grant program is not "the target of this lawsuit," as WCA claims, *see* WCA Br. at 17, nor is NWEA trying to defund Washington's nonpoint source programs. *Id.* at 3, 9, 18, 19, 29, 31, 40. To the contrary, NWEA is trying through this lawsuit to force the U.S. Department of Commerce, NOAA Fisheries, and the U.S. Environmental Protection Agency to

follow clearly-stated statutory procedures, which include the temporary withholding of funds from states that are not complying with federal law, to ensure the State of Washington adopts and implements nonpoint source pollution control programs that protect water quality and threatened aquatic species and to ensure the federal agencies consult under the Endangered Species Act so they fully understand how Washington's nonpoint source programs impact protected species before they approve and fund those programs. *See generally* ER 84–118.

Nonpoint source pollution is a serious problem that adversely affects water quality and aquatic species throughout Washington State. ER 96–100. Washington's coastal waters in particular serve as habitat for numerous ESA-listed species, and water quality that supports all life cycle stages is necessary for those species' survival and recovery. *Id.* Notwithstanding those facts, the federal agency defendants in this case have failed to follow clear statutory procedures and, in doing so, have subverted and rendered ineffective the statutes Congress adopted to protect water quality, aquatic species, and drinking water supplies from nonpoint source pollution in Washington. ER 85, 87–88, 109–110.

As explained further below, the relief NWEA seeks is the very relief Congress decided was appropriate when it wrote those remedies into federal law. Congress chose to impose financial penalties on states to ensure the adoption and implementation of nonpoint source pollution control programs that protect water

quality and threatened species. And Congress ordered federal action agencies to consult with federal wildlife agencies before they authorize, fund, or carry out any action. By seeking compliance with these federal procedures, NWEA seeks to strengthen Washington's nonpoint source programs so the federal agencies can legally and *fully* fund those programs while making sure grants are used in the best way possible. *See generally* ER 84–118.

## I. The Federal Clean Water Act Requires States to Have Nonpoint Source Pollution Plans to Protect Water Quality and Fish and Authorizes EPA to Fund Implementation of Those Plans.

The Clean Water Act ("CWA" or "Act") is the foundation of the federal laws addressing nonpoint source pollution. Congress adopted amendments to the CWA in 1972 in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA establishes "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife[.]" *Id.* § 1251(a)(2). Notably, the CWA states: "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." *Id.* § 1251(a)(7).

To help accomplish these policies, the CWA requires states to develop "water quality standards" that establish the desired conditions of each waterway

within the state's jurisdiction. *Id.* § 1313(a), (b); 40 C.F.R. § 131.2. Water quality standards must be sufficient "to protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA]." 33 U.S.C. § 1313(c)(2)(A). They must designate and be sufficient to protect the beneficial uses of each waterbody. *Id*. And the CWA requires states to review and possibly revise water quality standards at least every three years, *id.* § 1313(c)(1), and to have a "continuing planning process" to ensure ongoing compliance with Section 303 of the CWA. *Id.* § 1313(e).

CWA Section 319 required states to develop nonpoint source management plans ("319 Plans") to assist with meeting water quality standards and to be implemented in the first four years after submission. *Id.* § 1329(a), (b), (c)(2), (d). Section 319 Plans must: (1) identify the best management practices ("BMPs") to be used to reduce nonpoint source pollution; (2) identify the programs to be used to implement those BMPs; (3) include an implementation schedule; (4) certify that state law authorizes the program; and (5) describe the funding for the program. *Id.* § 1329(b)(2). States must develop their 319 Plans "on a watershed-by-watershed basis" to the maximum extent practicable. *Id.* § 1329(b)(4). The CWA required states to submit their 319 Plans to EPA during the 18-month period beginning February 4, 1987. *Id.* § 1329(c)(2).

CWA Section 319 requires EPA to approve or disapprove states' original

319 Plan, as well as "any report or management program under this section[,]" within 180 days of submittal. *Id.* § 1329(d)(1). EPA must base its decision on the mandatory plan components in CWA Section 319(b)(2). *Id.* § 1329(b)(2), (d)(2). Specifically, EPA must evaluate: (1) whether "the proposed management program" meets the requirements of CWA Section 1329(b)(2); (2) whether adequate authority and resources exist to implement the program; (3) whether the implementation schedule is sufficiently expeditious; and (4) whether the proposed measures are adequate to reduce the level of pollution and to improve the quality of navigable waters in the state. *Id.* § 1329(d)(2). If EPA determines a state's program is deficient it may seek revisions. *Id.*

The CWA does not address whether states must update their 319 Plans; however, EPA has issued formal guidance requiring states to submit updated 319 Plans for approval every five years. *See* Northwest Environmental Advocates' Supplemental Excerpts of Record ("SER") 2, 6, 19, 57. That guidance requires 319 Plan updates to include the elements listed in CWA Section 319(b)(2). SER 19, 61–62. EPA's guidance on this point is consistent with the text of the CWA. *See* 33 U.S.C. § 1329(b)(2) ("Each management program proposed for implementation under this subsection shall include each of the following: . . . .").

States with approved 319 Plans may apply for federal grants "for the purpose of assisting the State in implementing" the state's plan. *Id.* § 1329(h)(1).

EPA may grant funds "subject to such terms and conditions as the Administrator considers appropriate." *Id.* EPA may not, however, grant funds to a state that received a grant in the prior year unless EPA determines that state "made satisfactory progress in such preceding fiscal year in meeting the schedule specified by such State under subsection (b)(2)." *Id.* § 1329(h)(8). The "schedule" referred to in Section 319(h)(8) is the schedule states must include in their 319 Plans—the schedule for implementing the program, including BMPs to reduce nonpoint source pollution. *See id.* § 1329(b)(2)(C).

NWEA alleges that Washington's 319 Plan does not meet CWA Section 319 requirements because, among other things, it does not contain BMPs for agriculture or a schedule for implementing them. ER 101–102. Notwithstanding that, EPA approved Washington's 319 Plan and also found that Washington made "satisfactory progress" in implementing BMPs. ER 101–102, 112–115. EPA approved Washington's 319 Plan even though just a few months earlier it specifically instructed Washington to identify methods it would use to implement BMPs for agriculture and to explain how those BMPs would achieve and maintain water quality standards. *Id*. NWEA challenges those EPA decisions because they are plainly contrary to the CWA.

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## II. The Coastal Zone Act Reauthorization Amendments of 1990 Require Coastal States Like Washington to Have Nonpoint Plans That Meet Federal Standards and Require EPA and NOAA to Withhold Grants from States Without Such Plans.

The Coastal Zone Act Reauthorization Amendments of 1990 ("CZARA") builds on the CWA and requires states that have federally-approved plans under the Coastal Zone Management Act, 16 U.S.C. §§ 1451–1465 ("CZMA"), to submit a coastal nonpoint pollution control program ("Coastal Program") to EPA and NOAA for approval. *Id.* § 1455b(a)(1). "The purpose of the program shall be to develop and implement management measures for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities." *Id*. CZARA requires states to implement their Coastal Programs through updates to their 319 Plans. *Id.* § 1455b(a)(2), (c)(2).

CZARA establishes *federal* requirements for Coastal Programs to maximize protection of water quality and designated uses. *Id.* § 1455b(b), (g)(1), (g)(2), (g)(5). Specifically, CZARA requires Coastal Programs to identify land uses that may cause or contribute significantly to degradation of coastal waters that are failing "to attain or maintain applicable water quality standards or protect designated uses[.]" *Id.* § 1455b(b)(1)(A). Coastal Programs must then apply federal "management measures" to protect water quality. *Id.* § 1455b(b) ("Each State program under this section shall provide for the implementation, at a minimum, of management measures in conformity with the guidance published under subsection

(g), to protect coastal waters generally . . . ."); *see also id.* § 1455b(g)(1), (2), (5). The term "management measures" means:

> economically achievable measures for the control of the addition of pollutants from existing and new categories and classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives.

*Id.* § 1455b(g)(5). States must also implement "additional management measures" as necessary to attain and maintain water quality standards. *Id.* § 1455b(b)(3).

EPA's publication of the federal management measures in 1993 triggered coastal states' obligation to submit proposed Coastal Programs to EPA and NOAA by July 1995. *Id.* § 1455b(a)(1). CZARA then required EPA and NOAA to review state programs within six months and to approve them if they met the requirements of CZARA. *Id.* § 1455b(c)(1). However, if NOAA and EPA found "that a coastal state has failed to submit an approvable program," CZARA required the agencies to withhold CZMA and CWA grants funds from such state starting in 1996 and until the state submits an approvable program. *Id.* § 1455b(c)(3), (4).

Under CZARA, EPA and NOAA issued findings on Washington's Coastal Program in 1998 that identified the ways that program failed to meet federal standards, imposed conditions Washington had to meet to gain final approval of its Coastal Program, and gave Washington until 2002 to meet those conditions. ER 102–103; SER 2, 83–92. Notwithstanding that deadline and the deadlines imposed

by CZARA, and even though Washington continues to implement a Coastal Program that fails to meet federal standards established under CZARA, *see* ER at 102–109, EPA and NOAA continue to delay withholding grant funds from Washington, in plain violation of the statute. ER 103, 109–110.

## III. The Endangered Species Act Requires EPA and NOAA to Consider—and To Limit—Impacts to Protected Species from Any Action the Agencies Authorize, Fund, or Implement.

The ESA is a comprehensive wildlife protection statute that seeks to "provide a program for the conservation of . . . endangered species and threatened species," as well as "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Section 7(a)(2)—the "heart" of the ESA—requires each federal agency to ensure its activities are not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). To make that determination, "[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). An action "may affect" a listed species if it will have "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character." *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d.

999, 1018 (9th Cir. 2009) (quotations omitted). If an action "may affect" a listed species, the agency must engage in formal consultation with the U.S. Fish and Wildlife Service or NOAA Fisheries unless it determines the action "is not likely to adversely affect" listed species. 50 C.F.R. § 402.14(b)(1); *Or. Nat. Res. Council v. Allen,* 476 F.3d 1031, 1033 (9th Cir. 2007). "Thus, actions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012). Formal consultation concludes with a "biological opinion." 16 U.S.C. § 1536(b)(3)(A).

Compliance with Section 7 is critical. "If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Accordingly, Congress authorized citizens to enforce ESA Section 7 against government agencies. 16 U.S.C. § 1540(g)(1); *Kraayenbrink*, 632 F.3d at 495–96.

The federal agency defendants in this case recognize that nonpoint source pollution has widespread and adverse impacts on Washington's threatened and endangered aquatic species. ER 96, 100, 110. But EPA and NOAA have never consulted under ESA Section 7 to determine whether their authorization and full

funding of Washington's programs jeopardizes ESA-listed species or adversely modifies designated critical habitats. ER 110. By failing to consult under ESA Section 7, EPA and NOAA have acted for decades without a full understanding of how their authorization and funding of Washington's nonpoint programs impacts listed species. *Id*.

IV. NWEA Agrees WCA Has Interests That Could Be Affected by This Case.

NWEA filed this lawsuit in December 2016 to remedy these delays. ER 119–152. Defendants below, the intervenor (State of Washington), and WCA all allege NWEA does not have standing to pursue its claims. The District Court found that NWEA adequately pleaded standing, *see Northwest Envtl. Advocates v. U.S. Dep't of Commerce, et al.*, 283 F. Supp. 3d 982, 987–990 (W.D. Wash. 2018) (order denying motion to dismiss for lack of standing), but it recently dismissed NWEA's CZARA claims (claims two and three in the complaint) without prejudice after finding that NWEA failed to establish standing for those claims. ER 81; SER 93–101 (order on summary judgment). Litigation at the District Court is ongoing on NWEA's other claims so the District Court has not yet entered final judgment. SER 102–103. Accordingly, the District Court can still change its standing ruling and NWEA can still appeal the District Court's ruling that NWEA failed to establish standing for its CZARA claims. Fed. R. Civ. P. 54(b); Fed. R. App. P. 4(a)(1)(B).

As to intervention, NWEA did not oppose intervention by the State of Washington or WCA at the District Court. ER 36–37. NWEA is not changing its position on appeal. But this Court should not accept WCA's claim that its members "implement effective methods to control NPS pollution," *see* WCA Br. at 27 (citing ER 61 ¶ 10), because the record as a whole contradicts that claim and because it remains at issue below. NWEA agrees, however, that WCA and its members have interests in the outcome of this case. Specifically, NWEA agrees with WCA that "management measures for the agricultural category of NPS pollution … are necessary and become part of the Section 319 requirements for an approved NPS program." WCA Br. at 10; *see also* 33 U.S.C. §§ 1329(b)(2), (d)(2); 16 U.S.C. § 1455b(b); SER 14, 58, 85–86. NWEA also agrees with WCA that "agricultural practices will be more stringently regulated if plaintiff's challenges succeed." WCA Br. at 21; *id.* at 15, 18, 19, 20, 26, 31, 34–35, 38; *see also* 16 U.S.C. § 1455b(c)(2); 33 U.S.C. §§ 1329(d)(2), (h)(1) (CWA section 319 grants "subject to such terms and conditions as the [EPA] Administrator considers appropriate"); 16 U.S.C. §§ 1536(b)(3)(A), (b)(4)(c)(ii)–(iv); SER 14, 58, 85–86. That said, NWEA's position is that WCA's issues on appeal should and must be resolved under the law of intervention, not the law of standing.

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## SUMMARY OF ARGUMENT

This Court should not address standing in ruling on WCA's appeal because the District Court did not rule on that issue in denying intervention and because NWEA's standing is a contested issue that is not yet before this Court but that could be affected by a ruling here. This Court should wait until standing is squarely presented before ruling on that issue in this case. If the Court decides to address standing NWEA respectfully requests that the Court order supplemental briefing on that issue before ruling because WCA did not clearly and thoroughly argue the issue in its opening brief.

## ARGUMENT

This Court should not address standing in resolving WCA's appeal. First, WCA is wrong when it suggests the District Court ruled that WCA could not intervene because WCA lacked standing. *See* WCA Br. at 32–33. The District Court did not evaluate or rule on WCA's standing in resolving WCA's motion to intervene. ER 1–9. The District Court's citation to a case that discusses standing does not change that, as WCA suggests. *See* WCA Br. at 33 (citing ER 7).

Second, in this Circuit, applicants for intervention do not need to establish standing. *Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011) ("In general, an applicant for intervention need not establish Article III standing to intervene."); *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) (distinguishing standing

analysis from intervention analysis); *see also Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (stating four-part test for intervention as of right). This is true unless applicants for intervention "pursue relief that is different from that which is sought by a party with standing." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). Here, WCA does not need to establish Article III standing to intervene because it is not seeking relief, but only seeking denial of relief to NWEA. ER 81; *Town of Chester*, 137 S. Ct. at 1651.

## CONCLUSION

For the foregoing reasons, Northwest Environmental Advocates respectfully requests that this Court avoid discussing standing in its order resolving this appeal. If the Court decides to address standing NWEA respectfully requests that the Court order supplemental briefing on that issue because WCA did not clearly and thoroughly argue the issue in its opening brief.

Respectfully submitted this 29th day of October, 2018.

KAMPMEIER & KNUTSEN PLLC

s/Paul A. Kampmeier
Paul A. Kampmeier (WSBA #31560)

EARTHRISE LAW CENTER

s/Allison LaPlante
Allison LaPlante (OSB #023614)

*Attorneys for Plaintiff Northwest Environmental Advocates*

## STATEMENT OF RELATED CASES

Counsel for Appellee Northwest Environmental Advocates is not aware of any cases that are related to this appeal within the meaning Ninth Circuit Rule 28-2.6.

Dated this 29th day of October, 2018.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 3,222 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated this 29th day of October, 2018.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Response Brief of Appellee Northwest Environmental Advocates with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on October 29, 2018.

I further certify that counsel for all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| NORTHWEST ENVIRONMENTAL ADVOCATES,<br><br>Plaintiff,<br>v.<br><br>UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,<br><br>Defendants. | CASE NO. C16-1866-JCC<br><br>ORDER DENYING MOTION TO INTERVENE |

This matter comes before the Court on the Washington State Farm Bureau Federation's ("WFB") and the Washington Cattlemen's Association's ("WCA") motion to intervene (Dkt. No. 67). 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.

## I. BACKGROUND

WFB and WCA (collectively "Proposed Intervenors") seek to join Defendants—the U.S. Department of Commerce ("Commerce"), the National Oceanic and Atmospheric Administration ("NOAA"), and the Environmental Protection Agency ("EPA") (collectively "Federal Agencies"); and the existing intervenor Washington state—in this environmental suit. (Dkt. No. 67.) Proposed Intervenors move to intervene either as of right or permissively under Federal

Rule of Civil Procedure 24. (Dkt. No. 67 at 3–11.)

Plaintiff Northwest Environmental Advocates ("NWEA") brings this Administrative Procedure Act ("APA") suit asserting that its members have been harmed by Federal Agencies' actions or inactions under the Clean Water Act ("CWA") and the Coastal Zone Act Reauthorization Amendments ("CZARA"), the latter of which represents a portion of the Coastal Zone Management Act ("CZMA"). (Dkt. No. 74 at 1–2.) NWEA also brings an Endangered Species Act ("ESA") citizen suit, alleging that Federal Agencies have unlawfully failed to consult on the EPA's approvals and funding of Washington's Nonpoint Source Pollution Management Programs. (*Id.*) This Court previously articulated relevant background information and summarized the associated statutory schemes in its order granting in part and denying in part Defendants' motion to dismiss, and will not repeat that information here. (Dkt. No. 39.)

Proposed Intervenors claim that, should NWEA prevail, the farmers and ranchers they represent will be directly affected by a loss of CZMA and CWA grant funds that support Washington's nonpoint source pollution programs and the development of best management practices ("BMPs"), and by regulatory costs that may arise from a finding that the EPA arbitrarily approved Washington's CWA Section 319 Nonpoint Management Program. (Dkt. No. 67 at 6–7, 9.) Proposed Intervenors also allege that they would be harmed by additional layers of regulatory approval resulting from a court order compelling Federal Agencies to engage in ESA consultation. (*Id.* at 6–7.) The Court previously granted Washington's unopposed motion to intervene on behalf of the Federal Agency defendants (Dkt. No. 79). Federal Agencies oppose WFB's and WCA's intervention (Dkt. No. 80).

## II. DISCUSSION

### A. Intervention as of Right

Absent an unconditional right to intervene by statute, a party seeking to intervene as a matter of right must: (1) timely move to intervene, (2) have a significantly protectable interest relating to the property or transaction that is the subject of the action, (3) be situated such that the

disposition of the action may impair or impede the party's ability to protect that interest, and (4) not be adequately represented by existing parties. *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003); Fed. R. Civ. P. 24(a)(2). The burden is on the intervenors to demonstrate all four prongs. *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002).

"An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *State ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). The Supreme Court has yet to clearly define an interest that satisfies Rule 24(a)(2). *See Arakaki*, 324 F.3d at 1084 (stating that the phrase "significantly protectable" is not a term of art in law and "sufficient room for disagreement exists" over its meaning). The Ninth Circuit views the "interest test" as "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 985 (9th Cir. 2008) (internal quotes omitted). When injunctive relief is sought that will have "direct, immediate, and harmful effects upon a third party's legally protectable interests, that party satisfies the 'interest' test of Fed. R. Civ. P. 24(a)(2)." *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995). Whether resolution of an action will impair or impede a proposed intervenor's ability to safeguard their protectable interest is considered as "a practical matter." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 862 (9th Cir. 2016). However, intervention is improper where intervenors have an "alternative forum where they can mount a robust defense." *Lockyer*, 450 F.3d at 442.

To determine if a proposed intervenor is adequately represented, the Court considers "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the

proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086. The burden on proposed intervenors to show that the current representation is inadequate normally "is minimal, and would be satisfied if they could demonstrate that representation of their interests 'may be' inadequate." *Id.* (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). But when the would-be intervenor shares the same interest as a government entity party, absent a "very compelling showing to the contrary," a presumption that the government entity adequately represents the intervenor applies. *Arakaki*, 324 F.3d at 1086. This presumption can be overcome if the intervenor makes a compelling showing of distinct "parochial interests." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011).

Proposed Intervenors timely moved to intervene. The remaining factors, by claim,[1] are discussed below.

1. Claims #2–3:[2] Failure to Withhold Required Amounts From Washington's CWA Assistance Grants and Coastal Assistance Grants

Proposed Intervenors allege both general and specific interests in NWEA's procedural claims. Their general allegation—that defunding Washington's CZARA Coastline Nonpoint Pollution Management Program and its 2015 CWA Nonpoint Program "will directly impact . . . their members' agricultural and livestock operations"—is unpersuasive for its lack of specificity. (Dkt. Nos. 67 at 6–7, 67-5 at 5.)

As to a specific interest, Proposed Intervenors assert that they receive CWA Section 319 funds to mitigate their nonpoint pollution sources, and that the loss of these funds will detrimentally affect programs in which their members are directly involved. (Dkt. No. 67 at 2, 6–7.) According to Proposed Intervenors, these federal funds—though initially distributed to

[1] Motions to intervene may be entertained on a claim-by-claim basis. *See United States ex rel. Voss v. Monaco Enters.*, No. 2:12-CV-0046-LRS, slip op. at 7–8 (E.D. Wash. July 1, 2016).

[2] The Court previously dismissed NWEA's Claim #1 (failure to render a final decision on Washington's Coastal Nonpoint Program) and fourth sub-claim of Claim #6 (failure to consult on NOAA's approval of full amount of Coastal Assistance Grants, despite a lack of an approvable Coastal Nonpoint Program). (Dkt. No. 39 at 10, 14.)

Washington's Department of Ecology ("Ecology")—are subsequently distributed to a "variety of municipalities . . . and other organizations" to support a network of water quality programs that depend on execution by their members.[3] (Dkt. Nos. 67-5 at 2–5, 67-4 at 2–3.) Proposed Intervenors assert these programs offer "educational outreach," "review and certification of farming practices," "technical … and financial assistance," "cost-share practices such as riparian planting," and "training." (Dkt. Nos. 67 at 7, 83 at 5.) According to Proposed Intervenors, Farmed Smart Sustainable Agricultural Certification is one example of a CWA Section 319 program reliant on the grants at issue. (Dkt. No. 67-4 at 3.) Another is the Conservation Reserve Enhancement Program, which is funded in part by Section 319 grants and pays WFB member-landowners "rent" to plant shrubs and "improve stream conditions." (*Id.* at 3–4.) Given the ways their members directly participate in the implementation of Washington's federal CWA and CZMA funds, Proposed Intervenors argue that they maintain "a direct economic interest and legal stake" in the outcome of this suit. (Dkt. No. 67-5 at 2–3.)

Federal Agencies argue that Proposed Intervenors' interests would not be practically impaired or impeded by NWEA's action "because their interests . . . could be (if at all) only indirectly affected by the outcome of this case based on actions the State of Washington may or may not take." (Dkt. No. 80 at 4.) The Court disagrees. Though Proposed Intervenors' interests depend on Ecology's initial receipt of federal funds, Federal Agencies concede that Proposed Intervenors "are precisely the types of entities who are eligible to receive funding to implement the State's nonpoint source control program[s] . . . funded in part by federal grants under the CZMA and CWA." (Dkt. No. 80 at 9.)

[3] Federal grants are distributed to organizations like WFB and WCA through Ecology's policy of "generally defer[ing]" the implementation of programs designed to address specific categories of nonpoint source pollution. (Dkt. No. 83 at 4–5.) The State's Water Quality and Advisory Committee, which WFB co-chairs with Ecology and in which WCA sits as a member, is responsible for implementing control programs for the agricultural category of nonpoint source pollution. (Dkt. No. 83 at 3–4.)

In light of the structure with which Ecology administers CZMA and CWA grants, Proposed Intervenors' fear—that injunctive relief in favor of NWEA will have a "direct, immediate, and harmful effect" upon their interests—is reasonable. *See Forest Conservation Council*, 66 F.3d at 1494. Proposed Intervenors provide specific, concrete examples of programs that directly affect their members; contextualize their participation in Ecology's practice of category-specific deferment; and sufficiently illustrate how resolution of the matter "may as a practical matter impair or impede their ability to safeguard their protectable interest." *Smith*, 830 F.3d at 862.

However, Proposed Intervenors' interest in Claims #2–3 is wholly eclipsed by Washington's identical interest in ensuring the grants continue. "The most important factor to determine whether a proposed intervenor is adequately represented by a present party to the action is how the intervenor's interest compares with the interest of existing parties." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950–51 (9th Cir. 2009) (internal quotes and citations omitted). Here, Washington has intervened to defend the validity of its nonpoint pollution control program, as well as its receipt of "the funding Ecology relies on to implement Washington's nonpoint pollution control programs." (Dkt. No. 66 at 7.) Any parochial or specialized knowledge Proposed Intervenors would offer in the adjudication of Claims #2–3, i.e., their "key, unique perspectives in how guidance should be developed to improve water quality from agricultural runoff," do not rebut Washington's comparable (and likely superior) Ecology-related expertise. (Dkt. No. 83 at 4); *see Prete v. Bradbury*, 438 F.3d 949, 958–59 (9th Cir. 2006) (finding "specialized knowledge" by proposed intervenor insufficient to show inadequate representation where there was "no evidence to support their speculation that the Secretary of State lacks comparable expertise"); *see also City of Los Angeles*, 288 F.3d at 402–03 (holding that "mere[] differences in [litigation] strategy" are insufficient grounds to "justify intervention as a matter of right").

The Court DENIES Proposed Intervenors' motion to intervene as of right on Claims #2–3.

2. Claims #4–5: Approval of Washington's 2015 Update to its CWA Nonpoint Program and Satisfactory Progress Determinations for Washington's CWA Nonpoint Program

NWEA asks the Court to find EPA arbitrarily approved Washington's CWA Section 319 Nonpoint Management Program and arbitrarily granted the State funds based off of an unjustified "satisfactory progress" finding. (Dkt. No. 74 at 29–32.) Proposed Intervenors allege that if NWEA prevails on Claims #4–5, it "*could* mean that certain buffers and other management practices used by [Proposed Intervenors] to protect water quality are inadequate to comply with the law, would diminish the benefit of [Proposed Intervenors'] participation in TMDL planning, [and] *could* increase costs." (Dkt. No. 67 at 9) (emphasis added). Proposed Intervenors further allege that because they are "neck deep in helping to develop those measures" and are "already directly involved in developing the agricultural measures being challenged as insufficient to justify further program defunding," Federal Agencies are "plainly wrong" for challenging their interest in ensuring that Ecology's program is not invalidated. (Dkt. No. 83 at 5–6.) The Court does not agree.

Proposed Intervenors' interest "falls far short of the 'direct, non-contingent, substantial and legally protectable' interest required for intervention as a matter of right." *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quoting *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981)). This is particularly true in this case, where the "special solicitude" afforded to Plaintiff's interest in *Alaska Center for the Environment v. Browner* would not apply to Proposed Intervenors. 20 F.3d 981, 984 (9th Cir. 1994). Here, Proposed Intervenors bring suit not to "protect the public health or welfare, enhance the quality of water, and serve the purposes of [the CWA]," § 1313(c)(2)(A), but to protect their interest in "viable, economic management of their farms and ranches." (Dkt. Nos. 67 at 6, 74 at 6–7).[4]

[4] Furthermore, intervention is improper in that Proposed Intervenors may defend their operational reliance on existing BMPs in an alternate forum when it is actually and practically impaired (e.g., during the notice-and-comment rulemaking period that may result following a holding on NWEA's behalf). *See Lockyer*, 450 F.3d at 442.

In addition, existing parties adequately represent Proposed Intervenors' interests in these claims. If NWEA succeeds, it is Washington, not Proposed Intervenors, who will be unable to rely on Federal Agencies' prior approval of its CWA Section 319 Nonpoint Program. (Dkt. No. 66 at 5.) Proposed Intervenors would differentiate their "ultimate objective[]" from Federal Agencies' by the fact that Federal Agencies do not participate in the Advisory Committee tasked with creating the programs at issue in NWEA's claims. (Dkt. No. 83 at 6.) However, Ecology does, and mere committee membership is not a parochial interest compelling enough to rebut the presumption that existing government entities will adequately represent their shared "ultimate objective: that the Federal Agencies' determinations be upheld under the relevant statutes." (Dkt. Nos. 80 at 6, 83 at 8); *see Citizens for Balanced Use*, 647 F.3d at 899. Insofar as Proposed Intervenors' interests relate to those of existing parties', the Court finds that they are neither procedurally nor substantively "parochial" in any distinguishable sense, but the same. *Citizens for Balanced Use*, 647 F.3d at 899.

The Court DENIES Proposed Intervenors' motion to intervene as of right on Claims #4–5.

3. Claim #6: Failure to Engage in ESA Section 7 Consultation

Proposed Intervenors' interest in NWEA's ESA action lies in potential costs saved by avoiding an additional layer of federal regulatory approval. (Dkt. No. 67 at 6, 7.) The Court declines to find a significantly protectable interest here, as Proposed Intervenors fail to allege a relationship between their interest and Claim #6 that is more than theoretical. *See Lynch*, 307 F.3d at 803 (denying intervention to an applicant whose "undifferentiated, generalized interest in the outcome of an ongoing action" was "too porous a foundation on which to premise intervention as of right") (internal quotes and citations omitted). Further, Proposed Intervenors do not purport to bring any necessary or novel elements to the adjudication of this procedural claim, and fail to illustrate how the Court's holding on this matter would impact them. Proposed Intervenors fail to carry their burden. *Arakaki*, 324 F.3d at 1083.

The Court DENIES Proposed Intervenors' motion to intervene as of right on Claim #6.

**B. Permissive Intervention**

An applicant seeking permissive intervention must prove three threshold requirements: (1) it shares common questions of law or fact with the main action; (2) its motion is timely, and (3) a court has an independent basis for jurisdiction over the applicant's claims. *Donnelly*, 159 F.3d at 412. But once these conditions for permissive intervention are met, intervention rests in the sound discretion of the Court. *Id.* In exercising its discretion, the Court must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties. *See* Fed. R. Civ. P. 24(b)(2). The Court may also consider "whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit." *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977) (internal citations omitted). Even if Proposed Intervenors satisfy the threshold requirements, the Court exercises its discretion to deny permissive intervention. Existing parties will adequately represent the interests of Proposed Intervenors in Claims #2–3, Proposed Intervenors have failed to plead protectable interests for Claims #4–6, and further intervention would be likely to cause undue delay in the litigation.

The Court DENIES Proposed Intervenors' motion to permissively intervene on Claims #2–6.

## III. CONCLUSION

For the foregoing reasons, Proposed Intervenors' motion to intervene (Dkt. No. 67) is DENIED.

DATED this 7th day of March 2018.

John C. Coughenour
UNITED STATES DISTRICT JUDGE