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CASE INLET SHORELINE ASSOCIATION

11  
12 IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
13 AT SEATTLE

14 SEATTLE SHELLFISH LLC, a Washington Limited  
Liability Company, )

15 )  
16 Plaintiff, )

17 v. )

18 UNITED STATES ARMY CORPS OF )  
ENGINEERS; and COL. BRUCE A. ESTOK, in )  
19 his official capacity as commander of the Seattle )  
District, )

20 Defendants. )

21 CASE INLET SHORELINE ASSOCIATION, )

22 Applicant for Intervention )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

Case No. 2:12-cv-02150-RSL

**MOTION TO INTERVENE OF CASE  
INLET SHORELINE ASSOCIATION**

NOTING DATE: March 15, 2013  
JUDGE: Hon. Robert S. Lasnik

1 **I. MOTION TO INTERVENE**

2 Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, the Case Inlet Shoreline  
3 Association (“CISA”) moves to intervene as of right as a defendant to the claims asserted by Plaintiff  
4 Seattle Shellfish LLC that may affect the interests of CISA as set forth in this motion. In the alternative,  
5 CISA moves to intervene permissibly as a defendant pursuant to Rule 24(b). Counsel for CISA has  
6 conferred with counsel for Plaintiff Seattle Shellfish, LLC and counsel for Defendants, United States  
7 Army Corps of Engineers, et al. (collectively “Corps”). Counsel for both the Corps and the Plaintiff have  
8 indicated that they do not take a position on the motion at this time.

9 **II. BACKGROUND**

10 CISA is a non-profit, tax exempt corporation organized under the laws of Washington,  
11 headquartered in Vaughn Bay, Washington, and founded in 2007. Declaration of Curt Puddicombe  
12 (“Puddicombe Dec.”) ¶ 2. CISA has over 100 members who reside, own property, or recreate in, or  
13 otherwise enjoy Puget Sound’s many waterways and their bountiful fish and wildlife and unparalleled  
14 scenic beauty. *Id.* CISA’s principal purpose is to promote and insure an ecologically healthy Puget  
15 Sound that can be safely enjoyed by CISA’s members, the public at large and future generations. *Id.* To  
16 that end, CISA advocates intelligent and balanced resource management in Puget Sound, based on  
17 adequate site-specific scientific reviews, and public/stakeholder participation in the Corps’ decisions  
18 regarding potential expansion of shellfish aquaculture. *Id.* CISA is vitally concerned that the expansion  
19 of commercial aquaculture avoid adverse ecological, recreational and public health impacts, including  
20 water pollution, habitat destruction, loss of native species, reduced biodiversity, impaired water clarity  
21 and impeded beach access. *Id.*

22 CISA has a direct interest in the Corps’ informed management of commercial aquaculture within  
23 Puget Sound, through its regulation of the discharge of dredged or fill material into waters of the United  
24 States under section 404(e) of the Clean Water Act (“CWA”), 33 U.S.C. § 1344(e). Members of CISA  
25 live near and/or fish, boat, swim or otherwise enjoy the areas of Puget Sound proposed for the expansion  
26 of commercial aquaculture that are the subject of this action, including tidelands and adjacent public  
27 waters and uplands in Case Inlet and Totten Inlet. Puddicombe Dec. ¶ 3. Plaintiff’s proposed expansion  
28 of its commercial shellfish operations within these areas may adversely impact the ability of CISA’s

1 members to fish, boat, swim, dive, wade, windsurf, beachcomb or otherwise use and enjoy Puget Sound.  
2 *Id.* CISA intends through its intervention in this action to protect its interests and to defend the Corps'  
3 proper exercise of its discretion under CWA section 404 not to recognize Nationwide Permit ("NWP") 48  
4 coverage for areas not previously planted with shellfish.

5 As shown below, CISA meets the requirements for intervention as of right. Alternatively, CISA  
6 also qualifies for permissive intervention. CISA respectfully submits in support of this Motion the  
7 declarations of CISA Vice President Curt Puddicombe and CISA's undersigned counsel, Stephan C.  
8 Volker, and CISA's application for Mr. Volker's appearance *pro hac vice*. CISA's Proposed Orders  
9 granting intervention as of right, and alternatively, permissively, are also lodged.

### 10 III. PROCEDURAL BACKGROUND

11 On March 19, 2007, the Corps issued NWP 48 to streamline CWA permitting for *preexisting*  
12 commercial shellfish aquaculture activities in place as of March 19, 2007. 72 FR 11092-01. NWP 48  
13 was reissued by the Corps on March 19, 2012. 77 FR 10184-01. NWP 48 authorizes the installation of  
14 structures necessary for *continuing* aquaculture operations and the discharge of dredged or fill material  
15 for such activities. Complaint herein (Dkt. 1), Exhibit A (March 1, 2007, Decision Document for NWP  
16 48) at 1. NWP 48 does not, however, "authorize new operations or the expansion of the project area for  
17 an existing commercial shellfish aquaculture activity." *Id.*

18 Plaintiff operates aquaculture facilities located throughout Puget Sound and "is in the business of  
19 commercially cultivating, harvesting and selling shellfish, primarily geoduck clams." Complaint ¶3.2.  
20 Plaintiff brings this suit to overturn the Corps' decision to require individual section 404 permits for  
21 *expanded* geoduck aquaculture operations. The Corps' challenged decision protects the bountiful natural  
22 resources, scenic beauty, and recreational opportunities that CISA's members enjoy in the area.  
23 Complaint ¶3.3. If successful with this suit, Plaintiff may significantly expand its commercial  
24 aquaculture activities within areas utilized by CISA's members, including Case Inlet and Totten Inlet, and  
25 thus impede public access thereto, impair recreation therein, and degrade the areas' natural resources and  
26 scenic grandeur. Puddicombe Dec. ¶ 3.

IV. ARGUMENT

A. CISA Should Be Granted Intervention As of Right.

Rule 24(a) of the Federal Rules of Civil Procedure (“FRCP”) states that

On timely motion, the court must permit anyone to intervene who: . . . 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.

The Ninth Circuit “construe[s] Rule 24(a) liberally in favor of potential intervenors.” *California ex. rel. Lockyer v. U.S.*, 450 F.3d 436, 440 (9th Cir. 2006); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (Rule 24 “is construed broadly in favor of the applicants”); *Greene v. U.S.*, 996 F.2d 973, 976 (9th Cir. 1993) (same). As the Ninth Circuit has explained: “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, [courts] often prevent or simplify future litigation involving related issues; at the same time, [they] allow an additional interested party to express its views before the court.” *U.S. v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (emphasis in original) (internal quotations and citations omitted).

The Ninth Circuit has established a four-part test to determine whether intervention as a matter of right is warranted:

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

*California ex. rel. Lockyer*, 450 F.3d at 440 (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)). CISA qualifies for intervention as of right because (1) this Motion is timely, (2) CISA has interests that are directly affected by this lawsuit, (3) disposition of the action may impair CISA’s ability to protect its interests, and (4) no parties to the action adequately represent CISA’s interests.

**1. This Motion Is Timely.**

The case is at its earliest stage. Plaintiff filed its Complaint on December 11, 2012 and the Corps filed its Answer on February 11, 2013. The administrative record has not yet been completed, Plaintiff is not scheduled to file its summary judgment motion until April 30, 2013, the parties’ further summary

1 judgment papers will not be filed until this summer, and this Court has not made any substantive rulings.  
 2 An industry group supporting Plaintiff has just moved to intervene (Dkt. 16). Because this case remains  
 3 at the very earliest stage of litigation, CISA's Motion to Intervene is timely. *Northwest Forest Resource*  
 4 *Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996).

5 This Motion is also timely because no party will be prejudiced by CISA's intervention at this  
 6 point. *Id.* CISA will abide by the briefing and hearing schedule adopted by the Court in its January 31,  
 7 2013 Case Management Order.

## 8 **2. CISA Has a Significant Protectable Interest in This Litigation.**

9 CISA has "a 'significant protectable interest'" because it asserts a sufficient "interest that is  
 10 protected under some law," and "there is a 'relationship' between its legally protected interest and the  
 11 plaintiff's claims," as shown below. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (*quoting*  
 12 *Northwest Forest Resource Council*, 82 F.3d at 837).

### 13 **i. CISA Asserts Qualifying Interests in the Puget Sound Area and** 14 **in the Public Interest Values it Champions There.**

15 CISA need not establish any "specific legal or equitable interest" to satisfy the "protectable  
 16 interest" requirement of Rule 24(a). *City of Los Angeles*, 288 F.3d at 398. Instead, courts "make a  
 17 practical, threshold inquiry" into an applicant's interest in the action, bearing in mind that the interest test  
 18 "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned  
 19 persons as is compatible with efficiency and due process." *Id.*

20 Applying this practical inquiry, the Ninth Circuit holds that public interest groups such as CISA  
 21 satisfy Rule 24(a)'s interest requirement where they intervene to defend causes and values they have  
 22 championed. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) ("there can be no  
 23 serious dispute in this case concerning . . . the existence of a protectable interest on the part of the  
 24 applicant," the Audubon Society, because an "adverse decision in this suit would impair the society's  
 25 interest in the preservation of birds and their habitats"); *Idaho Farm Bureau Federation*, 58 F.3d at 1398  
 26 (conservation groups had a sufficient interest in litigation challenging the listing of the Springs Snail  
 27 under the federal Endangered Species Act where they had "been active in the process [the U.S. Fish and  
 28 Wildlife Service] went through to list" the snail); *County of Inyo v. U.S.*, No. CVF06-1502 AWI-DLB,

1 2007 WL 1746389 at \*4 (E.D. Cal. June 14, 2007) (conservation organizations had a significant  
 2 protectable interest in a Quiet Title Act action regarding claimed rights-of-way and the scope of the rights  
 3 attaching to them because the action sought “to undo precisely what proposed intervenors worked to  
 4 accomplish”); *Mausolf v. Babbitt*, 85 F.3d 1295, 1302-03 (8th Cir. 1996) (conservation group seeking to  
 5 intervene to defend the National Park Service’s decision to close a national park to certain motor vehicle  
 6 use satisfied the interest requirement when it had “consistently demonstrated its interest in the Park’s  
 7 well-being . . . and ha[d] worked hard . . . to protect that interest”). *Alleman v. U.S.*, No. Civ.  
 8 99-3010-CO, 2003 WL 23975165, at \*4 (D. Or. Nov. 10, 2003) (conservation groups’ recreational,  
 9 environmental, and aesthetic interests in wilderness lands were sufficient to merit intervention where  
 10 plaintiff sought route across wilderness).

11 Here, CISA clearly satisfies Rule 24(a)’s interest requirement. CISA advocates proper resource  
 12 management in Puget Sound and its members enjoy fishing, boating, swimming, wading, windsurfing,  
 13 beachcombing and generally enjoying the wildlife and beauty of Puget Sound and its tidelands that are  
 14 threatened by Plaintiff’s desired expansion of its aquaculture operations without compliance with the  
 15 Corps’ section 404 permit requirements. Puddicombe Dec. ¶¶ 2-3. “CISA’s principal purpose is to  
 16 promote and ensure an ecologically healthy Puget Sound that can be safely enjoyed by CISA’s members,  
 17 the public at large and future generations.” *Id.* ¶2. “To that end, CISA advocates proper resource  
 18 management in Puget Sound and opposes the expansion of shellfish aquaculture there without unbiased  
 19 site-specific scientific review and stakeholder participation.” *Id.* CISA thus satisfies Rule 24(a)’s interest  
 20 requirement. *Sagebrush Rebellion, Inc.*, 713 F.2d at 528; *Alleman*, 2003 WL 23975165, at \*4.

21 Furthermore, like the conservation group intervenors in *Idaho Farm Bureau Federation*, 58 F.3d  
 22 at 1398, CISA and its members were active in and advocated CISA’s positions throughout the Corps’  
 23 administrative process leading up to the agency actions at issue here. Puddicombe Dec. ¶ 5. Among  
 24 other activities,

25 CISA and its members provided the Corps with detailed research on and photo  
 26 documentation of aquaculture’s biological, ecological, visual and other impacts,  
 27 including destruction of federally and state-protected eelgrass, degradation of  
 28 forage fish spawning habitat, proliferation of aquaculture-generated plastic debris  
 in Puget Sound, reduction of plankton, increased sedimentation on and nearby  
 aquaculture project sites, and disturbance and restriction of aquatic waterfowl  
 foraging . . . .

1 *Id.* CISA and its members have commented extensively on commercial shellfish growers' applications to  
2 the Corps for authorization under NWP 48. *Id.* ¶4, Exhibits 2 and 3.

3 The sufficiency of CISA's interests under Rule 24(a) is cemented by the fact that all of CISA's  
4 efforts will be undermined, and CISA's and its members' interests significantly impaired, if Plaintiff  
5 obtains the relief it requests – evasion of the Corps' section 404 individual, site-specific permit  
6 requirements. *County of Inyo*, 2007 WL 1746389 at \*4. Because CISA has long worked to protect Puget  
7 Sound, including the project areas at issue in this litigation, and because CISA and its members have  
8 significant interests in the area that will likely be impaired if Plaintiff obtains its requested relief, CISA's  
9 interests satisfy Rule 24(a).

10 **ii. CISA's Interests Are Legally Protectable.**

11 The requirement that an intervenor's interest in the litigation be "legally protectable" means that  
12 the interest is "generally protected by law." *Tiffany Fine Arts, Inc. v. U.S.*, 469 U.S. 310, 315 (1985);  
13 *Arakaki v. Cayetano*, 324 F.3d 1078, 1085 (9th Cir. 2003). "An applicant seeking to intervene need not  
14 show that the interest he asserts is one that is protected by statute under which litigation is brought. It is  
15 enough that the interest is protectable under any statute." *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 919  
16 (9th Cir. 2004) (internal quotations and citation omitted); *Arakaki*, 324 F.3d at 1085; *Sagebrush*  
17 *Rebellion, Inc.*, 713 F.2d at 526, n.1, 528 (allowing the Audubon Society to intervene even though its  
18 interests were not protected by – and indeed *contrary* to – the statutes put in issue by the complaint  
19 because an adverse decision in the suit would impair the Society's interest in preservation of birds and  
20 their habitat); *Georgia v. Ashcroft*, 539 U.S. 461, 476-77 (2003) (upholding order allowing private  
21 citizens to intervene in Voting Rights Act preclearance case even though they could not have filed the suit  
22 on their own and would not have been properly named as original defendants); *Trbovich v. United Mine*  
23 *Workers*, 404 U.S. 528, 535-37 (1972) (holding that a party could intervene even when it could not have  
24 filed suit under the statute relied upon by the original plaintiff).

25 CISA has protected interests in the specific project areas at issue. Among the federal statutes that  
26 protect CISA's interests, the CWA provides the clearest demonstration. When Congress enacted the  
27 CWA in 1972, it set the goal of restoring and maintaining the chemical, physical, and biological integrity  
28 of the waters of the US. 33 U.S.C. § 1251(a). As part of its protective scheme, the CWA prohibits the

1 “discharge of dredged or fill material into the navigable waters” of the United States except as permitted  
2 by the Corps. 33 U.S.C. § 1344. This prohibition extends to commercial shellfish operations in Puget  
3 Sound, and so directly protects CISA’s paramount interest in preserving Puget Sound’s natural resources  
4 and ecological health. Congress’ inclusion in the CWA of a provision allowing citizens to sue to enforce  
5 these and other requirements further safeguards CISA’s interests.

6 Besides the CWA, myriad other federal statutes also protect CISA’s interests here. For example,  
7 under the Endangered Species Act (“ESA”), 16 U.S.C. section 1531 *et seq.*, federal agencies must ensure  
8 that their actions are not likely to jeopardize the continued existence of endangered and threatened  
9 species. 16 U.S.C. § 1536(a)(2). Aquaculture activities along the Puget Sound shoreline could impact  
10 the available food for forage fish that are now protected under ESA regulations as a critical food source  
11 for threatened Chinook salmon and endangered steelhead. 50 C.F.R. § 17.11.

12 The Magnuson–Stevens Fishery Conservation and Management Act (“MSA”), 16 U.S.C. sections  
13 1801–1884, is another statute that guards CISA’s interests in preserving the ecological health and  
14 recreational fisheries of Puget Sound. The MSA was adopted by Congress in order “to conserve and  
15 manage the fishery resources found off the coasts of the United States” through the utilization of “sound  
16 conservation and management principles.” 16 U.S.C. § 1801(b)(1); *San Joaquin River Group v.*  
17 *National Marine Fisheries Service*, 819 F.Supp.2d 1077, 1084 (E.D. Cal. 2011). The MSA recognizes  
18 that “[o]ne of the greatest long-term threats to the viability of commercial and recreational fisheries is the  
19 continuing loss of marine, estuarine, and other aquatic habitats.” 16 U.S.C. § 1801(a)(9). The  
20 unpermitted expansion of aquaculture contemplated by Plaintiff constitutes one of these threats.

21 Yet another safeguard of CISA’s interests is the Coastal Zone Management Act (“CZMA”), 16  
22 U.S.C. section 1451 *et seq.*, which requires that federal agencies follow the policies of state management  
23 programs. 16 U.S.C. § 1456(c)(1); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1201 (9th Cir. 2004).  
24 Washington’s program in turn requires that projects comply with the CWA (including Washington’s  
25 water quality standards), the Shoreline Management Act (including local shoreline master programs), the  
26 State Environmental Policy Act, and other applicable laws.

27 Because CISA’s interests are protectable under the CWA, ESA, MSA and CZMA, among other  
28 federal statutes, they are “legally protectable interests” for purposes of Rule 24(a). *Alisal Water Corp.*,



1 370 F.3d at 919; *Arakaki*, 324 F.3d at 1085; *Sagebrush Rebellion, Inc.*, 713 F.2d at 528; *cf. Sierra Club v.*  
 2 *EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993), *abrogated on other grounds by Wilderness Society v. U.S.*  
 3 *Forest Service*, 630 F.3d 1173 (9th Cir. 2011).

4 **iii. CISA’s Legally Protected Interests Are Related to Plaintiff’s Claims.**

5 To meet the final prong, CISA must show that “there is a ‘relationship’ between its legally  
 6 protected interest and the plaintiff’s claims.” *Donnelly*, 159 F.3d at 409. “The relationship requirement  
 7 is met if the resolution of the plaintiff’s claims actually will affect the applicant.” *City of Los Angeles*,  
 8 288 F.3d at 398. This rule is not to be applied rigidly: “a party has a sufficient interest for intervention  
 9 purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.”  
 10 *California ex rel. Lockyer*, 450 F.3d at 441.

11 Because the relief sought by plaintiff would impair the resources that CISA exists to protect and  
 12 has fought to preserve, there is a direct relationship between CISA’s legally protectable interests and  
 13 Plaintiff’s claims in this case. Plaintiff’s Complaint attacks the Corps for failing to allow expansion of  
 14 commercial shellfish aquaculture in Puget Sound (Complaint ¶1.1), activities that CISA has strived to  
 15 limit and which it believes – and evidence it has submitted to the Corps shows – will result in  
 16 “ecological, recreational and public health impacts, including water pollution, habitat destruction,  
 17 destruction of native species, loss of biodiversity, reduced water clarity, restricted beach access and  
 18 impaired scenic resources.” Puddicombe Dec. ¶ 2. Plaintiff’s desire to expand its shellfish aquaculture  
 19 operations in Puget Sound without Corps approval would thus hinder CISA’s core mission and  
 20 significantly impair its interests and those of its members. CISA therefore satisfies the protectable  
 21 interest prong of Rule 24(a)’s inquiry. *California ex rel. Lockyer*, 450 F.3d at 441.

22 **3. Disposition of the Action May Impair CISA’s Ability to Protect its Interests.**

23 Under the third prong of the Rule 24( a) intervention test, a party must demonstrate that the  
 24 litigation “may as a practical matter impair or impede” its ability to protect its interests. FRCP 24(a)(2);  
 25 *California ex rel. Lockyer*, 450 F.3d at 440. The Advisory Committee Notes for the 1966 Amendments  
 26 to Rule 24(a) explain that, “[i]f an absentee would be substantially affected in a practical sense by the  
 27 determination made in an action, he should, as a general rule, be entitled to intervene.” *Southwest Center*  
 28 *for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). “Thus, the court is not limited to

1 consequences of a strictly legal nature.” *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d  
 2 1489, 1498 (9th Cir. 1995), *abrogated on other grounds by Wilderness Society*, 630 F.3d 1173.

3 The Ninth Circuit has long permitted conservation groups to intervene where the litigation at issue  
 4 may harm natural and other resources that are important to the groups’ missions and where the groups  
 5 have worked to protect those resources. *Idaho Farm Bureau Federation*, 58 F.3d at 1398 (impairment  
 6 prong of intervention test satisfied when claim could impair conservation groups’ ability to protect an  
 7 interest in a threatened species for which they had advocated); *Sagebrush Rebellion*, 713 F.2d at 527-28  
 8 (impairment of interest found where proposed intervenor conservation group had interests in protecting  
 9 wildlife and habitat and lawsuit sought to invalidate conservation area designation); *Utah Association of*  
 10 *Counties v. Clinton*, 255 F.3d 1246, 1253-54 (10th Cir. 2001) (where relief could result in reduced  
 11 environmental protection of national monument in which conservation groups had interest, groups’  
 12 interests were impaired); *Mausolf*, 85 F.3d at 1302-03 (same). In the present case, it is substantially  
 13 likely that CISA’s interests will be impaired if Plaintiff obtains the relief it has requested.

14 In sum, the relief sought by Plaintiff could impair the natural, recreational, aesthetic, wildlife and  
 15 other Puget Sound resources that CISA exists to protect and has fought to preserve. Because of the  
 16 resulting damage to the natural resources, scenic beauty and recreational opportunities in the areas of  
 17 Puget Sound at issue in this case, CISA’s members would be much less likely to enjoy the impacted areas  
 18 in the future. Puddicombe Dec. ¶ 3. CISA therefore satisfies the third prong of the Rule 24(a)  
 19 intervention test. *Idaho Farm Bureau Federation*, 58 F.3d at 1398; *Sagebrush Rebellion*, 713 F.2d at  
 20 527-28; *Utah Association of Counties*, 255 F.3d at 1253-54; *Mausolf*, 85 F.3d at 1302-03.

#### 21 4. No Parties to the Action Adequately Represent CISA’s Interests.

22 Rule 24(a)’s final requirement is that an applicant for intervention as a matter of right “must be  
 23 inadequately represented by the parties to the action.” *California ex. rel. Lockyer*, 450 F.3d at 440. This  
 24 requirement “is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate;  
 25 and the burden of making that showing should be treated as minimal.” *Trbovich*, 404 U.S. at 538 n.10;  
 26 *Forest Conservation Council*, 66 F.3d 1489, 1498 (9th Cir. 1995). To determine whether an applicant’s  
 27 interest is adequately represented by the existing parties, the court considers whether: ( 1) the interest of  
 28 a present party is such that it will undoubtedly make all of a proposed intervenor’s arguments; (2) a

1 present party is capable and willing to make such arguments; and (3) the proposed intervenor would offer  
2 any necessary elements to the proceedings that other parties would neglect. *Arakaki*, 324 F.3d at 1086.

3 The “most important” of these factors is how the proposed intervenor’s interest “compares with  
4 the interests of existing parties.” *Id.*; *Southwest Center for Biological Diversity*, 268 F.3d at 823 (a  
5 proposed intervenor is inadequately represented when there exists a “difference in interests,” such that an  
6 existing party “will not advance the same arguments as Applicants”). Although courts sometimes  
7 presume a governmental body or officer will adequately represent the interests of an absentee, this  
8 presumption does not hold when the government is “required to represent a broader view than the more  
9 narrow, parochial interests” of the proposed intervenors. *Forest Conservation Council*, 66 F.3d at 1499;  
10 *Johnson v. S.F. Unified Sch. Dist.*, 500 F.2d 349, 354 (9th Cir. 1974) (school district did not adequately  
11 represent the particular views of parents of children of Chinese ancestry when, *inter alia*, district was  
12 charged with representing all parents in the school district). “Inadequate representation is most likely to  
13 be found when the applicant asserts a personal interest that does not belong to the general public,” *Forest*  
14 *Conservation Council*, 66 F.3d at 1499, or “offers a perspective which differs materially from that of the  
15 present parties to [the] litigation.” *Sagebrush Rebellion, Inc.*, 713 F.2d at 528.

16 In *Sagebrush Rebellion, Inc.*, for example, the court allowed the intervention of a conservation  
17 group on the side of the federal defendant, the Interior Secretary. 713 F.2d 525. The court held that the  
18 Interior Secretary would not adequately represent the interest of the proposed intervenor-defendant  
19 conservation group because the group had “expertise apart from that of the Secretary [and] . . . offer[ed] a  
20 perspective which differs materially from that of the present parties to this litigation.” *Id.* at 528.

21 As in *Sagebrush Rebellion, Inc.*, the defendant federal environmental manager here – the Corps –  
22 will not adequately represent the interests of the proposed intervenor-defendant conservation group –  
23 CISA. While CISA and the Corps both seek to uphold the Corps’ decisions to not recognize NWP 48  
24 coverage for Puget Sound aquaculture projects that had never been planted with shellfish as of March 19,  
25 2007, their interests and “perspectives . . . differ[] materially.” *Id.* For example, to “ensure an  
26 ecologically healthy Puget Sound that can be safely enjoyed by CISA’s members, the public at large and  
27 future generations,” which is CISA’s principal purpose, CISA “opposes the expansion of shellfish  
28 aquaculture . . . without unbiased site-specific scientific review and stakeholder participation.”

1 Puddicombe Dec. ¶ 2. The Corps, on the other hand, supports and provides through its issuance of NWP  
 2 48 “a streamlined authorization process” for dredge and fill activities – like the shellfish projects at issue  
 3 in this case – instead of the traditional *site-specific* “permit process with a full public notice” that CISA  
 4 prefers. 77 Fed. Reg. 10184-01, 10185 (2012).

5 Furthermore, unlike CISA, the Corps is charged with representing and accommodating the general  
 6 public, which encompasses a broad spectrum of Puget Sound users including commercial shellfish  
 7 growers. CISA, by contrast, represents a more focused interest in protection of Puget Sound’s natural  
 8 resources, scenic beauty and recreational opportunities for CISA’s members and other non-commercial  
 9 interests. This interest is sometimes at odds with the commercial interests generally accommodated by  
 10 the Corps, particularly those of commercial shellfish growers.

11 In sum, the Corps’ interest is not such that it “will undoubtedly make all of” CISA’s arguments.  
 12 *Sagebrush Rebellion, Inc.*, 713 F.2d at 528.

13 **B. In the Alternative, CISA Should Be Granted Permissive Intervention.**

14 In the alternative, CISA asks the Court for permissive intervention. Rule 24(b) provides that “on  
 15 timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with  
 16 the main action a common question of law or fact.” *Id.* CISA easily satisfies the requirements of Rule  
 17 24(b), as shown below.

18 **1. CISA’s Claims and Defenses and the Main Action Share Common**  
 19 **Questions of Law and Fact.**

20 CISA’s proposed claims and defenses in this case will be based on the same questions of law and  
 21 fact as those raised in the main action. CISA does not seek intervention to raise new claims or issues, but  
 22 rather to ensure that its voice is heard and that its interests in a viable, sustainable and scientifically  
 23 unbiased CWA permitting system are protected. CISA seeks to defend the Corps’ reasonable exercise of  
 24 discretion not to recognize NWP 48 coverage for Puget Sound aquaculture areas that had never been  
 25 planted with shellfish as of March 19, 2007, while protecting the environmental and recreational  
 26 resources of the areas in question. Because CISA’s arguments “and the main action have a question of  
 27 law or fact in common,” CISA clearly qualifies for permissive intervention in this case. FRCP 24(b).  
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1 I HEREBY CERTIFY that on the 28<sup>th</sup> day of February, 2013, I filed the foregoing document with the Clerk  
2 of the Court using the CM/ECF system, which will send notice of filing to all parties registered in the  
CM/ECF system for this matter,

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4 s/Peggy S. Cahill  
Legal Assistant

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