☐ EXPEDITE
☐ No Hearing is set
☑ Hearing is set:
Date: 06/22/2018
Time: 9:00 AM
Judge/Calendar: Honorable Christopher Lanese

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

PROTECT ZANGLE COVE; COALITION TO PROTECT PUGET SOUND HABITAT; and WILD FISH CONSERVANCY, Petitioners, v. WASHINGTON DEPARTMENT OF FISH AND WILDLIFE; JOE STOHR, Acting Director of the Washington Department of Fish and Wildlife; and PACIFIC NORTHWEST AQUACULTURE, LLC, Respondents.	No. 18-2-01972-34 PETITIONERS' LIMITED OPPOSITION TO TAYLOR SHELLFISH COMPANY, INC.'S MOTION TO INTERVENE

I. INTRODUCTION

Petitioners Protect Zangle Cove, Coalition to Protect Puget Sound Habitat, and Wild Fish Conservancy (collectively, "Petitioners") hereby oppose, on limited grounds, Taylor Shellfish Company, Inc.'s ("Taylor") motion to intervene. Petitioners recognize that Taylor has an interest in this proceeding because it has declared its intention to partner with Respondent Pacific Northwest Aquaculture, LLC ("PNA") to operate the specific commercial geoduck facility (the "Facility") implicated by this litigation. Taylor, however, is not entitled to intervene as a matter of right because it is "adequately represented," both by Respondent Washington Department of Fish and Wildlife ("WDFW") and by PNA, with whom Taylor shares an attorney in this matter. Nevertheless, Petitioners do not oppose Taylor's motion for permissive intervention, as long as it is granted on terms that will ensure that it will not cause

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an undue delay or prejudice to the adjudication of the rights of the original parties in this matter.

Petitioners therefore respectfully recommend that, if the Court grants Taylor's motion to intervene, the Court (1) require Taylor and PNA to file joint briefs and make joint argument (or limit their combined page limit and argument time to that allocated to one party); and (2) prevent Taylor from expanding the scope of this litigation by advancing counterclaims, seeking to serve discovery, or otherwise.

II. STATEMENT OF FACTS

On April 12, 2018, Petitioners filed the Petition for Judicial Review, Declaratory Judgment and Injunctive Relief, against WDFW, Acting Director Joe Stohr, and PNA. The case is an agency rule-making challenge. Petitioners are seeking declaratory and injunctive relief related to WAC 220-660-040, which Petitioners allege unlawfully exempts commercial shellfish aquaculture operations from obtaining a Hydraulic Project Approval ("HPA") permit, as required by chapter 77.55 RCW. In addition to asking the Court to declare WAC 220-660-040 unlawful and direct WDFW to require HPA permits for aquaculture operations, Petitioners ask the Court to require PNA to obtain an HPA permit pursuant to chapter 77.55 RCW before operating the Facility. Taylor and PNA have stated an intention to partner in running the Facility, though they have not yet signed a written agreement. *See* Motion to Intervene at 2; *see also* Declaration of Aaron Schaer ("Schaer Decl.") ¶ 6, Ex. A at 25:15-26:1. PNA owns the property on which the Facility will operate, but Taylor has indicated its intention to be responsible for the majority of geoduck planting and harvesting activities. Motion to Intervene at 2. Taylor and PNA are represented by the same counsel in this litigation. *See id.* at 8.

On June 6, 2018, Taylor filed its motion to intervene. On June 11, 2018, counsel for Petitioners, WDFW, and Taylor and PNA had a phone conference on which Petitioners explained their concerns with Taylor's potential intervention, namely: (1) that Taylor was already adequately represented by PNA because they share counsel and plan to run the Facility together; (2) that, due to these overlapping interests, Taylor's intervention could amount to

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giving PNA/Taylor double briefing on every contested issue in this matter; and (3) due to Taylor's broader involvement in the commercial shellfish industry, it might seek to expand the scope of this litigation beyond the limited agency rule-making challenge. *See* Schaer Decl. ¶ 3. Petitioners explained that they would not oppose intervention if Taylor and PNA agreed to file filed joint briefs and Taylor agreed it would not expand the scope of the litigation. *Id.* ¶ 4. Taylor and PNA's counsel responded that they could not make any assurances regarding filing joint briefs, but that, at this time, Taylor was not planning on filing counterclaims or otherwise expanding the scope of the litigation. *Id.* ¶ 5.

III. LEGAL ARGUMENT

A. Taylor Cannot Intervene as a Matter of Right Under CR 24(a).

Civil Rule 24 provides for two types of intervention—intervention of right under CR 24(a) and permissive intervention under CR 24(b). Intervention of right is only permitted when provided by statute or "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the person is so situated that the disposition of the action may as a practical matter impair or impede the person's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." CR 24(a). To intervene as of right, a person seeking to become a party to a lawsuit must establish all of the following requirements:

(1) timely application for intervention;

(2) the applicant claims an interest which is the subject of action;

(3) the applicant is so situated that the disposition will impair or impede the applicant's ability to protect the interest; and

(4) the applicant's interest is not adequately protected by the existing parties.

Spokane Cty. v. State, 136 Wn.2d 644, 649, 966 P.2d 305 (1998). "All four of these requirements must be met" to qualify for intervention of right. *Westerman v. Cary*, 125 Wn.2d 277, 303, 892 P.2d 1067 (1994).

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Petitioners do not presently contest that Taylor meets the first three requirements for intervention. Taylor, however, is adequately represented by both PNA and WDFW, and is therefore not entitled to intervention as of right.

A party attempting to prove that it is not adequately represented in a litigation must establish "an interest divergent from that represented by" existing parties. *Fritz v. Gorton*, 8 Wn. App. 658, 661-62, 509 P.2d 83 (1973). Where a potential intervenor's "objective is identical" to an existing party's ultimate objective, representation is not inadequate, even if the parties' "ultimate motivation in this suit may differ." *City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1042-43 (10th Cir. 1996).[1] Likewise, "[r]epresentation is not inadequate simply because . . . the applicant and the existing party have different views on the facts, the applicable law, or the likelihood of success of a particular litigation strategy." *United States v. City of N.Y.*, 198 F.3d 360, 367 (2d Cir. 1999) (internal citation omitted). Moreover, the burden of persuasion to prove inadequate representation "is ratcheted upward" when, as in this case, a party is attempting to intervene alongside a party that is already defending a government decision "in their capacity as members of a representative governmental body." *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998); *see also Curry v. Regents of Univ. of Minn.*, 167 F.3d 420, 423 (8th Cir. 1999).

Taylor is adequately represented. Its interests do not diverge from either of Respondents. *See Fritz*, 8 Wn. App. at 661-62. In fact, Taylor's objective—maintaining the HPA exemption for commercial shellfish aquaculture—is identical to the objective of both WDFW and PNA. *See* Motion to Intervene at 3, 5. This is a rule-making challenge, and WDFW is in the best position to defend the legality of its rule. Taylor's business interests do not transform the matter before the Court, or impact whether or not the challenged rule is lawful. Moreover, Taylor's "ultimate motivation" is irrelevant to this inquiry. *See City of Stilwell*, 79 F.3d at 1042-43. Even if its ultimate motivation were relevant here, Taylor and PNA have the

[1] Because CR 24(a) and Federal Rule of Civil Procedure 24(a) are near-verbatim, Washington courts "look to decisions and analysis of the federal rule for guidance." *Am. Discount Corp. v. Saratoga W., Inc.*, 81 Wn.2d 34, 37, 499 P.2d 869 (1972).

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same motivation—to protect the business interests of the Facility. As of now, Taylor and PNA plan to co-manage the Facility. If anything, PNA actually has a stronger interest in defending the Facility: Taylor and PNA have not yet signed a written agreement to operate the Facility, which erodes the level of Taylor's interest in this matter.[2] The identical nature of the interests of Taylor and PNA are best illustrated by the fact that they are represented by the same attorneys. Although the rules of professional conduct do not determine whether parties are "adequately represented" under CR 24(a), it would be a fine line for counsel to represent parties with "divergent" interests as is required for CR 24(a) while simultaneously meeting the professional standards. *See* RPC 1.7 (explaining that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," which includes "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."). In short, because Taylor is adequately represented, it is not entitled to intervention of right.

B. CR 24(b) Permissive Intervention Should Not Be Granted Without Limitations.

Alternatively, Taylor asserts that it should be allowed to intervene permissively under CR 24(b), which grants the Court discretion to allow a party to intervene when it has a "question of law or fact in common" with the litigation. *Westerman*, 125 Wn.2d at 304. If such a common question exists, the Court must consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." CR 24(b)(2). If Taylor is granted permissive intervention without limitations, Taylor's participation may unduly delay or prejudice the adjudication of the rights of the original parties.

Petitioners have two main concerns. First, if limitations to intervention are not applied, counsel for Taylor and PNA could have two bites at the apple at every stage of briefing and argument to test different theories or focus on different arguments—in addition to the briefing

[2] To the extent that Taylor has broader "business, economic, property, and regulatory interests" in whether WAC 220-660-040 is declared unlawful, *see* Motion to Intervene at 8, it is no differently situated than any other person or entity that may seek to develop an aquaculture facility, and which would therefore be subjected to the applicable state law and WDFW rules.

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and argument by WDFW. For example, PNA and Taylor could file separate dispositive motions and merits briefs which focused on different facts and theories—even though they would all be authored by the same attorneys. Even if Petitioners were allowed additional pages and time to respond to the multiple briefs, it would unduly delay the litigation and prejudice Petitioners to allow two parties with nearly identical interests, who are represented by the same counsel, to file double briefing and present double argument.

Second, Taylor has indicated that it hopes to inject its "distinct interests" and "extensive experience" in the commercial shellfish industry into this litigation. *See* Motion to Intervene at 7-8. Based on these representations, Petitioners fear that Taylor will attempt to expand the scope of this case beyond its current contours: an agency rule-making challenge. The legality of the challenged rule should be determined based on the agency record and the relevant statutory authority—not by reference to Taylor's business interests. If Taylor attempts to expand the scope of this case beyond its current limited scope—be it through counterclaims, extended discovery, or otherwise—this litigation will be unduly delayed and Petitioners will be unduly prejudiced.

C. Petitioners Do Not Oppose Limited Intervention.

Petitioners recognize that Taylor has some level of interest in this litigation. But to the extent that Taylor seeks unlimited intervention, intervention is improper under CR 24(a) and CR 24(b). Petitioners therefore respectfully recommend that, if the Court grants Taylor's motion to intervene, the Court (1) require Taylor and PNA to file joint briefs and make joint argument (or limit their combined page limit and argument time to that allocated to one party); and (2) prevent Taylor from expanding the scope of this litigation by advancing counterclaims, seeking to serve discovery, or otherwise. *See, e.g.*, *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 527, 342 P.3d 308 (2015) (discussing that the trial court granted a party "limited intervention" to address a single issue in the case). These two requirements should ensure that Taylor's intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

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IV. CONCLUSION

If the Court allows Taylor to intervene, Petitioners respectfully request that the Court impose reasonable restrictions on that intervention, to ensure that Taylor's involvement does not unduly delay or prejudice the adjudication of the rights of the original parties.

DATED: June 19, 2018

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 19th day of June 2018, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system, and that it was served on all parties or their counsel of record via email in accordance with an Electronic Service Agreement:

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Executed on the 19th day of June, 2018, at Seattle, Washington.

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