

1 **POLLUTION CONTROL HEARINGS BOARD**  
2 **STATE OF WASHINGTON**

3 WILLAPA-GRAYS HARBOR OYSTER  
4 GROWERS ASSOCIATION,

5 Appellant,

6 v.

7 STATE OF WASHINGTON,  
8 DEPARTMENT OF ECOLOGY,

9 Respondent,

10 And

11 AD HOC COALITION FOR WILLAPA  
12 BAY,

13 Respondent Intervenors

PCHB No. 18-073

ORDER GRANTING INTERVENTION

14 **BACKGROUND**

15 On October 26, 2018, Willapa-Grays Harbor Oyster Growers Association (WGHOGA)  
16 filed an appeal with the Pollution Control Hearings Board (Board), challenging the Department  
17 of Ecology’s (Ecology) denial of its application for an NPDES permit to control an infestation of  
18 burrowing shrimp on the shellfish beds.

19 On December 12, 2018, the Ad Hoc Coalition for Willapa Bay (Coalition) filed and  
20 served a motion to intervene in the case. The Coalition, through its non-attorney spokesperson,  
21 describes itself as a “concerned group of oyster consumers, restaurant chefs, and oyster growers,

1 working to keep pollutants from contaminating Willapa Bay.” Coalition Motion, pp. 1, 2. The  
2 Coalition describes their interest in this matter as follows:

3       The disposition of Case No. P-18-073 will impact the interests of the [Coalition]  
4       in several ways. Water quality, recreational uses, and wildlife diversity will be  
5       diminished if pesticide spraying is allowed. Oyster consumers and chefs in our  
6       group do not want to prepare or eat oysters that may be contaminated. Oyster  
7       farmers who raise shellfish without pesticides do not want to risk contamination  
8       from drifting pesticide. Growers seeking to transition to Organic Certification  
9       will be blocked if pesticide is sprayed in the vicinity.

10 *Id.*, p. 2. The Coalition’s statements are not based on admissible evidence i.e. sworn statements  
11 from persons with first-hand knowledge. However, the Presiding Officer will consider the  
12 information because no timely challenge to the unsworn evidence was filed and the Coalition is  
13 representing itself without the aid of an attorney.<sup>1</sup> *See* WAC 371-08-385 (allowing the presiding  
14 officer to waive non-jurisdictional rules for parties representing themselves).

15       WGHOGA filed a response opposing the Coalition’s intervention on December 24, 2018.  
16 This response was late pursuant to the Board’s rules on motions. *See* WAC 371-08-450  
17 (4)(c)(“Unless a scheduling letter or order provides otherwise, the following schedule governs all  
18 written motions . . .(c) All responses to any nondispositive motion must be filed and served five  
19 days from receipt of the motion by the nonmoving party.”) Therefore, the Presiding Officer will  
20 not consider WGHOGA’s response.

21       The Coalition filed a timely reply on December 26, 2018. In their response, the Coalition  
clarifies that they are seeking to intervene as a matter of right. They also argue that their

---

<sup>1</sup> For future motion practice, both parties should present factual evidence through sworn affidavits or declarations.  
*See* CR 56(e).

1 interests are not identical to Ecology because their goal is to ensure that Organic Certification is  
2 an option for growers in Willapa Bay.

3 **DISCUSSION**

4 Intervention before the Board is governed by WAC 371-08-420, which provides in  
5 relevant part:

- 6 (1) The presiding officer may grant a petition for intervention by any person at  
7 any time, upon determining that the petitioner qualifies as an intervenor  
8 pursuant to civil rule 24, that the intervention will serve the interests of  
9 justice and that prompt and orderly conduct of the appeal will not be  
10 impaired.
- 11 (2) The presiding officer may impose conditions upon the intervenor's  
12 participation in the proceedings.

13 Intervention is generally favored so long as it does not pose a hardship on the original parties.  
14 *Loveless v. Yantis*, 82 Wn.2d 754, 759 (1973).

15 In ruling on a motion to intervene, the presiding officer analyzes the submission under  
16 CR 24, which provides for two types of intervention, intervention of right and permissive  
17 intervention. The Coalition, in its Reply, has clarified that it is seeking intervention as of right.  
18 CR 24 provides:

- 19 (a) **Intervention of Right.** Upon timely application anyone shall be permitted to  
20 intervene in an action: . . . (2) when the applicant claims an interest relating to  
21 the property or transaction which is the subject of the action and he is so  
situated that the disposition of the action may as a practical matter impair or  
impede his ability to protect that interest, unless the applicant's interest is  
adequately represented by existing parties.

1 A four-part test governs the decision whether or not to grant intervention of right under  
2 CR 24(a):

3 This rule thus imposes four requirements that must be satisfied before  
4 intervention must be granted: (1) timely application for intervention; (2) an  
5 applicant claims an interest which is the subject of the action; (3) the applicant is  
6 so situated that the disposition will impair or impede the applicant's ability to  
7 protect the interest; and (4) the applicant's interest is not adequately represented  
8 by the existing parties.

9 *Westerman v. Carey*, 125 Wn.2d 277, 303, 892 P.2d 1067 (1994).

10 The Presiding Officer concludes that the Coalition's motion to intervene is timely  
11 because it was filed shortly after the prehearing conference and before other deadlines in the  
12 litigation have run. The Coalition has presented information pertaining to their interest in the  
13 spraying of pesticides in Willapa Bay, including their financial interest in being able to claim  
14 organic grower status for their growing operations. Spraying chemicals in Willapa Bay could  
15 jeopardize this interest. Although the decision being defended is the permit denial, a reversal of  
16 the decision by the Board would open the door to approval of the use of pesticides. While  
17 Ecology is present to defend the application denial, Ecology's interests may not fully coincide  
18 with those of the Coalition, especially Coalition members' interests pertaining to organic  
19 certification. Therefore, the Presiding Officer cannot conclude that Ecology adequately  
20 represents the Coalition's interests.

21 Finally, granting the Coalition's intervention will serve the interests of justice.  
Intervention at this stage of the litigation will not work a hardship on the parties nor will it delay

1 resolution of the case. To ensure that the Coalition's intervention will not delay the proceedings,  
2 the presiding officer imposes conditions on the intervention. *See* Order below.

3 The Presiding Officer concludes that the Coalition meets the requirements of WAC 371-  
4 08-420 including the test for intervention as of right set out in CR 24(a).

5 **ORDER**

6 The Coalition's Motion to Intervene is GRANTED based on the following conditions:

- 7 a. The Coalition shall be bound by the existing issues in this appeal.  
8 b. The schedule established in the Prehearing Order shall govern the proceedings.  
9 c. At hearing, the Coalition shall share time with Ecology to present its case, and no  
10 hearing time will be added to accommodate the Coalition's intervention.

11 The caption of this appeal has been changed to indicate the Coalition's status as  
12 Respondent-Intervenors. All future pleadings filed by the parties shall be captioned accordingly.

13 SO ORDERED this 3rd day of January, 2019.

14 **POLLUTION CONTROL HEARINGS BOARD**

15  
16 \_\_\_\_\_  
17 KAY M. BROWN, Presiding  
18  
19  
20  
21