

FEB 24 2009

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

LAKE CARRIERS' ASSOCIATION,)
)
 Petitioner,)
)
 v.)
)
 LISA P. JACKSON, Administrator)
 U.S. Environmental Protection Agency,)
 and THE UNITED STATES)
 ENVIRONMENTAL PROTECTION)
 AGENCY,)
)
 Respondents.)

Case Nos. 09-1001
09-1010

**PETITIONER LAKE CARRIERS' ASSOCIATION'S RESPONSE TO THE
MOTION OF NORTHWEST ENVIRONMENTAL ADVOCATES, ET AL.,
FOR LEAVE TO INTERVENE AS RESPONDENTS**

Petitioner, the Lake Carriers' Association ("LCA"), opposes intervention by Northwest Environmental Advocates, *et al.* ("Intervenors"), in these consolidated appeals of EPA's the National Pollutant Discharge Elimination System (NPDES) Vessel General Permit (VGP), to the extent that their motion:

- rests upon the flawed contention that intervention is necessary to preserve a prior Ninth Circuit decision, which involved a challenge to a separate and distinct agency action, a different issue, and a holding which is not at issue in these appeals and, therefore, cannot supply a basis for intervention;
- is premised upon certain comments submitted by LCA to EPA on the draft VGP, which do not necessarily reflect the issues that will be raised by LCA in these appeals; and
- seeks leave to intervene as additional Respondents, as the Intervenors have already appealed the VGP in the Second and Ninth Circuits.

Additionally, Intervenors' motion is unnecessary. Prior to filing their motion, Intervenors had previously appealed the VGP in the Second and Ninth

Circuits. Intervenors' Motion at 4. On February 19, 2009, the United States Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 2112, entered an order consolidating petitions for review of the VGP in this Circuit. *See* Exhibit A (Panel Order). Consequently, even if there was some need for Intervenors to intervene in LCA's appeals, which LCA disputes, that need is now clearly gone.

ARGUMENT

A. Intervenors' Alleged Need To Preserve A Ninth Circuit Decision That Did Not Involve A Challenge To The VGP Does Not Supply Them With A Basis For Intervention.

Intervenors seek leave to intervene in these appeals because they allegedly "have an abiding interest in ensuring that the Ninth Circuit Court of Appeals decision in *Northwest Env'tl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008), is effectuated through a legally-adequate NPDES permit for vessel discharges." Intervenors' Motion at 1.¹ The Ninth Circuit's decision, however, is not at all implicated by LCA's appeals, which challenge a separate and distinct agency action. Consequently, Intervenors' "abiding interest" in preserving that decision does not supply them with a basis for intervention.

In *Northwest Env'tl. Advocates v. EPA*, plaintiffs petitioned the EPA, asking that the agency repeal 40 C.F.R. § 122.3(a), which exempted by regulation several categories of vessel discharges from NPDES permitting requirements under the CWA. 537 F.3d at 1013. Plaintiffs contended that the regulation was not authorized by the Clean Water Act and was thus *ultra vires*. EPA denied

¹ As the caption of the Ninth Circuit's decision indicates, movant Northwest Environmental Advocates was a party to the case.

plaintiffs' petition in its entirety. *Id.* Plaintiffs then brought suit against the EPA pursuant to the Declaratory Judgment Act and Administrative Procedure Act, challenging the final agency action denying their petition. *Id.* at 1014; *Northwest Env'tl. Advocates v. United States EPA*, No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476, at *17 (N.D. Cal. Sept. 18, 2006). Their first cause of action alleged that 40 C.F.R. § 122.3(a) was not authorized by the Clean Water Act and was thus *ultra vires*. 537 F.3d at 1014. Their second cause of action alleged, based on their *ultra vires* argument, that EPA's decision on their petition was "not in accordance with law." *Id.*

The district court granted summary judgment to plaintiffs on their first cause of action and ordered the EPA to repeal § 122.3(a). *Id.* The district court ordered further proceedings to determine the appropriate remedy and, on September 2006, vacated the challenged portions of 40 C.F.R. § 122.3(a) as of September 30, 2008. *Id.* at 1014.² The Ninth Circuit affirmed the decision of the district court. *Id.* at 1027.

The VGP was issued by EPA in order to replace the now vacated exemption. *See* 73 Fed. Reg. 79473 (December 29, 2008). The VGP is an entirely new EPA action that is separate and distinct from the regulatory exemption that was challenged and vacated by the court in *Northwest Env'tl. Advocates*, and challenges to portions of the VGP's validity are based on an entirely different set of issues and circumstances than those present in *Northwest Env'tl. Advocates*. Whether LCA

² The district court subsequently extended vacatur of the regulation until February 6, 2009. *See* 74 Fed. Reg. 7042 (Feb. 12, 2009).

wins or loses its appeals in this Court, § 122.3(a) will remain vacated in the Ninth Circuit pursuant to *Northwest Envtl. Advocates*.

Additionally, the Ninth Circuit's decision in *Northwest Envtl. Advocates* did not *compel* EPA to issue the VGP or any other Clean Water Act permit to fill the gap left by the district court's vacatur of § 122.3(a). 537 F.3d at 1027; *compare Natural Res. Def. Council, Inc. v. Costle*, 564 F.2d 573 (D.C. Cir. 1977) (affirming a district court order that EPA promulgate regulations consistent with the court's construction of section 208 of the Clean Water Act, 33 U.S.C. § 1288). To the contrary, EPA could have chosen not to issue the VGP at all. *See, e.g., Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977) ("The use of the word 'may' in § 402 [of the Clean Water Act] means only that the Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of § 301. This is the natural reading, and the one that retains the fundamental logic of the statute.").

In sum, while EPA ultimately chose to issue the VGP in response to the Ninth Circuit's decision, the agency action at issue in *Northwest Envtl. Advocates* (a regulatory exemption) is entirely separate and distinct from the agency action at issue in LCA's appeals (a nationwide general permit). Because LCA's appeals of the VGP do not implicate the Ninth Circuit's vacatur of § 122.3(a), Intervenor's "abiding interest" in preserving that decision is simply not affected. Thus, to the extent the basis for Intervenor's motion is preservation of the Ninth Circuit decision, that interest is insufficient to warrant intervention and the motion should be denied. *See SEC v. Prudential Sec.*, 136 F.3d 153, 161 (D.C. Cir. 1998)

(affirming district court's denial of intervention where movants had no legally protected interest in enforcing the terms of a consent decree); *see also Sierra Club v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004) (Easterbrook, J.) (“[o]fficious intermeddlers ought not be allowed to hijack litigation that the real parties in interest can resolve to mutual benefit”); *State of Tex. v. Dept. of Energy*, 754 F.3d 550 (5th Cir. 1985) (denying motion to intervene where intervenors’ only connection to the agency’s action was their funding of the program; funding was issue separate and apart from administration of program).

B. LCA’s Comments On The Draft VGP Do Not Supply A Basis For Intervention.

Intervenors contend that they should be permitted to intervene because, based upon comments submitted by LCA to EPA on the draft VGP, LCA will attempt to “re-litigate the key issue addressed in *Northwest Env’tl. Advocates*.” Intervenors’ Motion at 6.

As already explained, EPA’s issuance of the VGP is a distinct agency action and one that was not at issue in *Northwest Env’tl. Advocates*. The “key issue” decided by *Northwest Env’tl. Advocates* was whether EPA exceeded its authority under the Clean Water Act in promulgating § 122.3. *Northwest Env’tl. Advocates*, 537 F.3d at 1027. Whether, and to what extent, EPA exceeded its authority under the Clean Water Act in promulgating § 122.3 is not an issue that can be raised, or re-litigated, in the context of judicial review of the VGP in this Court under 5 U.S.C. § 706.

There is, moreover, no foundation for Intervenors' supposition that LCA's challenges to the VGP in these appeals will mirror its comments on the draft VGP. There is no requirement, and Intervenors do not suggest one, that a party seeking judicial review of the VGP is limited to raising, or must raise, only those issues it raised during the comment period on the proposed VGP. *See, e.g., Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) (EPA at all times "retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule," and therefore must justify its basic "assumptions even if no one objects ... during the comment period."); *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122 (D.C. Cir. 2008) ("an issue need not be raised explicitly [with the agency]; it is sufficient if the issue was 'necessarily implicated' in agency proceedings."); *Nevada v. Dept. of Energy*, 457 F.3d 78 (D.C. Cir. 2006) ("judicial review may be had if an issue was raised at the administrative level by a party other than the petitioner").³ Intervenors' supposition that LCA's challenges to the VGP must necessarily parallel its comments to EPA on the draft permit, therefore, cannot supply a basis for intervention.

C. Intervenors Should Be Precluded From Intervening As Respondents.

Intervenors seek to intervene in LCA's appeals as Respondents in support EPA's VGP. Intervenors' Motion at 1. At the same time, they have *challenged*

³ Additionally, these appeals were stayed before LCA was obligated to inform the Court, preliminarily, of the issues it intends to raise by its appeals.

the VGP in both the Ninth and Second Circuits on the grounds that it fails to comply with the requirements of the Clean Water Act. Intervenors' Motion at 4. Intervenors' challenges to the VGP in the Ninth and Second Circuit directly undermines their contention that their interests in LCA's appeals are aligned with those of Respondent EPA, such that they should be permitted to intervene on behalf of EPA. If Intervenors are at all successful in their own appeals, the VGP will, pursuant 5 U.S.C. § 706, be "h[e]ld unlawful and set aside" in whole or in part. Intervenors should, therefore, given their own challenges to the VGP, be precluded from intervening in this matter as additional Respondents.

Intervenors have, likewise, failed to demonstrate that intervention is necessary because EPA will not adequately represent their interests. Intervenors' interest in preserving the Ninth Circuit's decision is not implicated by LCA's appeals of the VGP. Thus, there is no interest of the Intervenors that EPA can be accused of not adequately representing in LCA's appeals. EPA's defense of the regulation challenged in *Northwest Env'tl. Advocates*, and its disappointment with the Ninth Circuit's decision, moreover, are not evidence that the agency will not defend the VGP. As noted above, the Ninth Circuit's decision in *Northwest Env'tl. Advocates* did not compel EPA to issue the VGP. EPA chose to issue the VGP and Intervenors have offered no evidence that EPA will not defend its action. See *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (intervention permitted where government's representation of the appellants' interests became potentially inadequate when government equivocated about whether it would appeal the adverse ruling of the district court).

D. Intervenor's Motion Is Unnecessary.

Because the Intervenor had previously filed their own appeals of the VGP in the Second and Ninth Circuits, their motion seeking intervention in LCA's appeals in this Court is unnecessary, as all such appeals of the VGP will ultimately be consolidated for disposition in one Court of Appeals. 28 U.S.C. §§ 2112(3), (5).

On February 19, 2009, the United States Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 2112, consolidated all appeals of the VGP in this Circuit. *See* Exhibit A (Panel Order). Even if there was some misperceived need for intervention in these appeals, therefore, that need is now clearly gone.

CONCLUSION

For the foregoing reasons, the Motion by Northwest Environmental Advocates, *et al.*, to intervene in these consolidated appeals should be denied.

Respectfully submitted,



February 24, 2009

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LAKE CARRIERS' ASSOCIATION,)	
)	
Petitioner,)	
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v.)	
)	
STEPHEN L. JOHNSON, et al.)	
)	
Respondents.)	

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2009, a copy of the foregoing document was served by first-class U.S. mail upon the following persons:

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A handwritten signature in black ink that reads "Christopher R. Tate". The signature is written in a cursive style with a horizontal line underneath the name.

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Exhibit A

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

FEB 19 2009

FILED
CLERK'S OFFICE

**UNITED STATES JUDICIAL PANEL
OR
MULTIDISTRICT LITIGATION**

**IN RE: ENVIRONMENTAL PROTECTION AGENCY,
FINAL GENERAL PERMIT: FINAL NATIONAL
POLLUTANT DISCHARGE ELIMINATION SYSTEM
(NPDES) GENERAL PERMIT FOR DISCHARGES
INCIDENTAL TO THE NORMAL OPERATION OF
A VESSEL, 73 FED. REG. 79,473, PUBLISHED ON
DECEMBER 29, 2008, ISSUED ON JANUARY 12, 2009**

National Resources Defense Council, Inc. v. EPA,)
Second Circuit, No. 09-0244)
Lake Carriers' Association v. Lisa Jackson,)
Administrator EPA and EPA, D.C. Circuit, No. 09-1010)

MCP-103

CONSOLIDATION ORDER


The Environmental Protection Agency published a final general permit on December 29, 2008. On February 19, 2009, the Panel filed pursuant to 28 U.S.C. § 2112(a)(3), a notice of multicircuit petitions for review of that permit. The notice included two petitions for review pending in two circuit courts of appeal as follows: Second Circuit and District of Columbia Circuit.¹


The Panel has randomly selected the United States Court of Appeals for the District of Columbia Circuit in which to consolidate these petitions for review.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 2112(a)(3), the above-captioned petitions for review are consolidated in the District of Columbia Circuit and that this circuit is designated as the circuit in which the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure.

¹ Any questions regarding the sufficiency of other petitions for review under rules promulgated by the Environmental Protection Agency are not properly before the Panel or contemplated by 28 U.S.C. § 2112(a)(1) and the rules promulgated thereunder.

FOR THE PANEL:


Jokeia Mells, Deputy Clerk
Random Selector


Denise Morgan Stone, Deputy Clerk
Witness