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The Honorable John C. Coughenour

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

PUGET SOUNDKEEPER ALLIANCE and  
SIERRA CLUB

Plaintiffs,

v.

SCOTT PRUITT,<sup>1</sup> in his official capacity as  
Administrator of the United States Environmental  
Protection Agency, and RICKY JAMES,<sup>2</sup> in his  
official capacity as Secretary of the Army for  
Civil Works,

Defendants.

Case No. 2:15-cv-01342-JCC

MOTION FOR LEAVE TO AMEND AND  
SUPPLEMENT COMPLAINT

Noted: April 20, 2018

Pursuant to Federal Rule of Civil Procedure 15 and Local Rule 15, Plaintiffs Puget  
Soundkeeper Alliance and Sierra Club (collectively “Plaintiffs”) respectfully request leave to  
amend and supplement the Complaint in the above-captioned case. Plaintiffs seek leave to

<sup>1</sup> Please note that pursuant to Fed. R. Civ. P. 25(d)(1), Scott Pruitt, Administrator of the U.S. Environmental  
Protection Agency, is substituted as a defendant for Gina McCarthy.

<sup>2</sup> Please note that pursuant to Fed. R. Civ. P. 25(d)(1), Ricky James, Secretary of the Army for Civil Works, is  
substituted as a defendant for Jo-Ellen Darcy.

1 amend and supplement the Complaint to add Idaho Conservation League as an additional  
2 plaintiff, allege new facts related to Defendants' February 2018 finalization of an "Applicability  
3 Date Rule" which amends the rule challenged in this case, and add two new claims against the  
4 U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (collectively  
5 "Defendants") related to Defendants' finalization of the Applicability Date Rule. In support of  
6 this Motion, Plaintiffs submit a proposed First Amended and Supplemental Complaint, attached  
7 as Exhibit A to this motion. Counsel for Plaintiffs contacted counsel for Defendants in this case  
8 on April 3, 2018, to request Defendants' position on this motion. Defendants were not able to  
9 respond within the requested time frame.

#### 10 BACKGROUND

11 Plaintiffs filed a Complaint in this case on August 20, 2015, bringing claims under the  
12 Clean Water Act ("CWA") and the Administrative Procedure Act ("APA") against specific  
13 portions of the 2015 "Waters of the U.S." definitional rule (hereinafter "2015 Final Rule")  
14 finalized by Defendants in 2015. *See* Pls. Compl., Aug. 20, 2015, ECF No. 1; 33 C.F.R. part  
15 328; 40 C.F.R. parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401. Although Plaintiffs  
16 and proposed plaintiff Idaho Conservation League had supported and commented favorably on  
17 the strong scientific grounding in the parts of the 2015 Final Rule that identify categories of  
18 waters that are definitional waters of the U.S. or that have a "significant nexus" to waters of the  
19 U.S., *see* public comments of Puget Soundkeeper, et al. at 23-24, 27, 38-39 (Nov. 14, 2014);  
20 public comments of Sierra Club, et al. at 1, 31-37 (Nov. 14, 2014); public comments of Idaho  
21 Conservation League at 1, 4-5, 7, 8 (Nov. 14, 2014), Plaintiffs brought CWA and APA claims  
22 against certain other discrete portions of the 2015 Final Rule. *See* Pls. Compl., Aug. 20, 2015,  
23 ECF No. 1. The 2015 Final Rule became effective, in its entirety, on August 28, 2015. *See*

1 “Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed. Reg. 37,054 (June 29,  
2 2015).

3 In addition to the instant case, various other challenges to the 2015 Final Rule were  
4 brought in federal district courts around the country, and a motion was made to transfer and  
5 consolidate these district court cases to the District Court for the District of Columbia. On  
6 September 9, 2015, this Court stayed this case pending a ruling from the Judicial Panel on  
7 Multidistrict Litigation regarding the motion to consolidate and transfer the district court cases.  
8 Minute Order, Sept. 9, 2015, ECF No. 14. Although this stay order was in response to  
9 Defendants’ motion to stay proceedings, the order also directed the clerk to “statistically close”  
10 this case. *Id.*

11 While these district court proceedings were taking place, petitions for review of the 2015  
12 Final Rule were also being brought in courts of appeals due to uncertainty about the proper  
13 original jurisdiction for challenges to the rule. The twenty-two petitions for review of the 2015  
14 Final Rule in the courts of appeals were consolidated in the Sixth Circuit, and on October 9,  
15 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the 2015 Final  
16 Rule. *In re E.P.A.*, 803 F.3d 804, 805 (6th Cir. 2015), *vacated sub nom. In re United States*  
17 *Dep’t of Def.*, 713 F. App’x 489 (6th Cir. 2018). After issuing this stay, the Sixth Circuit  
18 proceeded to consideration of the merits of whether it had jurisdiction to hear the petitions for  
19 review of the 2015 Final Rule.

20 In the meantime, on October 13, 2015, the Judicial Panel on Multidistrict Litigation  
21 entered an order denying the motion to consolidate and transfer the district court actions on the  
22 2015 Final Rule to the District Court for the District of Columbia. *See* Defs. Mot. to Stay  
23 Proceedings Att. A, Oct. 15, 2015, ECF No. 17. Two days later, on October 15, 2015,  
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1 Defendants filed a Motion to Stay Proceedings in this case because this Court's previously  
2 entered stay had only been pending the decision of the Judicial Panel on Multidistrict Litigation.  
3 *See* Defs. Mot. to Stay Proceedings, Oct. 15, 2015, ECF No. 16. This motion by Defendants to  
4 stay proceedings sought an additional stay pending the Sixth Circuit Court of Appeals' decision  
5 on the proper jurisdiction of challenges to the 2015 Final Rule. *See id.* Defendants' October 15,  
6 2015 Motion to Stay Proceedings was never ruled upon, presumably because this case was  
7 statistically closed at that time.

8 On February 22, 2016, the Sixth Circuit Court of Appeals decided that it had jurisdiction  
9 over the petitions for review of the 2015 Final Rule. *In re U.S. Dep't of Def., U.S. E.P.A.*, 817  
10 F.3d 261, 263 (6th Cir. 2016), *cert. granted sub nom. Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 137 S.  
11 Ct. 811 (2017), *rev'd and remanded sub nom. Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617  
12 (2018). This decision was appealed to the U.S. Supreme Court, and *certiorari* was granted on  
13 January 13, 2017. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 137 S. Ct. 811 (2017).

14 While waiting for the U.S. Supreme Court's decision on the proper jurisdiction of the  
15 court challenges, Defendants undertook three new administrative actions on the 2015 Final Rule.  
16 First, on March 6, 2017, the defendant agencies announced their future intent to review, rescind,  
17 and revise the 2015 Final Rule in a notice published in the Federal Register. *See* "Intention To  
18 Review and Rescind or Revise the Clean Water Rule," 82, Fed. Reg. 12,532 (March 6, 2017).  
19 Second, on June 27, 2017, the agencies proposed to repeal the 2015 Final Rule and recodify the  
20 previous regulatory definition of "Waters of the U.S." *See* "Definition of 'Waters of the United  
21 States' – Recodification of Pre-existing Rules," 82 Fed. Reg. 34,899 (June 27, 2017).  
22 Defendants filed a notice of this proposed rulemaking with this Court on June 30, 2017. *See*  
23 Defs. Notice of Proposed Rule, June 30, 2017, ECF No. 24. Finally, on November 22, 2017,  
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1 Defendants proposed to add an “applicability date” to the 2015 Final Rule. *See* “Definition of  
2 ‘Waters of the United States’—Addition of an Applicability Date to 2015 Clean Water Rule,” 82  
3 Fed. Reg. 55,542 (Nov. 22, 2017). Specifically, the agencies proposed to insert a new  
4 applicability date of two years from the date of the final adoption of the Applicability Date Rule,  
5 even though the rule had become effective on August 28, 2015, and even though there is no  
6 “applicability date,” compliance date, or any other form of later implementation date in the 2015  
7 Final Rule. The agencies’ stated purpose for the proposed new applicability date was to avoid  
8 “the possible inconsistencies, uncertainty and confusion” that could be caused by the Supreme  
9 Court’s ruling, particularly because the Supreme Court’s jurisdictional ruling could have the  
10 effect of nullifying the Sixth Circuit’s nationwide stay of the 2015 Final Rule. *Id.* at 55,544.  
11 The agencies also reasoned that rendering the rule inapplicable for two years would give the  
12 agencies sufficient time for their planned reconsideration of the 2015 Final Rule. *Id.* The  
13 agencies held a 21-day comment period on the proposed Applicability Date Rule, after denying  
14 requests for an extension of the comment period. Plaintiffs and proposed plaintiff Idaho  
15 Conservation League submitted timely comments opposing the publication of the Applicability  
16 Date Rule. *See* public comments of Ohio Valley Environmental Coalition, Puget Soundkeeper  
17 Alliance, Sierra Club, Idaho Conservation League, Minnesota Center for Environmental  
18 Advocacy, Cook Inletkeeper, Upper Missouri Waterkeeper, and Southeast Alaska Conservation  
19 Council (Dec. 13, 2017).

20 On January 22, 2018, the U.S. Supreme Court ruled that federal district courts, not the  
21 courts of appeals, have jurisdiction over challenges to the 2015 Final Rule. *Nat’l Ass’n of Mfrs.*  
22 *v. Dep’t of Def.*, 138 S. Ct. 617 (2018). As a result, the Sixth Circuit vacated its nationwide stay  
23 of the 2015 Final Rule on February 28, 2016. *In re United States Dep’t of Def.*, 713 F. App’x 489  
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1 (6th Cir. 2018).

2 On February 1, 2018, Defendants filed a Notice of Pertinent Rule, notifying this Court of  
3 its proposed Applicability Date Rule. *See* Defs. Notice of Pertinent Rule, Feb. 1, 2018, ECF No.  
4 26. A few days later, on February 6, 2018, the Agencies finalized the Applicability Date Rule,  
5 which added a new “applicability date” of February 6, 2020 to the 2015 Final Rule. *See*  
6 “Definition of ‘Waters of the United States’—Addition of an Applicability Date to 2015 Clean  
7 Water Rule,” 83 Fed. Reg. 5200 (Feb. 6, 2018). As a result of this new rule, Defendants are  
8 treating the 2015 Final Rule as “inapplicable” for the next two years.

#### 9 ARGUMENT

10 Federal Rule of Civil Procedure 15(a)(2) allows for the amendment of pleadings with  
11 leave of court, or with the opposing counsel’s written consent, before trial. Fed. R. Civ. P.  
12 15(a)(2). The Rule further provides that “[t]he court should freely give leave when justice so  
13 requires.” *Id.* In addition, Rule 15(d) specifically allows the filing of supplemental pleadings to  
14 allege new facts that occur after the filing of original pleadings. Rule 15(d) states that “[o]n  
15 motion and reasonable notice, the court may, on just terms, permit a party to serve a  
16 supplemental pleading setting out any transaction, occurrence, or event that happened after the  
17 date of the pleading to be supplemented.” Fed. R. Civ. P. 15(d).

18 Because Rule 15(a) instructs that leave to amend pleadings should be “freely” given, the  
19 standard of review is liberal. Indeed, the Ninth Circuit has instructed that the rule “should be  
20 interpreted with ‘extreme liberality,’” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir.  
21 1990) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981)), and “[a]n outright  
22 refusal to grant leave to amend without a justifying reason is ... an abuse of discretion.” *Smith v.*  
23 *Constellation Brands, Inc.*, 2018 WL 991450, at \*2 (9th Cir. Feb. 21, 2018) (quoting *Leadsinger,*  
24 *Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008) and citing *Foman v. Davis*, 371

1 U.S. 178, 182 (1962)). A district court only has discretion to deny leave to amend ““due to ...  
2 repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the  
3 opposing party by virtue of allowance of the amendment, [and] futility of amendment.”” *Id.* at  
4 \*2 (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) and  
5 *Leadsinger, Inc.*, 512 F.3d at 532).

6 Similarly, Rule 15(d) “is intended to give district courts broad discretion in allowing  
7 supplemental pleadings” to promote “judicial economy and convenience.” *Keith v. Volpe*, 858  
8 F.2d 467, 473 (9th Cir. 1988); *see also San Luis & Delta-Mendota Water Auth. v. U.S. Dep’t of*  
9 *Interior*, 236 F.R.D. 491, 496 (E.D. Cal. 2006) (“Leave should be freely given”). Supplemental  
10 pleadings should be allowed as a matter of course “unless some particular reason for disallowing  
11 them appears.” *Keith*, 858 F.2d at 473 (citation omitted).

12 In the case at bar, Plaintiffs seek to amend and supplement their Complaint in order to  
13 add two new claims arising out of events that happened after the date of the original Complaint,  
14 as well as to add an additional plaintiff that is harmed by those new events and by the specific  
15 portions of the 2015 Final Rule that excluded certain classes of waters from the protections  
16 required and afforded by the CWA. Specifically, Plaintiffs seek leave to amend their Complaint  
17 to add Idaho Conservation League as an additional plaintiff, and to supplement their Complaint  
18 with new facts and two new claims related to the two-year-long delay of the 2015 Final Rule  
19 accomplished by the publication of the Applicability Date Rule. The Applicability Date Rule  
20 was not proposed until November of 2017, and was not finalized until February of 2018 – more  
21 than two years after the filing of the original Complaint in this case. The new facts and claims  
22 related to the Applicability Date Rule directly arise out of Plaintiffs’ original Complaint, as the  
23 Applicability Date Rule amends the originally challenged rule. Therefore, as a matter of judicial  
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1 economy and convenience, it is appropriate for these claims to be added to the original  
2 Complaint, rather than brought as a separate action. Furthermore, the addition of these facts and  
3 claims to the existing case would not cause undue prejudice to Defendants.

4 CONCLUSION

5 For all of the above reasons, Plaintiffs respectfully request leave to amend and  
6 supplement the original Complaint in the above-captioned matter.

7 Respectfully submitted this 6<sup>th</sup> day of April, 2018.

8  
9 /s/ Janette K. Brimmer  
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League*



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**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2018, I electronically filed the foregoing Motion for Leave to Amend and Supplement Complaint with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

*/s/ Janette K. Brimmer*  
\_\_\_\_\_  
Janette K. Brimmer