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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ENVIRONMENTAL DEFENSE CENTER,

Plaintiff,

vs.

BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; BRIAN SALERNO, Director, Bureau of

Civil Case No.: 2:14-cv-09281-PSG-SH

NOTICE OF MOTION AND MOTION TO INTERVENE OF AMERICAN PETROLEUM INSTITUTE

Date: March 30, 2015

Time: 1:30 p.m.

Safety and Environmental Enforcement; JARON E. MING, Pacific Region Director, Bureau of Safety and Environmental Enforcement; BUREAU OF OCEAN ENERGY MANAGEMENT; WALTER CRUIKSHANK, Acting Director, Bureau of Ocean Energy Management; ELLEN G. ARONSON, Pacific Region Director, Bureau of Ocean Energy Management; UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, Secretary of the Interior,

Defendants.

Courtroom No. 880

Hon. Philip S. Gutierrez

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 30, 2015, at 1:30 p.m., or as soon thereafter as the matter may be heard before the Honorable Philip S. Gutierrez, United States Judge, in Courtroom 880 of the Edward R. Roybal United States Courthouse, 255 East Temple Street, Los Angeles, California 90012, the American Petroleum Institute ("API") will, and hereby does, move the court for an order permitting API to intervene as a defendant based upon the legally protectable interests of its members in the above-captioned matter either as of right pursuant to Federal Rule of Civil Procedure 24(a) or permissively pursuant to Federal Rule of Civil Procedure 24(b).

This Motion will be based on:

(1) This Notice of Motion and Motion and the attached Memorandum of Points and Authorities;

(2) The Declaration of Erik Milito, and all exhibits attached to the declaration; and

(3) The Proposed Answer of Intervenor American Petroleum Institute.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on January 28, 2015. Defendants take no position on this Motion, and Plaintiff takes no position at this time.

Dated: February 4, 2015

COVINGTON & BURLING LLP

By: */s/ Richard A. Jones*
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Attorney for Applicant for Intervention
AMERICAN PETROLEUM INSTITUTE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, the American Petroleum Institute ("API") respectfully moves for leave to intervene in the above-captioned matter.

This lawsuit challenges the decisions of the Bureau of Safety and Environmental Enforcement ("BSEE") of the United States Department of the Interior ("DOI") approving fifty-one Applications for Permits to Drill ("APD") and Applications for Permits to Modify ("APM") that Plaintiff asserts involve the use of certain well stimulation technologies, including hydraulic fracturing and acidizing, on the federal Outer Continental Shelf ("OCS") of California. Plaintiff Environmental Defense Center ("EDC") claims that these approvals violated the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act. EDC asks this Court to declare the government Defendants in violation of NEPA and enjoin both "further implement[ation] [of] the APDs and APMs for each and every one of the 51 approvals at issue in this action" and "***all*** pending and future APDs and APMs authorizing offshore well stimulation, until and unless Defendant BSEE complies with NEPA . . . ." Compl. (Dkt. No. 1), Prayer for Relief ¶ D (emphasis added).

API is the primary national trade association of the oil and natural gas industry, representing more than 600 companies involved in all aspects of that industry, including the exploration, production, shipping, transportation, and refining of crude oil. *See* Declaration of Erik Milito, ¶ 1 ("Milito Decl.") (submitted herewith). Together with its member companies, API is committed to ensuring a strong, viable U.S. oil and natural gas industry capable of meeting the energy needs of our Nation in an efficient and environmentally responsible manner. *See* Milito Decl. ¶ 3.

API's members are deeply engaged in the exploration and development of OCS oil and gas resources, including offshore California. *See* Milito Decl. ¶ 8. More broadly, API's members on occasion utilize well stimulation technologies, including hydraulic fracturing and acidizing, in conducting offshore exploration and development operations in order to improve well life and reliability, productivity, and oil recovery. *See* Milito Decl. ¶ 8. API's members are thus directly affected by EDC's demands to enjoin both the challenged, existing APDs and APMs offshore California and all pending and future offshore plans involving well stimulation methods. *See* Milito Decl. ¶ 9.

API is entitled to intervene in this action as of right, or, in the alternative, through permissive intervention.

ARGUMENT

I. API IS ENTITLED TO INTERVENE AS OF RIGHT.

Federal Rule of Civil Procedure 24(a) provides for intervention as of right if each of the following tests are met: (1) the motion is timely made, (2) the applicant claims a legally protectable interest relating to the property or transaction which is the subject of the action; (3) the interest may, as a practical matter, be impaired or impeded as a result of the litigation; and (4) existing parties do not adequately represent the applicant's interests. Fed. R. Civ. P. 24(a); *see also, e.g.*, *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001).

Courts in the Ninth Circuit "construe Rule 24(a) liberally in favor of potential intervenors," and assess a motion for intervention "primarily by practical considerations, not technical distinctions." *Id*. at 818 (quotation and citation omitted). Such "a liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *The Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (quotation and alteration omitted).

As set forth below, API satisfies each of the criteria for intervention.[1] Indeed, federal courts have routinely and repeatedly permitted oil industry trade associations—including API—to intervene on behalf of their members' interests in litigation involving both onshore and offshore oil and gas operations. *See*, *e.g.*, *Sierra Club v. United States of America*, No. 14-73682 (9th Cir.) (Jan. 5, 2015) (Docket Entry 15) (Order granting API intervention in challenge to the shipment of crude oil in certain types of rail cars); *Native Village of Chickaloon v. National Marine Fisheries Service*, 947 F. Supp. 2d 1031 (D. Alaska 2013) (API granted intervention in challenge to approval of Cook Inlet oil and gas seismic surveys); *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466 (D.C. Cir.

[1] An association has standing when its members would otherwise have standing in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual relief. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 181 (2000); *accord United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1096 (9th Cir. 2008). By showing *infra* that Rule 24 requirements are met, API also establishes that its members would themselves have standing. *See Sw. Ctr. for Biological Diversity*, 268 F.3d at 821 n.3; *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). Representation in litigation is germane to API's overall purposes of advancing the interests of the oil and gas industry, and "mere pertinence between litigation subject and organizational purpose is sufficient." *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 636 (D.C. Cir. 2000); *see also Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1122–23 (9th Cir. 2009) (finding interests "germane" where opponents' position "will interfere with the achievement of [associations'] goals"); Milito Decl. ¶ 2. Finally, no monetary relief is being sought. *See Comprehensive Drug Testing, Inc.*, 513 F.3d at 1096; *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343–44 (1977). API thus satisfies the three requirements of associational standing.

2009) (API granted intervention in challenge to Government's five-year OCS leasing program); *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 293 (D.C. Cir. 1988) (same); *California v. Watt*, 712 F.2d 584 (D.C. Cir. 1983) (same); *California v. Watt*, 668 F.2d 1290, 1294 n.1 (D.C. Cir. 1981) (same); *Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir. 1978) (Western Oil and Gas Association granted intervention in defense of first OCS lease sale offshore Alaska). *See also, e.g., Oceana v. Bureau of Ocean Energy Mgmt.*, --- F. Supp. 2d ---, 2014 WL 1281996 (D.D.C. Mar. 31, 2014) (API granted intervention in challenge to oil and gas lease sale); *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.*, 871 F. Supp. 2d 1312 (S.D. Ala. 2012) (API granted intervention in challenge to, *e.g.*, oil and gas lease sale).

A. API Has Timely Moved for Intervention.

This motion to intervene is timely because it has been filed at an early stage of the proceedings, and only two days after the Defendants filed their answer to the Complaint. *See, e.g., Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (noting that motion to intervene was timely where filed "less than three months after the complaint was filed and less than two weeks after the [government defendant] filed its answer to the complaint"); *Sierra Club v. U.S. Envt'l Protection Agency*, 995 F.2d 1478, 1481 (9th Cir. 1993) (upholding district court finding of timeliness where motion to intervene filed

before Government defendant filed answer), *abrogated on other grounds*, 630 F.3d 1173 (9th Cir. 2011).

B. API Possesses a Significantly Protectable Interest in this Proceeding.

Oil and gas development in the United States is carried out exclusively through private oil and gas companies, which acquire leases and then engage in exploration efforts that, if successful, will lead to production. Milito Decl. ¶ 7.[2] Operations for the exploration of oil and gas resources on an offshore lease are conducted pursuant to an exploration plan that must be approved by DOI. *See* 43 U.S.C. § 1340(c); 30 C.F.R. § 550.201; 30 C.F.R. §§ 550.211–235. Development and production operations are likewise subject to DOI approval through a development and production plan. *See* 43 U.S.C. § 1351; 30 C.F.R. § 550.201; 30 C.F.R. §§ 550.241–273. Before conducting drilling activities under an approved exploration or development plan, a lessee must also obtain BSEE's approval of, *inter alia*, an APD or APM. *See* 30 C.F.R. § 550.281(a)(1); 30 C.F.R. §§ 250.410–418; 30 C.F.R. §§ 250.465–469.

Members of API are directly engaged in such offshore exploration and production, and have been for decades among the principal developers of offshore

[2] "Courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 820.

leases throughout the United States, including offshore California. *See* Milito Decl. ¶ 8. API members operating on the federal OCS on occasion rely upon well stimulation technologies, including hydraulic fracturing and acidizing, in conducting offshore exploration and development operations in order to improve well life and reliability, productivity, and oil recovery. *See* Milito Decl. ¶ 8.[3]

While the Complaint requests an order enjoining fifty-one particular APDs and APMs issued to operators for activities on the California OCS until the Government complies with its purported NEPA obligations, *see* Compl. (Dkt. No. 1), Prayer for Relief ¶ D, the Complaint reaches far beyond California to seek an injunction against implementation of "***all*** pending and future APDs and APMs authorizing offshore well stimulation," *id*. (emphasis added). Thus, API's members are directly affected by EDC's challenge both to permits already obtained by (or operated by) API's members on the California OCS, and to future permits that API members will seek (or have already applied for). *See* Milito Decl. ¶ 9.

In other words, although Governmental agencies and officials are named as the defendants, in practice, restricting the offshore drilling activities of API's members on offshore leases is "a central goal of this action," thus clearly

[3] The use of hydraulic fracturing offshore is limited in comparison to onshore use, and the "scope of hydraulic fracturing offshore is significantly smaller than that for onshore operations . . . ." Milito Decl. ¶ 6 & Exh. A at 1.

qualifying API for intervention as of right. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 821; *see also California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) ("[A] party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation."); *In re City of Fall River, Ma.*, 470 F.3d 30, 31 (1st Cir. 2006) (recognizing that intervenor's application to export natural gas was "Petitioners' ultimate target" in seeking to compel agency to issue regulations) *Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002) (party has standing when its activities are the ultimate object of the legal challenge).

Private parties may accordingly intervene in defense of challenged conduct when their interests could be directly affected. *See Ross v. Marshall*, 426 F.3d 745, 757 n.46 (5th Cir. 2005) ("With respect to a potential intervenor seeking to *defend* an interest being attacked by a plaintiff in a lawsuit, we have observed that the intervenor is a real party in interest when the suit was intended to have a 'direct impact' on the intervenor."); *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818 ("Whether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry.") (quotation and alteration omitted).[4]

[4] The Ninth Circuit has recently overturned its prior rule prohibiting intervention of right on the merits of claims brought against the federal government under NEPA. *See Wilderness Soc'y*, 630 F.3d at 1176, 1180. Accordingly, "[a] putative intervenor will generally demonstrate a sufficient interest for intervention of right in a NEPA action, as in all cases, if 'it will suffer

In addition, API members broadly rely on occasion on well stimulation technologies, including hydraulic fracturing and acidizing, to facilitate oil and gas exploration, development, and production throughout the federal OCS, *see* Milito Decl. ¶ 8, which EDC likewise seeks to enjoin and subject to new environmental review, and thus further requires intervention. *See*, *e.g.*, *Supreme Beef Processors, Inc. v. U.S. Dep't of Agric.*, 275 F.3d 432, 437 n.14 (5th Cir. 2001) (association had Article III standing and sufficient interest to intervene where lawsuit "deal[t] with the application of a [regulatory] standard that affects [association's] members"); *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (association could intervene where members benefited from existing agency action challenged by petitioner); *Sierra Club*, 995 F.2d at 1481, 1485–86.

Finally, the interests of API's members are consistent with NEPA's "national policy" to "encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321; *see* Milito Decl. ¶ 3. *See also, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (With respect to prudential standing, a party's interests need only "*arguably* fall within the zone of interests protected *or regulated* by the statutory provision" at issue) (emphasis added).[5]

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a practical impairment of its interests as a result of the pending litigation.'" *Id*. at 1180 (quoting *Lockyer*, 450 F.3d at 441).

[5] *See also Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987) (holding that trade associations had standing, because even "[i]n cases where the plaintiff is

C. API's Protectable Interest May, as a Practical Matter, Be Impaired or Impeded as a Result of This Proceeding.

Satisfaction of the impairment requirement for intervention flows from API's legally protectable interest in the transactions and property underlying the case. *See Sw. Ctr. for Biological Diversity*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee's note on the 1966 amendments ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene . . . ."). The impairment prong of Rule 24(a) "look[s] to the practical consequences of denying intervention." *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977) (quotation omitted). *See also Lockyer*, 450 F.3d at 441.

Here, among other things, API's members *currently* enjoy a legally protected interest in approved APDs and APMs issued for operations on the California OCS. *See* Milito Decl. ¶ 8. *See also Sierra Club*, 995 F.2d at 1481, 1485–86. If EDC succeeds in enjoining implementation of these approvals and in imposing more restrictive permitting of all future requests of API members for APDs and APMs utilizing well stimulation technology, API would face practical

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not itself the subject of the contested regulatory action, the [zone of interest] test denies a right of review [only] if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.").

difficulty in restoring the status quo. *E.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (recognizing that it is irrelevant whether the applicant "could reverse an unfavorable ruling" in subsequent proceedings because "there is no question that the task of reestablishing the status quo if the [plaintiff] succeeds . . . will be difficult and burdensome.").

At a minimum such action would impose a lengthy administrative delay. *See Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992) (fishing group may intervene to defend lawsuit seeking to force government to change regulatory status quo, when "changes in the rules will affect the proposed intervenors' businesses, both immediately and in the future") (citation omitted). At worst, any subsequent lawsuit filed by API to restore the status quo "would be constrained by the *stare decisis* effect of" the present lawsuit, thereby supporting intervention in this initial lawsuit. *See Sierra Club*, 995 F.2d at 1486.

D. API's Interests Will Not Be Adequately Protected By Plaintiff or Defendants.

An applicant for intervention need only show that representation of its interest by an existing party "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538–39 & n.10 (1972); *see also, e.g.*, *Sw. Ctr. for Biological Diversity*, 260 F.3d at 823 (citing *Trbovich*). The burden of the applicant in meeting that test is "minimal." *Id.*

In this case, EDC's position is inimical to that of API, and the Government "is required to represent a broader view than the more narrow, parochial interests," *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (granting intervention), *abrogated on other grounds*, 630 F.3d 1173 (9th Cir. 2011), of the oil and gas industry. As the Supreme Court explained in *Trbovich*, a government agency cannot be characterized as able to adequately represent the interests of an intervenor if the agency has substantially similar interests to a potential intervenor, but has a statutory charge to pursue a different goal as well. *Trbovich*, 404 U.S. at 538–39.

Here, while the goals of the statute at issue—NEPA—include the interest of API's members in the exploration and production of offshore resources, *see supra* p. 9, these goals are not limited to those interests. *See* 42 U.S.C. § 4321. Although the Government's and API's interests could be expected to coincide in defending the claim of violations asserted in this action, these differing goals support API's intervention as of right. *See Citizens for Balanced Use*, 647 F.3d at 899 ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'" (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009))); *Forest Conservation Council*, 66 F.3d at 1499 ("The government must present the broad

public interest, not just the economic interest of . . . industry.") (quotation and alteration omitted). Because "[t]he interests of government and the private sector may diverge," "[o]n some issues [industry] will have to express their own unique private perspectives." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823.

Having met its "minimal" burden of showing that its interests are not adequately represented by either EDC or the Government, API should be allowed to intervene in this case as of right.

II. IN THE ALTERNATIVE, API QUALIFIES FOR PERMISSIVE INTERVENTION UNDER RULE 24(b).

Fed. R. Civ. P. 24(b)(1) and (3) provide in pertinent part:

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact . . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

API's and the Government's defenses to the Complaint will involve common questions of law—for example, the standards imposed by NEPA and the Administrative Procedure Act—and fact regarding the Government's fulfillment of its statutory and administrative obligations. In addition, as shown above, API has a substantial interest in the outcome of this litigation. Moreover, this litigation's basic simplicity as a primarily legal dispute belies any concern that API's intervention will result in prejudice to the original parties, and, at any rate, API's intervention vindicates "a major premise of intervention—the protection of

third parties affected by pending litigation." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 971 (3rd Cir. 1998). Finally, API applied to intervene in a timely manner and no delay or prejudice can be shown to the rights of the original parties herein.

Thus, if the Court does not allow API to intervene as of right, it should allow API permissive intervention in the exercise of its sound discretion.

CONCLUSION

For the foregoing reasons, API meets the requirements for intervention, and respectfully requests that this Court grant this motion for leave to intervene. As required by Federal Rule Civil Procedure 24(c), API has included with this motion its proposed Answer to the Complaint as Exhibit 1 hereto.

Respectfully submitted,

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February 4, 2015

Attorneys for Applicant for Intervention

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015, I caused the foregoing Motion to Intervene, and all attachments, to be served upon counsel of record through the Court's CM/ECF System.

Dated: February 4, 2015

/s/ Richard A. Jones
Richard A. Jones