UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-9281 PSG (SHx)	Date	April 2, 2015
Title	Environmental Defense Center v. Bureau of Safety and Environmental Enforcement, *et al.*		

Present: The Honorable	Philip S. Gutierrez, United States District Judge	
Wendy Hernandez		Not Reported
Deputy Clerk		Court Reporter
Attorneys Present for Plaintiff(s):		Attorneys Present for Defendant(s):
Not Present		Not Present

Proceedings (In Chambers): Order GRANTING Motions to Intervene

Pending before the Court are American Petroleum Institute and Exxon Mobil Corporation's motions to intervene. *See* Dkts. # 15, 19. The Court finds the matters appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. After considering the papers submitted by American Petroleum Institute, Exxon Mobil Corporation, and the Parties, the Court GRANTS American Petroleum Institute's motion to intervene and GRANTS Exxon Mobil Corporation's motion to intervene.

I. Background

On December 3, 2014, Plaintiff Environmental Defense Center ("EDC" or "Plaintiff") filed this action against Defendants Bureau of Safety and Environmental Enforcement ("BSEE"), Brian Salerno, in his official capacity as Director of BSEE, Jaron E. Ming, in his official capacity as the Pacific Region Director of BSEE, Bureau of Ocean Energy Management ("BOEM"), Walter Cruickshank, in his official capacity as Acting Director of BOEM, Ellen G. Aronson, in her official capacity as Pacific Region Director of BOEM, the United States Department of the Interior ("DOI"), and Sally Jewell, in her capacity as Secretary of the Interior (collectively, "Defendants"). *Compl.* ¶¶ 10-31.

Plaintiffs claim that Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, in connection with BSEE's approval of fifty-one applications for Permits to Drill ("APDs") and applications for Permits to Modify ("APMs") authorizing well stimulation methods – including acid well stimulation and hydraulic fracturing – to facilitate oil and gas development and production from offshore platforms located within federal, Outer Continental Shelf ("OCS") waters off the coast of California. *Id.* ¶ 3. Specifically, Plaintiff challenges APDs and APMs that authorized well stimulation methods "during drilling operations from offshore oil platforms located within the Santa Barbara

Channel." *Id.* ¶ 75. Plaintiff seeks that the Court, *inter alia*, enjoin Defendants from further implementing the challenged APDs and APMs, "as well as all pending and future APDs and APMs authorizing offshore well stimulation, until and unless Defendant BSEE complies with NEPA and all other applicable laws." *Id.* 39:8-13.

American Petroleum Institute and Exxon Mobil Corporation (together, "Proposed Intervenors") filed these motions to intervene on February 4, 2015 and February 18, 2015, respectively, under Federal Rule of Civil Procedure 24. *See* Dkts. # 15, 19.

A. Exxon Mobil Corporation

Exxon Mobil Corporation ("Exxon") is a "long standing and active participant in oil and gas exploration and development activities in the Pacific OCS Region." *Declaration of Ken Dowd* ("Dowd Decl.") ¶ 3. Exxon operates the Santa Ynez Unit, which is located in the Santa Barbara Channel and contains 16 OCS leases with interest in each owned exclusively by Exxon. *Id.* ¶¶ 4-5. Exxon conducts its activities from the Heritage Platform, the Harmony Platform, and the Hondo Platform – all of which are located in the Santa Ynez Unit. *Id.* ¶ 6. Exxon currently operates over one hundred wells in the Santa Ynez Unit and has made "substantial investments in acquiring, exploring, and developing the lease interests that make up the Santa Ynez Unit." *Id.* ¶¶ 10-11.

Exxon obtained ten of the APDs and nineteen of the APMs that Plaintiff challenges, has obtained additional permits for well stimulation in the three platforms described above, and intends to apply for an additional APD in the Santa Ynez Unit that contemplates well stimulation technologies at issue in this litigation. *Exxon Mot.* 2:20-22; *Dowd Decl.* ¶¶ 6, 17-20. Furthermore, Exxon plans to "continue to evaluate and generate new opportunities to develop the [Santa Ynez Unit] leases including but not limited to the drilling of new wells and stimulation of new and existing wells." *Dowd Decl.* ¶ 24.

B. American Petroleum Institute

American Petroleum Institute ("API") is a national trade association, which represents more than six hundred companies "involved in all aspects of the oil and natural gas industry, including the exploration, production, shipping, transportation, and refining of crude oil." *Declaration of Erik Milito* ("Milito Decl.") ¶ 1. API's members are "directly engaged in offshore oil and gas exploration and production" and "on occasion rely upon well stimulation technologies, including hydraulic fracturing and acidizing, to improve well life and reliability, productivity, and oil recovery." *Id.* ¶ 8. Specifically, Exxon, which obtained twenty-nine of the

challenged permits, and Freeport-McMoRan, Inc., which obtained four of the challenged permits, are members of API. *Id.*

II. Legal Standard

Under Federal Rule of Civil Procedure 24(a), anyone can intervene in an action as a matter of right who:

> Claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). In the Ninth Circuit, courts apply a four part test to determine if intervention as of right is warranted. *See Wilderness Soc. v. United States Forest Service*, 630 F. 3d 1173, 1177 (9th Cir. 2011). Specifically, an applicant must show that: (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest. *E.g.*, *Id.*; *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Courts construe this rule "broadly in favor of proposed intervenors" and consider "practical and equitable considerations." *Wilderness Soc.*, 630 F.3d at 1179 (quotations omitted).

Under Federal Rule of Civil Procedure 24(b), courts have discretion to grant permissive intervention to anyone who, "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b); *see* 7C Wright, Miller, & Kane, *Federal Practice and Procedure:* Civil 2d § 1913 at 376 (2d ed. 1986) ("[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b)."). In considering whether to grant intervention under Rule 24(b), the Court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b).

III. Discussion

The Proposed Intervenors both claim that they are entitled to intervene in this action as of right because they each meet all of the elements of the Ninth Circuit four-part test. *See Exxon Mot.* 1:3-2:5; *API Mot.* 2:1-25. Defendants do not oppose the motions. *See* Dkts. # 17, 20. Plaintiff, in turn, filed a partial opposition where it does not challenge the Proposed Intervenors' assertion that they are entitled to intervene as a matter of right, but argues that the Court should

not grant both motions because one Proposed Intervenor could adequately represent both Proposed Intervenors' interests. *Opp.* 1:22-2:7. Plaintiff requests that if the Court grants both motions to intervene, it "require intervenors to submit joint and consolidated pleadings." *Id.* 2:8-10. The Court will first determine whether the Proposed Intervenors are entitled to intervention as a matter of right, and whether to grant both motions to intervene. If it does, it will address Plaintiff's request to impose conditions on the Proposed Intervenors.

A. Intervention as of Right

The Court agrees with the Proposed Intervenors that they are entitled to intervention as of right. [1]

First, to "determine whether putative intervenors demonstrate the 'significantly protectable' interest necessary for intervention of right in a NEPA case, the operative inquiry should be whether the 'interest is protectable under some law' and whether 'there is a relationship between the legally protected interest and the claims at issue.'" *Wilderness Soc.*, 630 F. 3d at 1180 (citing *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)). Therefore, a proposed intervenor, "will generally demonstrate a sufficient interest for intervention of right in a NEPA action . . . if 'it will suffer a practical impairment of its interests as a result of the pending litigation.'" *Id.* (citing *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)).

The Proposed Intervenors have made a showing that they have significantly protectable interests related to this litigation. Exxon has a personal financial interest in this litigation because it has "invested significant resources in obtaining" twenty-nine of the challenged APDs and APMs and in "conducting drilling activities and operations on the wells associated" with those permits. *See Exxon Mot.* 5:1-10. Furthermore, Plaintiff's requested relief could prevent Exxon's ability to begin operations on additional permits it has obtained and could impair its "planned further developments of the Santa Ynez Unit." *See id.* 5:11-18. API, too, has shown that it has a significantly protectable interest related to this matter. As explained above, API is a trade association whose members are engaged in many aspects of "offshore development and production." *API Mot.* 6:21-23. Two of API's members – Exxon is one of them – have permits that are being challenged and, as API writes, its members are affected with regards to "future permits that API members will seek." *See id.* 7:14-20.

[1] The Court declines to analyze whether permissive intervention is warranted under Federal Rule of Civil Procedure 24(b) because it has found that the Proposed Intervenors are entitled to intervene as of right under Federal Rule of Civil Procedure 24(a).

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Second, the Proposed Intervenors have also shown that their protectable interests will be impaired as a result of this proceeding. *Wilderness Soc.*, 630 F. 3d at 1177. The relief sought by Plaintiff would undoubtedly have a "significant detrimental impact on [Exxon's]" interests in its Santa Ynez Unit leases and permits. *Exxon Mot.* 6:12-14. API's interests will also be impaired. As described above, API's members currently have legally protectable interests in the challenged permits and their plans to further use the challenged well stimulation technology will be impaired by Plaintiff's requested relief. *API Mot.*10:15-11:1.

Third, both Proposed Intervenors have timely moved to intervene. This case is in an early stage of litigation. No substantive briefing on the merits has been submitted and the scheduling conference has not occurred. Intervention would not cause delay or unduly prejudice the Parties. *See Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (finding that motion to intervene was timely when it "was made at an early stage of the proceedings, the parties would not have suffered prejudice from the grant of intervention at that early stage, and intervention would not cause disruption or delay in the proceedings.").

Lastly, to determine whether a proposed intervenor has shown inadequacy of representation, courts in the Ninth Circuit examine three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). "The burden on proposed intervenors in showing inadequate representation is minimal, and would be satisfied if they could demonstrate that representation of their interests 'may be' inadequate." *Id.* (citation omitted). When a proposed intervenor and an existing party share the same ultimate objective, however, "a presumption of adequacy arises." *See Citizens*, 647 F.3d at 898. To rebut this presumption, a proposed intervenor must make a "compelling showing" of inadequacy of representation. *Id.* (quotations and citations omitted).

Here, this presumption does not apply because neither current Party shares the same ultimate goal with the Proposed Intervenors and after analyzing the factors outlined above, the Court agrees that the Parties would not adequately represent the Proposed Intervenors' interests. As API contends, Plaintiff's position in this litigation is inimical to that of API and to Exxon, because the relief it seeks would impair both of the Proposed Intervenors' interests. *See API Mot.* 12:1-4. Furthermore, although the Proposed Intervenors may share some common goals in this litigation, the Proposed Intervenors seek to protect their private interests while the Defendants have an interest in protecting the public in general. *See Snowlands Network v. U.S.*, 2012 WL 4755161, at *3 (E.D. Cal. 2012) ("Defendant is a regulatory agency charged with

making decisions for the benefit of the entire population. As a result, Applicants necessarily set forth more specific goals and objectives than the much broader interests that Defendant must take into account."). As a result of these divergent interests, the Defendants may not make the same arguments as the Proposed Intervenors and it is clear that the Proposed Intervenors would offer necessary elements to the litigation that the Defendants, which much broader interests, may neglect.

For the reasons stated above, the Court finds that the Proposed Intervenors are entitled to intervention as of right under Federal Rule of Civil Procedure 24(a).

B. Intervention by Both Proposed Intervenors

Plaintiff contends, however, that both Proposed Intervenors should not be allowed to intervene because if the Court "grants intervention to API, [Exxon's] interest would be adequately represented" and if the Court "grants [Exxon's] motion for intervention, API's interest would be adequately represented." *Opp.* 2:2-7.

According to Plaintiff, there is a presumption of adequate representation because the Proposed Intervenors share the same ultimate objective and they must, consequently, make a compelling showing of inadequate representation. *Opp.* 3:2-10. That is, Plaintiff claims that because the Proposed Intervenors have an interest in (1) the challenged permits, (2) pending or future permits, and (3) broad reliance on well stimulation techniques in the federal OCS, they have the same ultimate objective to have "uninterrupted use of offshore well stimulation techniques, including offshore fracking and acidizing." *Id.* 3:7-4:12.

The Court disagrees. As both Proposed Intervenors argue, API's interests are significantly broader than Exxon's. *API Mot.* 3:7-4:4:18; *Exxon Mot.* 3:24-4:4. Whereas Exxon seeks to protect its financial investment, API seeks to address "industry-wide concerns and to protect the collective interests of its 600-plus members." *Exxon Mot.* 3:26-28; *API Mot.* 3:7-23; *see Defenders of Wildlife v. Minerals Management Service*, 2010 WL 5139101, at *3 (noting that proposed intervenor, who owned leases for drilling in the Gulf of Mexico had a "much more narrowly focused, direct and specific interest in [the] controversy than the broader and more general industry-wide concerns that may animate [a trade association's] intervention and endgame strategies."). Therefore, although Exxon is one of API's members, API seeks to represent another holder of the challenged permits, as well as "drilling companies, service and supply companies, equipment manufacturers, and a variety of vendors to all such entities." *API Mot.* 3:7-13. Resultantly, while the Proposed Intervenors may share certain goals, there are sufficient differences such that this presumption of adequate representation does not apply.

Even if it did, the Court would find that Exxon's representation of API would not be adequate, and *vice versa*. The Court agrees with Exxon that API, which seeks to represent members with varying types of operations and interests, may not make "all of [Exxon's] arguments." *Exxon Mot.* 4:11-13. Furthermore, "because [Exxon], as a permit holder, has specific knowledge regarding the permitted activities at issue, [it] can offer necessary elements to the proceeding which other parties may neglect." *Id.* 4:13-16. API, on the other hand, with its "broader view of the oil and gas industry and reflection of the many segments that play a role in exploration and production" could provide a necessary perspective as to Plaintiff's broad request for injunctive relief. *See API Mot.* 5:19-6:7.

Accordingly, the Court GRANTS the Proposed Intervenors' requests for intervention.

C. Limitations on Intervenors

Plaintiff requests that the Court impose certain restrictions on the Intervenors to "promote judicial economy." *Opp.* 10:8-11. Exxon argues that although "joint briefing is not warranted" it does "not oppose reasonable restrictions regarding the timing of brief submissions, page limitations, and other matters necessary to ensure the fair and prompt conduct of this case." *Exxon Reply* 7:14-19. API also argues that joint briefing is unwarranted but that the Proposed Intervenors are "likely to coordinate to prevent advancing duplicative arguments." *API Mot.* 8:6-9. The Court is sensitive to Plaintiff's concern, especially when the Proposed Intervenors do share certain interests and may likely make similar arguments in certain instances, and finds it appropriate to address these concerns at the upcoming Scheduling Conference currently set for **April 13, 2015 at 2:00PM.** Accordingly, the Court DENIES Plaintiff's request.

IV. Conclusion

For the reasons stated above, the Court GRANTS API's motion to intervene and GRANTS Exxon's motion to intervene. API and Exxon shall hereby be listed in this action as Intervenor-Defendants. API's answer and Exxon's answer to Plaintiff's complaint are accepted for filing and will be deemed filed as of the date of this Order.

IT IS SO ORDERED.

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