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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALERT PROJECT/EARTH ISLAND INSTITUTE; ALASKA COMMUNITY ACTION ON TOXICS; COOK INLETKEEPER; CENTER FOR BIOLOGICAL DIVERSITY; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN,

Plaintiffs,

vs.

ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No.: 3:20-CV-00670-WHO

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE BY AMERICAN PETROLEUM INSTITUTE

DATE: MAY 13, 2020
TIME: 2:00 P.M.
DEPT: SAN FRANCISCO, COURTROOM 2
HON. WILLIAM H. ORRICK

NOTICE: Pursuant to General Order 72, all civil matters will be decided on the papers, unless the assigned judge determines a telephonic or video conference hearing is necessary.

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INTRODUCTION

This case presents two questions. The first is whether the U.S. Environmental Protection Agency ("EPA") has a duty under the Clean Water Act ("CWA") to update its National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), which governs the nation's response to oil spills. The second is whether EPA's ongoing failure to take final action on Plaintiffs' petitions to update the NCP, and EPA's delay in concluding its NCP rulemaking process, violate the Administrative Procedure Act's ("APA") prohibition on unreasonable agency delay. *See* Pls.' Compl. for Decl. and Inj. Relief, ECF No. 1 ¶ 6 ("Compl.").

Plaintiffs are concerned that the current NCP, which EPA has not updated in 26 years, does not reflect significant advances in scientific knowledge regarding the toxicity and efficacy of chemical dispersants in oil spill response. They are also intimately aware of the harmful implications of the current NCP's deficiencies. The inclusion or exclusion of specific requirements in the NCP is not, however, at issue in this case. Here, the Court must decide only whether EPA has unlawfully withheld or unreasonably delayed an update to the NCP. Plaintiffs' ask is simply that this Court compel EPA to act by a date certain—a request that neither determines nor prejudges the substance of EPA's action in response to a court-ordered deadline.

The American Petroleum Institute ("API") seeks to intervene on the grounds that its members are regulated under the NCP. API Mot. to Intervene, ECF No. 23, at 6-7 ("Interv. Br."). However, as described below, the "interest" API seeks to protect is irrelevant to this case, which concerns the timing—not the substance—of EPA's action. Numerous courts have denied motions to intervene where, as here, the plaintiffs challenged an agency's failure to act; the substance of any ultimate agency action was not at issue; and the proposed intervenors would have ample, later opportunity to challenge the agency action on its merits. The Court should do so here, and deny API's motion to intervene.

BACKGROUND[1]

Congress passed the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish these goals, Section 311 of the CWA mandates that the President "prepare and publish a National Contingency Plan for removal of oil and hazardous substances" that "provide[s] for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges" in the waters of the United States. *Id.* § 1321(d)(1)-(2). The President delegated his authority to EPA by Executive Order. Exec. Order No. 12777, 56 Fed. Reg. 54,757 (Oct. 22, 1991).

EPA has a statutory duty under the CWA to ensure that the NCP provides for effective oil spill response that minimizes damage, and that reflects contemporary developments in science and technology. 33 U.S.C. § 1321(d)(2)-(3). Yet, although pertinent science has advanced substantially, the agency has not updated the NCP in a quarter-century.

EPA has an additional duty under the APA to conclude a matter presented to it "within a reasonable time." 5 U.S.C. § 555(b). Some Plaintiffs to this action filed a rulemaking petition with EPA in November 2012 (and a renewed petition in 2014) urging an NCP update, and in January 2015, EPA issued a proposed rule to update the NCP. National Oil and Hazardous Substances Pollution Contingency Plan, Proposed Rule, 80 Fed. Reg. 3,380 (Jan. 22, 2015). However, EPA has failed to issue a final rule or take final action on Plaintiffs' petition in the five years since the comment period closed, *see id.*, or the more than seven years since Plaintiffs filed their rulemaking petition.

Accordingly, on January 30, 2020, Plaintiffs filed this case to compel EPA to fulfill its statutory duties to complete the rulemaking-in-progress for the NCP, and to take final action on Plaintiffs' petitions. Plaintiffs have two claims for relief: one under the CWA, and one under the APA. Compl. ¶¶ 126-136.

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[1] Plaintiffs recently filed an Opposition to Defendants' Motion to Dismiss the First Cause of Action, ECF No. 26. Plaintiffs' opposition contains a lengthy description of case background, *see id.* at 1-6, so Plaintiffs here summarize that background only briefly.

Plaintiffs' CWA claim is brought under Section 505 (the citizen suit provision), which directs that a reviewing court can order EPA "to perform any act or duty . . . which is not discretionary" under the CWA. 33 U.S.C. § 1365(a)(2). Plaintiffs contend that EPA's duty to update the NCP to ensure that it is "effective" and "can minimize damage," *id.* § 1321(d)(2)-(3), is nondiscretionary, and thus falls under the purview of the citizen suit provision. Importantly, in ordering the agency to comply with its obligation, the Court will not tell the agency *how* to update its NCP, only that the agency has a legal obligation to do so. *See id.* § 1365(a)(2); *see also Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 899 (2d Cir. 1989) (interpreting similar provision in the Clean Air Act and holding that while the district court had jurisdiction to order agency to take some action, "the content of that decision [was] within the Administrator's discretion").

Plaintiffs' APA-based claim is brought under Section 706(1), which directs that a reviewing court "shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). In APA failure-to-act cases, a court does not and cannot direct the agency *how* to act; it can only direct the agency *to act* by a date certain. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("[Section] 706(1) empowers a court only to compel an agency . . . to take action upon a matter, without directing *how* it shall act." (citation omitted)).

In short, this case does not concern the substance of the NCP. This suit concerns only *when* EPA must make a final determination regarding updates to the NCP and Plaintiffs' rulemaking petition.

ARGUMENT

The Court should deny API's motion to intervene, whether as a matter of right or permissively, because API has failed to demonstrate a sufficient interest that may be impaired by resolution of this case. Courts nationwide have held that potentially regulated parties lack the requisite interest to intervene as of right under Rule 24(a) where, as here, the plaintiffs seek a timeframe for an agency decision, as opposed to a substantive outcome. The Court should deny API permissive intervention pursuant to Rule 24(b) for similar reasons.

I. API is not entitled to intervention as of right.

API is not entitled to intervene as of right. Under Federal Rule of Civil Procedure 24(a)(2), the Ninth Circuit applies a four-part test to determine whether to grant a motion to intervene as of right: (1) the motion must be timely; (2) the applicant must demonstrate a "significantly protectable interest" relating to the property or transaction which is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interests would be inadequately represented by the parties to the action. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997); Fed. R. Civ. P. 24(a)(2). The party seeking to intervene bears the burden of showing that all requirements for intervention have been met. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). If an applicant fails to satisfy any one of these, the court must deny intervention. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). A court need not reach the remaining elements if it finds that one of them is not satisfied. *Id.* Here, API fails to satisfy all but the first element (a timely motion).

A. API cannot demonstrate a significantly protectable interest in this action.

API is not entitled to intervene as of right because API cannot demonstrate a significantly protectable interest in the subject matter of this case. A significantly protectable interest for purposes of intervention as of right must (1) be protected under some law, and (2) have a relationship with Plaintiffs' claims. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). To merit intervention as of right, the interest must be "direct, non-contingent, substantial and legally protectable." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002), *modified by* 307 F.3d 943 (9th Cir. 2002) (citations omitted). API fails to satisfy this test.

Here, Plaintiffs seek an order compelling EPA to complete its NCP update by a date certain. Compl. ¶ 6. API claims that this relief would "potentially adversely" affect the contents of API members' plans for dispersant use. Interv. Br. at 6. API also claims to qualify for intervention as of right because its members' activities are the "object of" the challenged agency action, *id.* at 7, and therefore, its members "would suffer concrete injury if the court

grants the relief [Plaintiffs] seek." *Id.* at 8 (quoting *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998)). API is wrong.

This case does not challenge the substance of the NCP, and resolution of this litigation will not compel the agency to adopt particular rules regulating API members' dispersant use. The relief that Plaintiffs seek is simply the agency's timely fulfillment of statutory duties. If Plaintiffs' desired relief is granted, only at that point *might* the agency decide to promulgate a rule that *could* "potentially adversely" affect the contents of API members' dispersant use plans, or cause them to "suffer concrete injury." And at that point, API would be well within its rights to challenge EPA's rule on the merits. In other words, for any substantive changes to be made to the NCP and take effect on the ground, there are numerous steps that lie between this action and possible impairment of API's members' alleged interest. Thus, API's concerns regarding the substance of the NCP do not implicate the subject of this litigation, and do not constitute the requisite interest for intervention.

Numerous courts have denied intervention motions upon finding that a case involving the timing of an agency determination is not sufficiently related to the movant's interest in the determination's substance. For example, in *Our Children's Earth Found. v. EPA*, the plaintiffs alleged that EPA had failed to perform its nondiscretionary duty to review emissions standards for existing petroleum refineries. No. C 05-05184 WHA, 2006 WL 1305223 (N.D. Cal. May 11, 2006). The intervenor applicants, including API, asserted that refineries owned by their members were "affected by EPA emissions rules," and expressed concern that more stringent regulations would harm their members' economic interests. *Id.* at *2. Judge William Alsup rejected that argument and denied intervention, emphasizing that "*[t]he substantive content of any new regulations, is not . . . a subject of this lawsuit*." *Id.* at *3. While the court recognized that "[w]ithout a review process, of course, the standards will remain the same, thus preventing increase in pollution-control spending at refineries," it denied intervention because "[t]he connection between this lawsuit and any potential increase is, however, too vague, attenuated and contingent to satisfy Rule 24(a)." *Id.*

Likewise, in *Medical Advocates for Healthy Air v. Johnson*, when the plaintiffs alleged that EPA failed "its federal mandate to maintain national air quality standards" in a timely manner, the Air Coalition Team sought to intervene, alleging that its members' practices "will be strongly impacted by any new contingency measures imposed by the EPA." No. C 06-0093 SBA, 2006 WL 1530094 (N.D. Cal. June 2, 2006). Judge Saundra Brown Armstrong held that the proposed intervenors had failed to demonstrate a "significantly protectable interest" because the scope of the litigation was "not related to the *content* . . . [but] [r]ather . . . the determination of an appropriate deadline by which EPA must promulgate" a rule. *Id.* at *4; *see also Sierra Club v. EPA*, No. 13-cv-2809-YGR, 2013 WL 5568253, at *3 (N.D. Cal. Oct. 9, 2013) (holding that "speculative" economic interests that are "several degrees removed" from the subject matter of an action do not support intervention); *Ctr. for Biological Diversity v. EPA*, No. C-11-06059 YGR, 2012 WL 909831, at *4 (N.D. Cal. Mar. 16, 2012) (denying intervention because the possibility that a suit to compel EPA to review Clean Air Act regulations "could lead to a process that may change those regulations creates, at best, a remote economic interest in this litigation" and "[a] remote interest does not provide for intervention as a matter of right").

Courts in other jurisdictions have reached similar results. For example, in *In re Idaho Conservation League*, the D.C. Circuit held that the proposed intervenors lacked a sufficient interest under Rule 24(a) in contesting a consent order that "merely requires that [an agency] . . . decide whether to promulgate a new rule—the content of which is not in any way dictated [by the consent order]—using a specific timeline." 811 F.3d 502, 514-15 (D.C. Cir. 2016). The court reasoned that the order did not "resolve[ ] the substance of any rulemaking," and thus the case would not "impair" intervenors' interests, because it only "prescribes a date by which regulation could occur." *Id.* (internal quotations and citations omitted); *see also Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1324 (D.C. Cir. 2013) (denying intervention when "consent decree does not require EPA to promulgate a new, stricter rule" and instead only dictated "a specific timeline"); *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 261 (2d Cir. 1992) (denying intervention when the applicants' interest was "based on a 'double contingency' of events," requiring first, that the plaintiffs prevail in the present litigation, and second, that EPA strengthen its air quality

standards (citation omitted)); *ManaSota-88, Inc. v. Tidwell*, 896 F.2d 1318, 1322 (11th Cir. 1990) (denying intervention because potential noncompliance with a standard that EPA may promulgate in the future "does not impart . . . the kind of legally protectable interest . . . necessary to support intervention as of right," such that any potential effect on the proposed intervenors' interests "is purely a matter of speculation at this time").

The same is true here. API's interest in the effect of a revision to the NCP on its members' operations is "speculative" and "several degrees removed" from the present action. It is not a "significantly protectable interest" for the purposes of this litigation, which involves the timing, rather than the content, of EPA's rulemaking. None of the cases on which API relies dictate otherwise. Indeed, the decisions in those cases only underscore how the causal link between this litigation and API's purported interest is too attenuated (if not entirely speculative) to warrant allowing its intervention.

First, API wrongly suggests the Court should allow its intervention in this case because a district court in the District of Columbia permitted its intervention "in a previous lawsuit also challenging the National Contingency Plan." Interv. Br. at 4 (citing *Alaska Cmty. Action on Toxics v. EPA*, No. 12-1299 JDB, 2012 WL 13134338 (D.D.C. Nov. 29, 2012)). The problem for API, however, is that Plaintiffs here are not "challenging" the NCP, and it is the posture and potential implications of litigation, not its nominal subject matter, that is relevant in an intervention analysis.

In *Alaska Cmty. Action on Toxics*, the plaintiffs challenged the substance of the NCP, requesting various forms of relief, including that the court vacate certain parts of the NCP. *See* 2012 WL 13134338, at *2. The court found that API had a sufficient interest to support intervention because—and only because—"[i]f, as plaintiffs request, this Court *orders that 59 currently listed products be removed from the NCP Product Schedule,* then *as a direct result* API members will have fewer products on which to rely in their dispersant use plans and on which they could rely in the event of an oil spill." *Id.* at *3 (all emphasis added). Here, in marked contrast, Plaintiffs are not seeking vacatur of the existing NCP or any parts thereof, but simply a

date by which EPA must take final action on any updates to the NCP and final response to Plaintiffs' rulemaking petitions.

Likewise, in *Sw. Ctr. for Biological Diversity v. Berg*, proposed intervenors were granted intervention because they were "third-party beneficiaries" of a land management plan that would govern their projects for a fifty-year period. 268 F.3d 810, 818 (9th Cir. 2001). The plaintiffs in that case sought, *inter alia*, to invalidate the plan and require mitigation for projects it authorized *Id.* at 816. Here, Plaintiffs do not seek to invalidate the current NCP, or retroactively mitigate API's members' actions under the current NCP. Plaintiffs simply seek completion of a legally required procedural step, in the form of a final decision on a rulemaking that EPA began years ago.

California ex rel. Lockyer v. United States is distinguishable for similar reasons. 450 F.3d 436 (9th Cir. 2006). There, the court held that a group of health care providers demonstrated the requisite interest in the constitutionality of a federal law enacted for their benefit to support their intervention in the case. *Id.* at 441-42. The law at issue sought to "keep doctors who have moral qualms about performing abortions from being put to the hard choice of acting in conformity with their beliefs, or risking imprisonment or loss of professional livelihood." *Id.* at 441. The court found the health care providers had a sufficient interest in the case, because the law at issue provided them with an "important layer of protection" that would be eliminated if the plaintiffs were successful in overturning the law as unconstitutional. *Id.* This case, in contrast, does not involve a challenge to the legality of the existing NCP, or an attempt to overturn it. Nor is there any corresponding activity at issue indicating that imminent harm—much less, harm that implicates strong liberty interests, such as the threat of criminal prosecution or loss of medical license—awaits API should Plaintiffs prevail. *See id.* at 441.

Finally, API attempts to analogize its position to that of regulated entities in *Military Toxics Project*, where an association of chemical manufacturers intervened in a case challenging EPA's promulgation of a rule under the Resource Conservation and Recovery Act. 146 F.3d at 948. However, *Military Toxics Project* concerns precisely what the present litigation does not: the substance of an agency rule. Similarly, the many examples that API provides of courts that

have allowed oil industry groups to intervene were, *e.g.*, cases in which the plaintiffs challenged an agency's offshore leasing program, lease sale, or issuance of drilling permits; the industry groups were the direct beneficiaries of those agency actions; and the validity of the agency actions were directly at issue. *See* Interv. Br. at 10 (citing cases).[2] These distinctions are fatal to API's claim of interest. Because API cannot demonstrate a significantly protectable interest in the narrow subject of this action, the Court should deny intervention as of right.[3]

B. To the extent that API has an interest, the outcome of this lawsuit will not impair API's ability to protect that interest.

Although API lacks a significantly protectable interest in this case, should the Court's inquiry proceed to the second step, intervention is still improper because resolution of this case will not impair API's ability to protect its interests. API's contrary arguments are based on mischaracterizing the case as one challenging the substance of the NCP, rather than challenging EPA's failure to act in the first instance. Any future EPA regulatory action to update the NCP that actually and directly affects API's members' oil spill response plans will provide ample

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[2] API's brief also includes a footnote containing a lengthy string cite of these and other inapposite cases in which intervention was granted, but mentions only a single unreasonable delay case. *See* Interv. Br. at 4, n.1 (*citing Gulf Restoration Network v. Nat'l Marine Fisheries Serv.*, No 18-cv-1504, Dkt. No. 33 (M.D. Fla. Nov. 20, 2018)). In that case, the plaintiffs did not oppose intervention, the defendants expressed no position on intervention, and the court granted intervention without a written opinion. Defendants' discussion of *In re City of Fall River, Ma.*, 470 F.3d 30 (1st Cir. 2006), *see* Interv. Br. at 7, is likewise misleading: the court's opinion contains no discussion of the propriety of intervention, and there is no suggestion that the intervenor's participation was contested. In short, API cannot point to any judicial analysis supporting its view that intervention is appropriate here.

[3] API also summarily claims that "the requested order directing Federal Defendants to develop and issue a new National Contingency Plan by rulemaking . . . could substantially delay the development activities of API members and on API members' offshore leases." Interv. Br. at 7 (citation omitted). API, however, has no legal right to a static, unchanging NCP. Indeed, the CWA specifically requires EPA to update the NCP to provide for effective oil spill response that minimizes damage and reflects scientific and technologic advances. *See* 33 U.S.C. § 1321(d)(2)-(3). Nor does API have a legally protectable interest in Plaintiffs' statutory right to timely final action on their rulemaking petitions. *See* 5 U.S.C. § 555(b). Moreover, API provides no evidence why its members cannot continue to operate under the existing NCP and revise their oil spill response plans if such revisions become necessary.

opportunity, through administrative or judicial proceedings, for API to protect those interests. *See, e.g.*, 5 U.S.C. § 553 (rulemaking process); *id.* § 706(2)(A) (providing for judicial review of final agency actions).

In other words, API cannot demonstrate that its interests may be impaired in the present proceeding, because any potential impacts would be the result of a new administrative process, not the immediate and direct result of this litigation. *See Our Children's Earth Found.*, 2006 WL 1305223, at *3 (denying API intervention in Clean Air Act case seeking to compel update of emissions standards because the substance of the standards were not at issue, and API's economic interests were protectable in later proceedings, including "by advocating for less stringent standards during the EPA rule-making process itself"); *Ctr. for Biological Diversity*, 2012 WL 909831, at *5 (denying intervention because, *inter alia*, "[i]f EPA should determine revision to the existing [air emissions standard] is appropriate then [the proposed intervenor] will have an opportunity to protect its interests in any notice and comment proceeding. If EPA does not comply with the statutory procedures and [proposed intervenor's] interests are harmed, then it may file suit"); *Idaho Conservation League*, 811 F.3d at 515 (denying intervention and noting that "if [the agency] publishes a final rule, those affected could challenge it"). Here too, the outcome of this suit will not compromise API's ability to challenge any possible amendments to the NCP in future, if EPA adopts them.

C. To the extent that API has an interest, EPA adequately represents that interest.

API has failed to show that EPA would inadequately represent API members' interests. The Ninth Circuit evaluates three factors to determine whether existing parties will adequately represent an applicant's interest: "(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). API fails to establish any of these factors—

much less, all three—because EPA adequately represents the narrow interest that is the subject of this litigation.

In this case, API and EPA seek the same result: defending the agency's ongoing failure to update the NCP. API unconvincingly asserts that EPA will not adequately represent its interests because "the CWA's goals are not limited to API members' interests." Interv. Br. at 11. As explained above, however, this case is not about the substance of any action EPA has taken under the CWA, but whether EPA has unlawfully failed to take, or unreasonably delayed taking, action in the first place. In such a circumstance, API's and EPA's interests appear fully aligned, and it is unclear what additional arguments API's participation would add. API's further assertion that EPA will not adequately represent it—*i.e.*, would not be capable of and willing to make certain arguments, because API is a "private" entity with "economic interest[s]" at stake, Interv. Br. at 11 (citations omitted)—fails for the same reason. Because this suit is about rulemaking timing rather than substance, whether asserted interests are governmental, or private and pecuniary, is irrelevant to the nature of the defense.

As a final matter, API cannot point to anything indicating that it would supply a "necessary element" to this litigation—even, the element of litigation vigor. Indeed, to the contrary, EPA has already moved swiftly and aggressively in relation to Plaintiffs' complaint, filing a motion to dismiss Plaintiffs' First Cause of Action in lieu of an answer, and doing so well before the filing deadline. *See* Defs.' Mot. to Dismiss, ECF No. 16. Because API has not asserted any claim or defense that appears to diverge from EPA's expected position, or identified any necessary case elements that EPA will ignore, API cannot make the showing required for intervention as of right.

II. API does not satisfy the standards for permissive intervention.

API does not meet the criteria for permissive intervention. Further, permitting intervention would reduce judicial efficiency and prejudice Plaintiffs by allowing irrelevant briefing to which Plaintiffs must respond, and that the court must review. In this circuit, pursuant to Federal Rule of Civil Procedure 24(b), a court may grant permissive intervention if an applicant demonstrates: (1) independent grounds for jurisdiction; (2) a timely motion; and

(3) a claim or defense with a common question of law or fact with the main action. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). "In exercising its discretion, the court must [also] consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

API cannot meet the third requirement for permissive intervention, *i.e.*, demonstrate that its defense of this action would "involve common questions of law and fact regarding the Federal Defendants' fulfillment of their obligations under the CWA and APA." Interv. Br. at 11. Indeed, API nowhere describes the substance of these common questions. Rather, API asserts that the Court should grant permissive intervention because API's members have (and it may on their behalf assert) a "substantial interest" in the outcome of this case. *Id.* But, as explained above, API does not have such an interest. API's brief makes clear that it intends to insert into this case an "interest" that is not yet ripe, and that has no bearing on the legal questions before the Court: whether EPA has a mandatory duty to update the NCP, and to take final action on Plaintiffs' petitions.

While API may have an interest in the *contents* of any rule that EPA may ultimately promulgate, no such hypothetical future rule is now at issue, and its potential contours are unknown and unknowable. Permissive intervention is not intended to give proposed intervenors the opportunity to "creat[e] . . . whole new lawsuits." *Donnelly*, 159 F.3d at 412. Permitting API to intervene would therefore only confuse the issues at hand, and invite unnecessary and irrelevant briefing that would waste judicial resources and prejudice Plaintiffs. *See* Fed. R. Civ. P. 24(b)(3).

CONCLUSION

The substance of the NCP is not at issue in this litigation. API accordingly fails to demonstrate a significantly protectable interest that may be impaired by the resolution of this case, as required to intervene as of right. *See* Fed. R. Civ. P. 24(a). For similar reasons, API fails to demonstrate that it meets the requirements for permissive intervention. *See* Fed. R. Civ. P. 24(b). The Court should therefore deny API's motion to intervene.

Dated: April 21, 2020

Respectfully submitted,

/s/ Claudia Polsky

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