Jeffrey M. Davidson (SBN 248620)
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, CA 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091
Email: jdavidson@cov.com

Steven J. Rosenbaum (*pro hac vice* forthcoming)
Bradley K. Ervin (*pro hac vice* forthcoming)
COVINGTON & BURLING LLP
One CityCenter
850 Tenth St. N.W.
Washington, D.C. 20001
Tel: (202) 662-5568
Fax: (202) 778-5568
srosenbaum@cov.com
bervin@cov.com

Attorneys for Applicant for Intervention
American Petroleum Institute

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,

v.

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

Defendants.

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

NOTICE OF MOTION AND MOTION FOR LEAVE TO INTERVENE OF 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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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that the American Petroleum Institute ("API") will, and hereby does, move the court for an order permitting API to intervene as a defendant in the above-captioned matter. Pursuant to Rule 7-2 of the Civil Local Rules for the United States District Court for the Northern District of California ("L.R.") and the Honorable William H. Orrick's Standing Order, the hearing has been scheduled for May 13, 2020 in Courtroom 2 — 17th Floor, San Francisco Courthouse, 450 Golden Gate Avenue, 17th Floor, San Francisco, California 94102. However, under General Order 72, all civil matters will be decided on the papers, unless the assigned judge determines a telephonic or videoconference hearing is necessary. Responding papers, if any, must be served upon API pursuant to L.R. 7-3.

PLEASE TAKE FURTHER NOTICE that API will move this court for an order permitting API to intervene as a defendant pursuant to Federal Rule of Civil Procedure 24(a) or Federal Rule of Civil Procedure 24(b), as set forth in the Memorandum of Points and Authorities that follows. More specifically, API seeks an order granting its intervention as of right under Federal Rule of Civil Procedure 24(a) based upon its legally protectable interest in the above-captioned matter, or an order granting permissive intervention under Federal Rule of Civil Procedure 24(b).

PLEASE TAKE FURTHER NOTICE that API submits the following in support of this Motion to Intervene: Notice of Motion, Motion to Intervene and Memorandum of Points and Authorities, Declaration of Suzanne Lemieux, Proposed Answer to the Complaint, Proposed Order, and Disclosure Statement and Certificate of Interested Entities or Persons.

PLEASE TAKE FURTHER NOTICE that Counsel for API consulted with counsel for Plaintiffs and the Federal Defendants regarding the relief requested herein. Counsel for the Federal Defendants indicated that Federal Defendants take no position on API's motion. Counsel for Plaintiffs indicated that Plaintiffs will oppose API's intervention.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Pursuant to Fed. R. Civ. P. 24, API respectfully moves for leave to intervene in the above-captioned matter.

A. Plaintiffs' Legal Challenge.

This lawsuit challenges the alleged failure to perform a nondiscretionary update of the 1994 National Oil and Hazardous Substances Pollution Contingency Plan ("National Contingency Plan") by Defendants Environmental Protection Agency ("EPA") and Andrew Wheeler, in his official capacity as Administrator of the EPA (collectively, the "Federal Defendants"). *See* Compl. (Dkt. No. 1), ¶ 1. Plaintiffs ALERT Project/Earth Island Institute, Alaska Community Action on Toxics, Cook Inletkeeper, Center for Biological Diversity, Rosemary Ahtuangaruak, and Kindra Arnesen (collectively, "Plaintiffs") contend that the Federal Defendants' "failure to update the obsolete and dangerous" National Contingency Plan despite alleged "overwhelming scientific evidence . . . that dispersants" used to break up oil spills "likely cause more environmental harm than good" violated the Clean Water Act ("CWA"), 33 U.S.C. §§ 1321(d), 1365(a)(2), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq*. *See* Compl., ¶¶ 1–2, 126–36.

To remedy the alleged violations, Plaintiffs ask the Court to, *inter alia*, (1) rule that Federal Defendants' failure to update the National Contingency Plan "in accordance with improvements in scientific and technological knowledge" amounts to a "faul[ure] to perform a nondiscretionary duty required by the CWA"; (2) "[d]eclare that EPA has violated the APA by unlawfully withholding or unreasonably delaying issuance" of an updated National Contingency Plan, and (3) "[o]rder EPA to issue a final rule to update the [National Contingency Plan] on an expeditious schedule . . . ." *Id*., Relief Requested, ¶¶ 1–3.

B. API's Interest in Plaintiffs' Legal Challenge.

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 Suzanne Lemieux, ¶ 1 ("Lemieux Decl.") (attached as Exhibit 1 hereto). 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* Lemieux Decl. ¶ 2.

The CWA, 33 U.S.C. §§ 1251 *et seq.*, requires that the federal government establish the National Contingency Plan for "efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances . . . ." 33 U.S.C. § 1321(d)(2). Under authority delegated to it pursuant to Exec. Order No. 11,735, 38 Fed. Reg. 21,243 (Aug. 3, 1973) and Exec. Order No. 12,777, 56 Fed. Reg. 54,757 (Oct. 18, 1991), the EPA promulgated the National Contingency Plan, 40 C.F.R. Part 300, and maintains the National Contingency Plan Product Schedule, which lists dispersants and other agents that may be used in responding to a discharge of oil governed by the National Contingency Plan. *See* 33 U.S.C. § 1321(d)(2)(G); 40 C.F.R. § 300.905.

The U.S. Department of the Interior ("DOI") requires, as a condition of operation, that every offshore oil drilling unit, offshore platform, and pipeline seaward of the coast line have an "oil spill response plan" approved by DOI's Bureau of Safety and Environmental Enforcement ("BSEE"). 30 C.F.R. §§ 254.1, 254.2, 254.6.1. Each oil spill response plan must contain a "dispersant use plan" *see* 30 C.F.R. § 254.21, which specifies the inventory and location of dispersants and other agents that might be used in the event of a discharge of oil, *see* 30 C.F.R. § 254.27. A dispersant use plan must be consistent with the National Contingency Plan Product Schedule and other provisions of the National Contingency Plan. *See* 30 C.F.R. § 254.27.

API's members are deeply engaged in the exploration for and development of offshore oil and gas resources, and operate drilling units, offshore platforms, and pipelines. *See* Lemieux Decl. ¶¶ 5–7. As a result, they must maintain approved oil spill response plans including a dispersant use plan. *See* Lemieux Decl. ¶¶ 6–9. The operations of API's members rely upon, and are therefore regulated by, the contents of the National Contingency Plan. *See* Lemieux Decl. ¶ 9.

To protect their interests, API is entitled to intervene in this action as of right, or, in the alternative, through permissive intervention. Numerous federal courts have routinely granted API's motions to intervene as a defendant in lawsuits brought by plaintiffs challenging Governmental actions with respect

to oil and gas activities across the country.[1] This included the granting of API's motion to intervene in a previous lawsuit also challenging the National Contingency Plan, filed by entities that included two of the named plaintiffs here. *See Alaska Community Action on Toxics, et al. v. U.S. EPA, et al.*, No. 12-cv-01299, Dkt. No. 19 (D.D.C. Nov. 29, 2012).

ARGUMENT

I. API IS ENTITLED TO INTERVENE AS OF RIGHT

Fed. R. Civ. P. 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 could 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). *See also The Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) ("[A] liberal policy in favor of intervention serves both efficient resolution of issues

[1] *See also*, *e.g.*, *Ctr. for Biological Diversity v. U.S. EPA*, 937 F.3d 533 (5th Cir. 2019) (intervened to EPA issuance of pollutant discharge permit); *Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015) challenge to five-year leasing program); *Defenders of Wildlife v. Bur. of Ocean Energy Mgmt.*, 684 F.3d 1242 (11th Cir. 2012) (challenge to lease sales and use of categorical exclusions to approve exploration plans); *WildEarth Guardians v. Bernhardt, et al.*, No. 19-cv-00505, Dkt. No. 36 (D.N.M. Feb. 11, 2020) (challenge to oil and gas lease sales); *Gulf Restoration Network, et al. v. Zinke, et al.*, No. 18-cv-1674, Dkt. No. 35 (D.D.C. Dec. 7, 2018) (same); *Gulf Restoration Network, et al. v. Nat'l Marine Fisheries Serv.*, No. 18-cv-1504, Dkt. No. 33 (M.D. Fla. Nov. 20, 2018) (challenge to agency delay in issuing Biological Opinion); *Wilderness Workshop, et al. v. U.S. Bureau of Land Mgmt.*, No. 18-cv-987-WYD, Dkt. No. 15 (D. Colo. Aug. 16, 2018) (challenge to oil and gas lease sales); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 17-cv-372, Dkt. No. 52 (S.D. Ohio Sept. 29, 2017) (challenge to lease sales in Ohio); *League of Conservation Voters v. Trump*, No. 17-cv-101, Dkt. No. 22 (D. Ak. July 21, 2017) (challenge to presidential authority to resume oil and gas leasing on previously withdrawn lands); *WildEarth Guardians v. Jewell*, No. 16-cv-1724, Dkt. No. 19 (D.D.C. Nov. 23, 2016) (challenges to lease sales in Colorado, Utah and Wyoming); *Diné Citizens Against Ruining our Envt. v. Jewell*, No. 15-cv-209, 2015 WL 4997207 (D.N.M. Aug. 14, 2015) (challenge to drilling permit approvals); *Envtl. Defense Ctr. v. Bur. of Safety & Envtl. Enforcement*, No. 14-cv-9281, 2015 WL 12734012 (C.D. Cal. Apr. 2, 2015) (same); *Oceana v. Bur. of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147 (D.D.C. 2014) (challenge to lease sales); *Defenders of Wildlife v. Minerals Mgmt. Serv.*, No. 10-cv-254, 2010 WL 3169337 (S.D. Ala. Aug. 9, 2010) (challenge to lease sale).

and broadened access to the courts." (quotation and alteration omitted)). As set forth below, API's intervention satisfies each of the criteria for intervention as of right.[2]

A. API's Motion to Intervene is Timely.

This motion to intervene is timely because it has been filed only seven days after the Federal Defendants filed a motion to dismiss the first of Plaintiffs' two causes of action in this case, and the Federal Defendants' answer is not set to be filed until fourteen days after the Court resolves the pending motion to dismiss. *See* Fed. Defs.' Mot. to Dismiss First Cause of Action (Dkt. No. 16); Fed Defs.' Proposed Order (Dkt. No. 16-1), at 2. *See also*, *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 Cognizable Interest That May Be Impaired Or Impeded As A Result Of This Proceeding.

Oil and gas development on the outer continental shelf ("OCS") is carried out exclusively through private oil and gas companies, which acquire leases through a sealed bidding process and then engage in exploration efforts that, if successful, will lead to production. *See* Lemieux Decl. ¶ 5. API members are

[2] For purposes of applying Rule 24 requirements, API may assert the interests of its members. An association may act on behalf of its members 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 the participation of individual members in the lawsuit. *See*, *e.g.*, *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). API's showing that Fed. R. Civ. P. 24 standards are met in this case also establishes that its members would themselves have standing. *See infra*. *E.g.*, *Sw. Ctr. for Biological Diversity*, 268 F.3d at 821 n.3. 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"); *Sierra Club v. Glickman*, 82 F.3d 106, 108–10 (5th Cir. 1996) (goals of suit to limit farmers' water pumping germane to association purpose to advance farmers' interests); Lemieux Decl. ¶ 2. It is not necessary for API members to be included in this case individually, especially because no monetary relief is being sought. *See Comprehensive Drug Testing*, 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.

among the principal bidders for offshore leases, are directly engaged in the resulting exploration and production, and, indeed, have been for decades among the principal explorers and developers of leases throughout the United States, including on the OCS. *See* Lemieux Decl. ¶ 6. API members include leaseholders that have expended significant sums to obtain leases from the Government for the opportunity to explore for and develop valuable oil and gas resources. *See* Lemieux Decl. ¶¶ 5–6. API members also include the operators and suppliers that either conduct or support oil and gas development operations on OCS leases. *See* Lemieux Decl. ¶ 6.

Operations for the exploration and development of oil and gas resources on a lease—including drilling—are conducted pursuant to plans and permits 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; 43 U.S.C. § 1351; 30 C.F.R. § 550.201; 30 C.F.R. §§ 550.241–273; Lemieux Decl. ¶ 8. Before conducting drilling activities under an approved exploration or development plan, a lessee must also obtain DOI's approval of, *inter alia*, an application for a permit to drill. *See* 30 C.F.R. § 550.281(a)(1); 30 C.F.R. §§ 250.410–418; 30 C.F.R. §§ 250.465–469; Lemieux Decl. ¶ 8. As a condition for operation every offshore oil drilling unit, offshore platform, and pipeline seaward of the coast line must have a DOI approved "oil spill response plan." 30 C.F.R. §§ 254.1, 254.2. 254.6.1. Each oil spill response plan must contain a "dispersant use plan" *see* 30 C.F.R. § 254.21, which specifies the inventory and location of dispersants and other agents that might be used in the event of a discharge of oil, *see* 30 C.F.R. § 254.27. A dispersant use plan must be consistent with the National Contingency Plan. *See* 30 C.F.R. § 254.27. *See* Lemieux Decl. ¶ 9.

In short, the National Contingency Plan is an important component in the approval of operations on API members' leases, or conducted by API members on OCS leases. *See* Lemieux Decl. ¶ 10. Plaintiffs' claims that the National Contingency Plan is legally inadequate and that Federal Defendants must therefore prepare a new Plan governing dispersants to be used in API member operations, *see supra* p. 2, thus directly affects API member property rights, operations, and interests. *See* Lemieux Decl. ¶ 10. Plaintiffs' challenge would affect, potentially adversely, both the required contents of API members' dispersant use plans, and the required explanation in their oil spill response plans of the methods by which the dispersant use plan would be implemented. *See* Lemieux Decl. ¶ 10. Plaintiffs' attack could also ultimately impact the dispersants and other products that would be available to API members for use in

the event of an oil discharge from a drilling unit, platform, pipeline, or vessel. *See* Lemieux Decl. ¶ 10. At a minimum, the requested order directing Federal Defendants to develop and issue a new National Contingency Plan by rulemaking, *see* Compl., Relief Requested, ¶ 3, could substantially delay the development activities of API members and on API members' offshore leases. *See* Lemieux Decl. ¶ 11.

Although Governmental agencies and officials are named as the defendants, in practice, the activities of API's members are the "object of" the agency action that Plaintiffs' lawsuit challenges—the issuance of a National Contingency Plan with which API's members must comply in order to conduct OCS oil and gas development operations. This clearly qualifies API for intervention as of right. *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); *see also*, *e.g.*, *Sw. Ctr. for Biological Diversity*, 268 F.3d at 821; *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); 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 . . . .").

Private parties may intervene in defense of challenged conduct when their interests could thus be directly affected. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (foreign governmental agency may intervene in defense of legal challenge to federal regulations that would, if successful, limit sport hunting by U.S. citizens in that country; the country's sheep "are the subject of the disputed regulations"); *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.").

In this regard, API's members are in a similar situation as the members of the association seeking intervention in *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998). The plaintiffs there challenged an EPA rule excluding munitions from stringent hazardous waste regulation, and the D.C.

Circuit held that the Chemical Manufacturers Association ("CMA") had standing to intervene in defense of the EPA rule:

> CMA has standing because some of its members produce military munitions and operate military firing ranges regulated under the Military Munitions Rule. These companies are directly subject to the challenged Rule, and they benefit from the EPA's "intended use" interpretation (under which most military munitions at firing ranges are not solid waste) . . . that the [petitioner] is challenging in this appeal. These CMA members would suffer concrete injury if the court grants the relief the petitioners seek; they would therefore have standing to intervene in their own right, and we agree with the litigants that the CMA has standing to intervene on their behalf in support of the EPA.

146 F.3d at 954.

API likewise has Article III standing—and thus a sufficient interest to support intervention—here because its members own leases and conduct, *inter alia*, exploration, development, and drilling operations, and are thus engaged in activities that are "directly subject to the challenged" Government policy, and "would suffer concrete injury if the court grants the relief petitioners seek," *i.e.*, ordering the Federal Defendants to undertake the rulemaking process necessary to replace the existing National Contingency Plan that must be in place for API members to conduct operations. *Id.* *See also, 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"); *Fund for Animals*, 322 F.3d at 733–34 (agreeing that Article III standing exists where "injury is fairly traceable to the regulatory action . . . that the [plaintiff] seeks in the underlying lawsuit" and "it is likely that a decision favorable to the [applicant for intervention] would prevent that loss from occurring"); *id.* at 734 (in identifying a qualifying injury under Rule 24(a), "we see no meaningful distinction between a regulation that directly regulates a party and one that directly regulates the disposition of a party's property"); *Atlantic States Legal Found., Inc. v. EPA*, 325 F.3d 281, 282, 285 (D.C. Cir. 2003) (intervention by trade association of utilities regulated by EPA regulation).

In addition, API's members undoubtedly satisfy prudential standing in this litigation because their activities are regulated by "the contested regulatory action," *Amgen, Inc. v. Smith*, 357 F.3d 103, 108 (D.C. Cir. 2004) (quotation omitted)—namely, the Federal Defendants' application of the existing National Contingency Plan to their operations. Furthermore, the interests of API members correspond

with the Clean Water Act's policy that there be "efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances . . . ." 33 U.S.C. § 1321(d)(2); *see* Lemieux Decl. ¶ 2. *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); *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 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.").

Finally, the Court's disposition of this action would impair the ability of API (and its members) to protect their interests. The impairment prong of Rule 24(a) "look[s] to the practical consequences of denying intervention." *Natural Res. Def. Council v. Costle*, 561 F.3d 904, 909 (D.C. Cir. 1977) (quotation omitted). 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." *Fund for Animals*, 322 F.3d at 735.

Here, API's members *currently* rely on and use the National Contingency Plan as promulgated by EPA, and would face practical difficulty in restoring the status quo following a victory by Plaintiffs challenging the existing National Contingency Plan. At a minimum, such action would impose a lengthy administrative delay and related costs and uncertainty upon API members. *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). *Cf. Humane Society of the U.S. v. Clark*, 109 F.R.D. 518, 520 (D.D.C. 1985) (sufficient interest of recreational hunting and trapping groups in "present right of their members to hunt and trap on public lands"). 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 v. U.S. EPA*, 995 F.2d 1478, 1486 (9th Cir. 1993), *abrogated on other grounds*, 630 F.3d 1173 (9th Cir. 2011).

For all these reasons, API is entitled to intervene. Indeed, federal courts have routinely and repeatedly permitted oil industry trade associations to intervene on behalf of their members' interests in litigation involving oil and gas operations. *See supra* pp. 3–4 & n.1; *see also e.g.*, *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466 (D.C. Cir. 2009) (API granted intervention in challenge to Government's five-year OCS leasing program under NEPA and OCS Lands Act); *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); *Suffolk Cnty. v. Sec'y of the Interior*, 562 F.2d 1368 (2d Cir. 1977) (National Ocean Industries Association granted intervention in defense of first Atlantic OCS lease sale); *Diné Citizens Against Ruining our Env't v. Jewell*, No. 15-cv-209, 2015 WL 4997207 (D.N.M. Aug. 14, 2015) (intervened in challenges to drilling permits); *Envt'l Defense Ctr. v. Bureau of Safety and Envt'l Enforcement*, No. 14-cv-9281, 2015 WL 12734012 (C.D. Cal. Apr. 2, 2015) (intervened in challenges to drilling permits); *Native Vill. of Chickaloon v. Nat'l Marine Fisheries Serv.*, 947 F. Supp. 2d 1031 (D. Ak. 2013) (intervened in challenge to geological and geophysical survey permit).

C. API's Interests Will Not Be Adequately Protected By Plaintiffs 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, Plaintiffs' position is inimical to that of API, and the Federal Defendants are "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 adequately to 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 CWA include the "efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges," 33 U.S.C. § 1321(d)(2), that corresponds with API's members' interests in safe and "expeditious development" of oil and gas resources on public land, the CWA's goals are not limited to API members' interests, *see* 43 U.S.C. § 1332.

Although the Federal Defendants' 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. *See also*, *e.g.*, *Dimond v. District of Columbia*, 792 F.2d 179, 192–93 (D.C. Cir. 1986) (explaining that government "is charged by law with representing the public interest of [all] its citizens" and therefore cannot represent the "narrow and 'parochial' financial interest" of interested private party).

Because their interests are not adequately represented by either the Plaintiffs or the Federal Defendants, API should be allowed to intervene in this case as of right.

II. IN THE ALTERNATIVE, API QUALIFIES FOR PERMISSIVE INTERVENTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 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 and fact regarding the Federal Defendants' fulfillment of their obligations under the CWA and APA. 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 has 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 pursuant to both Fed. R. Civ. P. 24(a) and 24(b). API respectfully requests that this Court grant this motion for leave to intervene in this proceeding without limitation.[3]

A proposed Order is submitted herewith. As required by Fed. R. Civ. P. 24(c), API has included with this motion, as Exhibit 2 hereto, its proposed Answer to the Complaint.

Dated: April 7, 2020

Respectfully submitted,

/s/ Jeffrey M. Davidson

Jeffrey M. Davidson (SBN 248620)
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, CA 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091
Email: jdavidson@cov.com

Attorneys for Applicant for Intervention
American Petroleum Institute

Steven J. Rosenbaum
(*pro hac vice* forthcoming)
Bradley K. Ervin
(*pro hac vice* forthcoming)
COVINGTON & BURLING LLP
One CityCenter
850 Tenth St. N.W.
Washington, D.C. 20001
Tel: (202) 662-5568
Fax: (202) 778-5568
srosenbaum@cov.com
bervin@cov.com

[3] *See The Wilderness Society v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (finding "the purposes of Rule 24 are best served by permitting the prospective intervenors to engage in all aspects of this litigation . . . without limitation"); 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1922 (3d ed. 2010) (questioning authority of courts to impose conditions on intervenor-of-right beyond those of a housekeeping nature).

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2020, I caused a true and correct copy of the foregoing Motion to Intervene and all accompanying documents to be filed with the Court electronically and served by the Court's CM/ECF System upon the following:

Claudia Polsky
Environmental Law Clinic
UC Berkeley School of Law
434 Boald Hall (North Addition)
Berkeley, CA 94720-7200
cpolsky@law.berkeley.edu

Kristen Monsell
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612-1810
kmonsell@biologicaldiversity.org

Counsel for Plaintiffs

Mark Albert Rigau
Senior Trial Counsel
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
301 Howard Street, Suite 1050
San Francisco, CA 94105
Tel: (415) 744-6487
Fax: (415) 744-6476

Counsel for Federal Defendants

/s/ Jeffrey M. Davidson
Jeffrey M. Davidson (SBN 248620)