IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GULF RESTORATION NETWORK; SIERRA CLUB; and CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs, v. RYAN ZINKE, Secretary, U.S. Department of the Interior; JOSEPH BALASH, Assistant Secretary, Land and Minerals Management; U.S. DEPARTMENT OF THE INTERIOR; and BUREAU OF OCEAN ENERGY MANAGEMENT, Defendants.	No. 1:18-cv-01674-RBW

MOTION OF THE AMERICAN PETROLEUM INSTITUTE FOR LEAVE TO INTERVENE AS A DEFENDANT

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INTRODUCTION AND BACKGROUND

Pursuant to Fed. R. Civ. P. 24, the American Petroleum Institute ("API") respectfully moves for leave to intervene in the above captioned matter. Pursuant to Local Civil Rule 7(m), counsel for API consulted with counsel for Plaintiffs and the Federal Defendants regarding the relief requested herein. Counsel for Plaintiffs has indicated that Plaintiffs take no position on API's motion at this time, but reserve the right to file a response after Plaintiffs have had an opportunity to review the filed motion. Counsel for the Federal Defendants has indicated that the Federal Defendants take no position at this time, and will wait to review API's filed motion.

A. Plaintiffs' Legal Challenge.

This lawsuit challenges the conduct of two oil and gas lease sales on the federal outer continental shelf ("OCS") in the Gulf of Mexico by Defendants Secretary of the Interior, Assistant Secretary for Land and Mineral Development, the Bureau of Ocean Energy Management ("BOEM"), and the Department of the Interior (collectively, "Federal Defendants"). Plaintiffs Gulf Restoration Network, Sierra Club, and Center for Biological Diversity (collectively, "Plaintiffs") contend that the Federal Defendants' leasing actions violated the National Environmental Policy Act ("NEPA), 42 U.S.C. §§ 4321, *et seq*. and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq*., because they were allegedly taken "without an adequate understanding of the environmental effects," Complaint (Dkt. No. 1), ¶¶ 1, 7. More specifically, Plaintiffs allege that (1) "Interior turned a blind eye to the policies it had adopted[,]" "such as repealing significant drilling safety regulations," that "will considerably increase the effects and risks to the environment from oil and gas activities," and (2) improperly "assumed that the same environmental effects would occur even if it did not hold the lease sales," *Id*., ¶¶ 6–7. To remedy the alleged NEPA violations, Plaintiffs ask the Court to, *inter*

alia, vacate the challenged lease sales, and "[v]acate or enjoin leases executed pursuant to Offshore Lease Sales 250 and 251," *id*., Relief Requested, ¶¶ 3–4.

B. API's Interests 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 Erik Milito, ¶ 1 ("Milito Decl.") (attached as Exhibit 2 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* Milito Decl. ¶ 2.

API's members are deeply engaged in the exploration for and development of offshore oil and gas resources as leaseholders, lease operators, and service companies, including in the Gulf of Mexico. *See* Milito Decl. ¶¶ 5–7. API's members are thus directly affected by the instant legal challenge. *See* Milito Decl. ¶ 8. To protect their interests, API is entitled to intervene in this action as of right, or, in the alternative, through permissive intervention. Indeed, this Court, the U.S. Court of Appeals for the D.C. Circuit, and federal courts elsewhere have routinely granted API's motions to intervene in lawsuits brought by plaintiffs challenging Governmental actions with respect to oil and gas activities, including but not limited to lease sales and the issuance of leases. *See, e.g., Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015) (intervened in challenge to five-year leasing program); *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242 (11th Cir. 2012) (intervened in challenge to lease sales and agency use of categorical exclusions to approve exploration plans); *WildEarth Guardians v. Jewell*, No. 16-cv-1724, Dkt. No. 19 (D.D.C. Nov. 23, 2016) (intervened in challenges to lease sales in Colorado, Utah and Wyoming); *Oceana v. Bureau of Ocean Energy*

Mgmt., 37 F. Supp. 3d 147 (D.D.C. 2014) (intervened in challenge to lease sales); *Defenders of Wildlife v. Minerals Management Serv.*, No. 10-cv-254, 2010 WL 3169337 (S.D. Ala. Aug. 9, 2010) (intervened in challenge to lease sale).

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 Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). API's intervention satisfies each of these criteria.[1]

[1] 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); *City of Waukesha v. EPA*, 320 F.3d 228, 233 (D.C. Cir. 2003). 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* pp. 4–10. *E.g.*, *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 821 n.3 (9th Cir. 2001). 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 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); Milito 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 City of Waukesha*, 320 F.3d at 236; *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343–44 (1977). API thus satisfies the three requirements of associational standing.

A. API Has Timely Moved For Intervention.

This motion to intervene is timely because it has been filed before the Federal Defendants have filed their answer, and before any non-ministerial action of the parties has taken place in this litigation other than the filing of the Complaint itself.

B. API Possesses A Cognizable Interest That May Be Impaired Or Impeded As A Result Of This Proceeding.

Offshore oil and gas development 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 development and production. *See, e.g.*, 43 U.S.C. §§ 1337, 1340, 1351; Milito Decl. ¶ 5. 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 the Department of the Interior. *See* 30 C.F.R. § 550.201; 30 C.F.R. §§ 550.211–235; 30 C.F.R. § 550.201; 30 C.F.R. §§ 550.241–273; 30 C.F.R. § 550.281(a)(1); 30 C.F.R. §§ 250.410–418; 30 C.F.R. §§ 250.465–469.

API members are directly engaged in the resulting exploration and production and have been for decades among the principal explorers and developers of offshore leases throughout the United States, and in the Gulf of Mexico OCS. *See* Milito Decl. ¶ 7. 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* Milito Decl. ¶ 5. Indeed, API members hold leases issued through Lease Sale 250 and have submitted bids on leases to be issued through Lease Sale 251, and are thus directly challenged by Plaintiffs in this action. *See* Milito Decl. ¶ 6.

Plaintiffs' claims that the Federal Defendants' decisions to conduct the challenged leases failed to meet NEPA's directive to take a "hard look" at the alleged environmental impacts of

future exploration and drilling activities on issued leases, *see, e.g.*, Compl., ¶ 162–71, and the Court should therefore void or enjoin all of the leases issued during the challenged lease sales, *see id*., Relief Requested, ¶¶ 3–4, thus directly affects the members' property and contractual interests. Milito Decl. ¶¶ 5–8. At a minimum, the requested injunction pending a potentially lengthy NEPA review process to correct the alleged errors in the decisions leading to Lease Sales 250 and 251, could substantially delay these activities of API members. *See* Milito Decl. ¶ 9.

Although Governmental agencies and officials are named as the defendants, in practice, the exploration and drilling activities of API's members are the "object of" the agency actions that Plaintiffs' lawsuit challenges—Federal Defendants' decisions to conduct Lease Sales 250 and 251, and the issuance of offshore leases during those sales. 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.*, *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 . . . .").

Ultimately, Plaintiffs ask this Court to end the activities of API members, and eliminate their leases. *See* Comp., Relief Requested, ¶¶ 3–4. Private parties may intervene in defense of challenged conduct when their interests could thus be directly affected. *See Fund for Animals*,

322 F.3d at 733 (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.*, voiding challenged leases and subjecting the Federal Defendants' reissuance of those leases to new, broad, and uncertain environmental review. *Military Toxics*, 146 F.3d at 954. *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).

Moreover, standing is found and intervention warranted here by an additional consideration. Oil and gas leases constitute both contracts, *see, e.g.*, *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607–08 (2000), and property interests, *see, e.g.*, *Union Oil Co. v. United States*, 512 F.2d 743, 747 (9th Cir. 1975), and by seeking to void, or forestall exploration or development on, already purchased leases, Plaintiffs would cause an injury to API members by requesting "an agency [action] that replaces a certain [contract] outcome with one that contains uncertainty." *Idaho Power Co. v. FERC*, 312 F.3d 454, 460 (D.C. Cir. 2002). *See also Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 967 (D.C. Cir. 1999) (granting intervention by party "which purchased the great majority of the licenses awarded" under the existing rule); *Sw. Ctr. for Biological Diversity*, 268 F.3d at 820 ("Contract rights are traditionally protectable interests.").

In addition, API's members undoubtedly satisfy prudential standing in this litigation because their activities are the "subject of the contested regulatory action," *Amgen, Inc. v. Smith*,

357 F.3d 103, 108 (D.C. Cir. 2004) (quotation omitted)—namely, the Federal Defendants' issuance to them of leases. Furthermore, the interests of API members correspond with NEPA's "national policy" to "encourage productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321; *see* Milito 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* own leases and obtain approval of their activities through longstanding NEPA policies and procedures of the Federal Defendants, and would face practical difficulty in restoring the status quo following a victory by Plaintiffs voiding or enjoining the

leases and requiring Federal Defendants to conduct additional NEPA reviews. 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, the D.C. Circuit and federal district courts have routinely and repeatedly permitted oil industry trade associations to intervene on behalf of their members' interests in litigation involving oil and gas leasing and operations. *See supra* pp. 2–3; *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); *Fund for Animals*, 322 F.3d at 735 (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' "obligation is to represent the interests of the American people . . . while [API's] concern is for" the interests of its members, *see Fund for Animals*, 322 F.3d at 736 (granting intervention). 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 NEPA include the interest of the API's members in the exploration and development of offshore resources, *see supra* p. 8, NEPA's goals are not limited to those interests, *see* 42 U.S.C. § 4321.

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. As the D.C. Circuit has recognized, the Government "is charged by law

with representing the public interest of [all] its citizens" rather than the "narrow and 'parochial' financial interest" of API's members. *Dimond v. District of Columbia*, 792 F.2d 179, 192–93 (D.C. Cir. 1986). Because the interests of API's members "cannot be subsumed within the shared interests of the citizens [at large], no presumption exists that the [Government] will adequately represent [their] interests." *Id*. at 193. *See also Apotex, Inc. v. FDA*, 508 F. Supp. 2d 78, 80 n.2 (D.D.C. 2007) (finding representation inadequate where applicant "has a financial interest . . . that is not an interest shared by the public"); *Fund for Animals*, 322 F.3d at 736–37 (noting that early general agreement and "tactical similarity" with parties "does not assure adequacy of representation") (citation omitted).

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 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 rights of the original parties….

API's and the Federal Defendants' 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 Federal Defendants' fulfillment of their obligations under the statutes upon which the Complaint relies. 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 did 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.[2]

A proposed Order is submitted herewith. As required by Fed. R. Civ. P. 24(c), API has included with this motion, as Exhibit 1 hereto, its proposed Answer to the Complaint.

Respectfully submitted,

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[2] *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 21st day of September, 2018, I caused a true and correct copy of the foregoing Motion for Leave to Intervene and all accompanying attachments, to be filed with the Court electronically and served by the Court's CM/ECF System upon the listed counsel for Plaintiffs, while the listed counsel for Federal Defendants was served by email:

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