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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,

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

AMERICAN PETROLEUM INSTITUTE'S REPLY IN SUPPORT OF MOTION TO INTERVENE

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

The American Petroleum Institute ("API") respectfully submits this reply memorandum in support of its motion to intervene in Plaintiffs' challenge to Federal Defendants' alleged failure to perform a purportedly nondiscretionary update of the 1994 National Oil and Hazardous Substances Pollution Contingency Plan ("National Contingency Plan" or "Plan").[1] Although Plaintiffs concede that API has associational standing to assert its members' interests and that API's motion is timely, Plaintiffs argue that intervention is improper because, in their view, API's members lack a protectable interest that may be impaired by this lawsuit, and, even if such an interest exists, the Federal Defendants adequately represent API's interests. *See* Pls.' Opp. (Dkt. No. 29) at 1, 10–11. Plaintiffs' arguments mischaracterize API's motion to intervene, governing legal authority, and the nature of Plaintiffs' claims in this case.

Contrary to Plaintiffs' mischaracterizations, granting API's intervention in this case furthers the Ninth Circuit's directive to "construe [Federal Rule of Civil Procedure] 24(a) liberally in favor of potential intervenors" based on "practical considerations, not technical distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (quotations omitted). As a practical matter, API members' operations to develop their offshore oil and gas leases are directly regulated by the National Contingency Plan, *see* API Motion to Intervene (Dkt. No. 23) at 3, 6–7; Lemieux Decl. (Dkt. No. 23-1), ¶¶ 5–10,[2] and will be impacted by Plaintiffs' claim that the Plan must be updated because "improvements in scientific and technologic knowledge" demonstrate that the contents of the Plan no longer "'provide for . . . effective action to minimize damage' from oil spills in the nation's waters" as required by the Clean Water Act ("CWA"), Compl. (Dkt. No. 1), ¶ 43 (quoting 33 U.S.C. § 1321(d)(2)–(3)); *see also id.*, ¶¶ 126–32. In short, Plaintiffs contend that a substantive standard—ineffectiveness—has been met and therefore requires EPA to update the Plan in conformance with the alleged

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[1] Plaintiffs are ALERT Project/Earth Island Institute, Alaska Community Action on Toxics, Cook Inletkeeper, Center for Biological Diversity, Rosemary Ahtuangaruak, and Kindra Arnesen (collectively, "Plaintiffs"). Defendants are the Environmental Protection Agency ("EPA") and Andrew Wheeler, in his official capacity as Administrator of the EPA (collectively, the "Federal Defendants").

[2] *See, e.g.*, *Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 295 (D.D.C. 2018) ("Courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections." (quotation omitted)).

"improvements in scientific and technologic knowledge" that render the Plan ineffective. Because API's members will be regulated by any such updates, granting API's motion 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).

ARGUMENT

I. API IS ENTITLED TO INTERVENE AS OF RIGHT

A prospective intervenor is entitled to intervene in an action where it satisfies a four-part test dictated by Federal Rule of Civil Procedure 24(a) ("Rule 24(a)"):

> (1) the application for intervention must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

Sw. Ctr. for Biological Diversity, 268 F.3d at 817–18. In applying these requirements, courts in this Circuit follow "a liberal policy in favor of intervention" because a broad understanding of intervention "serves both efficient resolution of issues and broadened access to the courts." *The Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (quotation and alteration omitted)).

API's motion to intervene fully demonstrated that it satisfies each requirement for intervention as of right. Plaintiffs do not dispute that API timely filed its motion. As detailed below, Plaintiffs' objections to API's showing as to the remaining Rule 24(a) requirements cannot square with the legal standards governing intervention or the allegations set forth in the Complaint.

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

An applicant for intervention that "claims an interest ***relating to*** . . . the subject of the action" alleges a cognizable interest supporting intervention. *See* Fed. R. Civ. P. 24(a). *See also*, *e.g.*, *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1251 (11th Cir. 2002) (courts "look to the subject matter of the litigation" in assessing claimed interest). API claims such an interest because its members are directly regulated by the National Contingency Plan's provisions governing the use and availability of dispersants that Plaintiffs challenge as, *inter alia*, "inadequate and outdated." Compl. ¶ 60 (describing Plan's testing standards for qualifying dispersants for industry use). *See also* API Motion to Intervene at

1 5–10 (detailing API members' interests). Where, as here, the regulatory regime governing a party's
2 activities is the subject of the lawsuit, intervention is warranted. *See id.* at 7–9 (citing cases).[3]
3 In Plaintiffs' view, however, API's interests are insufficient to support intervention because
4 Plaintiffs contend that this case involves only "the timing—not the substance" of EPA's issuance of an
5 updated National Contingency Plan. Pls.' Opp. at 1. *See also id.* at 4–5. The Complaint belies Plaintiffs'
6 stilted view of the case and API's corresponding interest.
7 To establish an entitlement to relief, Plaintiffs allege that the "EPA must maintain a[] [National
8 Contingency Plan] that reflects ***improvements in scientific and technologic knowledge***, to 'provide for
9 . . . ***effective*** action to ***minimize*** damage' from oil spills in the nation's waters." Compl., ¶ 43 (quoting
10 33 U.S.C. § 1321(d)(2)–(3)) (emphases added). Because the current Plan purportedly does not
11 "incorporate scientific and technological developments," Plaintiffs contend that the CWA requires EPA
12 to update the National Contingency Plan "to assure that the [Plan] is 'effective' and can 'minimize
13 damage.'" *Id.*, ¶ 127 (quoting 33 U.S.C. § 1321(d)(2)–(3)). With that predicate inadequacy of the
14 National Contingency Plan under the CWA's provisions, Plaintiffs allege that "EPA's failure to update
15 the [Plan], as required by 33 U.S.C. § 1321(d)(3), constitutes a failure to perform a nondiscretionary duty
16 under the CWA" that gives rise to this Court's jurisdiction to order relief. Compl., ¶¶ 129–30.
17 Accordingly, Plaintiffs ask the Court to, *inter alia*, rule that Federal Defendants' failure to update the
18 National Contingency Plan "***in accordance with*** improvements in scientific and technological
19 knowledge" amounts to a "fail[ure] to perform a nondiscretionary duty required by the CWA" and
20 "[o]rder EPA to issue a final rule ***to update*** the [National Contingency Plan] on an expeditious schedule
21 . . . ." *Id.*, Relief Requested, ¶¶ 1, 3 (emphases added).
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24 [3] That API cites intervention cases that do not involve an agency's alleged failure to act, *see* Pls.' Opp. at 7–8, 9 n.2, is a distinction without a difference. API's citations demonstrate both API's longstanding and deep interest in protecting its members' interests in litigation "relating to," Fed. R. Civ. P. 24(a), offshore oil and gas operations, *see* API Motion to Intervene at 4 n.1, 10 (citing cases), and set out the standards that govern ***all*** requests for intervention without regard to technical distinctions between the underlying claims, *see id.* at 7–9 (citing cases). At any rate, Plaintiffs' challenge to the National Contingency Plan is not, as they contend, restricted solely to non-substantive issues regarding timing. *See infra*.
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Taken together, the allegations in the Complaint unquestionably assume that EPA must issue ***some*** "update" to the National Contingency Plan because recent scientific information demonstrates that the Plan no longer satisfies the CWA's ***substantive*** requirements that a Plan be "effective" to "minimize damage" to the nation's waters.[4] By asking the Court to order an update to the Plan to satisfy the CWA's substantive requirements, Plaintiffs' legal challenge would necessarily require substantive changes to the National Contingency Plan that regulates API members' activities, and with which API members' ***existing*** oil spill response plans and offshore development operations must comply. *See* API Motion to Intervene at 2–3, 5–9. In short, contrary to Plaintiffs' characterization of the case, the ultimate question is ***whether*** the National Contingency Plan must be updated—a question posing substantive issues under the CWA—***not*** simply when an update must issue. API disagrees that the current Plan fails to satisfy the substantive requirements of the CWA, and its members will necessarily be impacted if the Court determines that Plaintiffs' alleged "contemporary developments in science and technology," Compl., ¶ 3, have shown otherwise.[5]

Plaintiffs' APA claim under 5 U.S.C. § 706(1) rests on the same assumptions. "[A] plaintiff who asks a court to 'compel agency action . . . unreasonably delayed' under § 706(1) must pinpoint an agency's failure to take an action that is both discrete and mandatory." *Connecticut*, 344 F. Supp. 3d at 295 (quoting 5 U.S.C. § 706(1)). Here, Plaintiffs' APA claim similarly asks the Court to "[d]eclare that EPA has violated the APA by unlawfully withholding or unreasonably delaying issuance" of an "update[d]" National Contingency Plan, Compl., Relief Requested, ¶ 2. And both claims rest on the underlying premise that API members' offshore development activities, *see* Compl., ¶¶ 87–100, are the ultimate source of the alleged danger arising from an ineffective National Contingency Plan. Nor is intervention

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[4] In arguing that the Complaint involves only the "timing—not the substance—of EPA's action," Pls.' Opp. at 1, Plaintiffs' Opposition likewise assumes that EPA must take some "action" on the Plan to comply with the law. But API's members—as regulated entities—will be impacted by any change to the status quo.

[5] With respect to API members' interests as regulated parties, Plaintiffs tellingly do not challenge API's prudential standing in this litigation. As shown in API's motion to intervene, "API's members undoubtedly satisfy prudential standing in this litigation because their activities are regulated by 'the contested regulatory action.'" *See* API Motion to Intervene at 8–9 (quoting *Amgen, Inc. v. Smith*, 357 F.3d 103, 108 (D.C. Cir. 2004) (quotation omitted)). *See also Bennett v. Spear*, 520 U.S. 154, 162 (1997) (to establish prudential standing, a party's interests need only "arguably fall within the zone of interests protected or regulated by the statutory provision" at issue).

1 precluded where the complaint alleges only a failure by the defendant agency to take an action allegedly
2 mandated by law, including, as here, under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1).
3 *See*, *e.g.*, *Telecomms. Research & Action Ctr. v. Fed. Communcs. Comm'n*, 750 F.2d 70, 72 (D.C. Cir.
4 1984) (intervention by regulated company in lawsuit seeking to compel agency to rule on petitions asking
5 agency to require regulated company to reimburse ratepayers); *Connecticut v. U.S. Dep't of the Interior*,
6 344 F. Supp. 3d 279 (D.D.C. 2018) (granting intervention as of right to casino owner in APA challenge
7 to agency's failure to act on Native American submission that would allow operation of rival casino).
8 *Cf. The Otter Project v. Salazar*, 712 F. Supp. 2d 999, 1003 (N.D. Cal. 2010) (granting permissive
9 intervention).

10 Because Plaintiffs "seek to overturn" the EPA's alleged failure to issue a new Plan under the
11 CWA's substantive requirements, *Connecticut*, 344 F. Supp. 3d at 298, and thereby change the regulatory
12 regime under which API's members operate offshore oil and gas operations and maintain qualifying
13 dispersants to respond in the unlikely event of an oil spill, API is entitled to intervene to protect its
14 members' interests in "maintain[ing] the status quo," *id*. at 302.[6]

15 Plaintiffs' cited cases, *see* Pls.' Opp. at 5–7, are not to the contrary. Unlike the substantive
16 components of Plaintiffs' claims in this case, the cases that Plaintiffs cite solely "involv[ed] the timing of
17 an agency determination," *id*. at 5, because (1) the statutory provisions at issue included a set deadline—
18 either an express date or set number of years—for the agency to take the allegedly delayed action, *see*
19 *Sierra Club v. U.S. EPA*, No. 13-cv-2809, 2013 WL 5568253, at *1 (N.D. Cal. Oct. 9, 2013) (Clean Air
20 Act required EPA to review and revise criteria pollutant air standards "at five-year intervals"); *Ctr. for*
21 *Biological Diversity v. U.S. EPA*, No. 11-cv-06059, 2012 WL 909831, at *1 (N.D. Cal. March 16, 2012)
22 (statute required EPA to review and revise certain standards "at least every 8 years" (quotation omitted));
23 *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 260 (2d Cir. 1992) (statutory provision required EPA to make a
24 final decision "no later than December 31, 1990"), or (2) the issue before the Court was the propriety of
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26 [6] API is not claiming a "legal right to a static, unchanging" National Contingency Plan, Pls.' Opp. at 9
27 n.3, but merely showing that its members will be impacted by a change in the Plan. That impact establishes API's protectable interest for purposes of Rule 24(a). At any rate, Plaintiffs' argument again
28 underscores that the litigation is aimed at "[]changing" the existing Plan that regulates API's members. *See id*.

a consent decree through which the defendant agency conceded that an action was required by law, *see Our Children's Earth Found. v. U.S. EPA*, No. 05-cv-05184, 2006 WL 1305223, at *1 (N.D. Cal. May 11, 2006) ("Defendants do not dispute liability for not having conducted the review process on time."); *In re Idaho Conservation League*, 811 F.3d 502, 506 (D.C. Cir. 2016) (considering EPA's agreed schedule to complete rulemaking sought by petitioners); *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1319 (D.C. Cir. 2013) (same). No such express deadline or concession is present here to restrict the case solely to a question of timing.[7]

Plaintiffs' related assertion that, even if API members have a cognizable interest, the litigation will not impair its ability to protect that interest, *see* Pls.' Opp. at 9–10, fares no better. Indeed, Plaintiffs' argument depends entirely upon their mistaken assertion that the Complaint is wholly unrelated to the substance of the National Contingency Plan. *See id.* at 9. It is irrelevant whether API could comment on future changes to the Plan during subsequent administrative proceedings because "there is no question that the task of reestablishing the status quo if the [Plaintiffs] succeed[] . . . will be difficult and burdensome," *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003), if the Plaintiffs succeed in convincing this Court that scientific developments have rendered the existing Plan ineffective under the CWA, *see supra*. The "practical consequences," *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977) (quotation omitted); *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818, of denying API's intervention would therefore include a lengthy administrative delay while a new Plan is developed, uncertainty for API members regarding the appropriate contents of their oil spill response plans, and a *stare decisis* bar on any subsequent claim by API that the CWA's substantive requirements for updating the Plan have not been met. *See, e.g.*, API Motion to Intervene at 9–10; *supra* pp. 3–4.

These practical impairments satisfy Rule 24(a). *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

[7] Plaintiffs' reliance on *Medical Advocates for Healthy Air v. Johnson*, No. 06-cv-0093, 2006 WL 1530094 (N.D. Cal. June 2, 2006), is similarly misplaced. In that case, the motion to intervene was untimely because it was filed after substantive merits briefing was complete. *See id.* at *3. Moreover, the applicant for intervention expressed primarily a procedural interest in participating in a rulemaking process under the Clean Air Act, and an administrative process would proceed regardless of the outcome of the litigation. *See id.* at *4. API claims no such procedural interest; rather, its members are substantively regulated by the National Contingency Plan challenged as ineffective under the CWA.

1 force government to change regulatory status quo, when "changes in the rules will affect the proposed
2 intervenors' businesses, both immediately and in the future") (citation omitted); *Sierra Club v. U.S. EPA*,
3 995 F.2d 1478, 1486 (9th Cir. 1993), *abrogated on other grounds*, 630 F.3d 1173 (9th Cir. 2011); *see*
4 *also Georgia*, 302 F.3d at 1258 ("[W]here a party seeking to intervene in an action claims an interest in
5 the very property and very transaction that is the subject of the main action, the potential *stare decisis*
6 effect may supply the practical disadvantage which warrants interventions as of right." (quotation
7 omitted)).

8 **B. API's Interests Will Not Be Adequately Protected By The Federal Defendants.**

9 An applicant for intervention's burden to demonstrate that existing parties do not adequately
10 represent the applicant's interests is "minimal." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823
11 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Here, API
12 accordingly need only show that Plaintiffs' and Federal Defendants' representation of API member
13 interests "may be" inadequate. *Trbovich*, 404 U.S. at 538–39 & n.10. To combat API's showing, *see*
14 API Motion to Intervene at 10–11, Plaintiffs again rely primarily upon their mistaken view that their
15 claims do not implicate the National Contingency Plan's substance, *see* Pls.' Opp. at 11.

16 At any rate, as the Courts of Appeals have made clear, "it is on its face impossible for a
17 government agency to carry the task of protecting the public's interests and the private interests of a
18 prospective intervenor." *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010)
19 (quotation omitted). *See also*, *e.g.*, *Georgia*, 302 F.3d at 1259 ("We do not believe that a federal
20 defendant with a primary interest in the management of a resource has interests identical to those of an
21 entity with economic interests in the use of that resource."); *Forest Conservation Council v. U.S. Forest*
22 *Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) ("The government must present the broad public interest, not
23 just the economic concerns of . . . industry.") (quotation and alteration omitted)); API Motion to Intervene
24 at 10–11 (citing cases).

25 That API and Federal Defendants both presently "seek the same result" in this litigation, Pls.'
26 Opp. at 11, is irrelevant. Unlike API members' property and other economic interests in expeditious
27 development of their offshore leases pursuant to, among other things, existing oil spill response plans and
28 available dispersants regulated by the National Contingency Plan, the EPA "has no independent stake"

in, for example, which dispersants are included in the Plan. *Georgia*, 302 F.3d at 1256. Federal Defendants, therefore, may have an interest in settlement or compromise not shared by API's members. Such a possibility of divergent interests is sufficient to satisfy Rule 24(a). *See, e.g.*, *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009) ("[T]he possibility of divergence of interest need not be great in order to satisfy the burden," and the movant "need only show the ***possibility*** of inadequate representation." (quotations omitted) (emphasis original)); *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011) ("We stress that intervention of right does not require an absolute certainty that . . . existing parties will not adequately represent its interests.").

Furthermore, because API represents all aspects of the oil and natural gas industry, *see* Lemieux Decl., ¶ 1, API's members occupy a variety of relationships to the challenged National Contingency Plan that "bring . . . point[s] of view to the litigation not presented by" any one group, *California ex rel. Lockyer v. United States*, 450 F.3d 436, 445 (9th Cir. 2006). For example, a leaseholder may have a more long term view of offshore development—and the regulatory impact of the National Contingency Plan—than a lease operator or service supplier concerned with more immediate completion of operations on a given lease. And those members with varying relationships to the National Contingency Plan may likewise bring to bear different practical experience with dispersants to address Plaintiffs' allegations that the existing Plan's treatment and authorization of particular dispersants is unsupported by current science or operational conditions. *See, e.g.*, Compl., ¶ 61 (alleging dispersants' alleged "failure to ***behave in the field*** as they do in laboratory settings" (emphasis added)). *See also id.*, ¶¶ 2–3, 25, 43, 50, 73. Intervention by API is therefore necessary to represent the "wide variety of interests" that are reflected in its membership and may be separately impacted by Plaintiffs' claims. *Nat'l Wildlife Fed. v. U.S. Army Corps of Eng'rs*, 188 F.R.D. 381, 385 (D. Or. 1999) (granting intervention to permit holder and interested organizations).

* * *

Viewing Rule 24(a)'s requirements as a whole, because API's members "would be substantially affected in a practical sense by the determination" Plaintiffs seek in this action, API "should . . . be entitled to intervene." Fed. R. Civ. P. 24 advisory committee's note on the 1966 amendments. *See also The Wilderness Soc'y*, 630 F.3d at 1179 (noting, in rejecting prior Ninth Circuit rule prohibiting intervention

of right on claims under National Environmental Policy Act ("NEPA"), that a "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to courts" (internal quotation marks omitted)); 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Practice & Procedure* § 1908, at 301 (2d ed. 1986) ("The central purpose of the 1966 amendment" that brought Rule 24 into essentially its present form "was to allow intervention by those who might be practically disadvantaged by the disposition of the action.").

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

Because API satisfies the requirements for intervention as of right under Rule 24(a), the Court need not address permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). That said, API's motion to intervene demonstrates the propriety of API's permissive intervention in this case. *See* API Motion to Intervene at 11–12. Plaintiffs' arguments to the contrary miss the mark.

First, Plaintiffs' objections again rest on the mistaken supposition that the claims at issue are limited solely to a question of timing. *See* Pls.' Opp. at 12. *Compare supra*. The "common questions," Pls.' Opp. at 12, between API and the Federal Defendants are likewise dictated by the allegations in the Complaint. As an intervenor, API, like the Federal Defendants, will address the standards imposed by the CWA and APA—including whether the CWA and APA impose a nondiscretionary duty to update the National Contingency Plan, and whether any such duty was triggered in practice. API's defenses thus "depend upon the same issues of law and fact that are at issue in this action." *The Otter Project*, 712 F. Supp. 2d at 1003. *Cf. Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) ("Where the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away."). Indeed, because API's members have "an interest in retaining" the existing National Contingency Plan, they share a defense in common with the Government. *See Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007); *supra* pp. 1, 2–5.

Plaintiffs further oppose API's permissive intervention based on a vague and speculative assertion that API will inject "irrelevant briefing" into the litigation. Pls.' Opp. at 11. Not only do Plaintiffs offer no support for this position, Plaintiffs' speculation is illogical. API has no interest in briefing irrelevant matters, which would only diminish the persuasiveness of its briefs. To the contrary, API seeks prompt

resolution of this litigation in order to protect its members' interests and remove any cloud over the oil spill response plans under which API members conduct offshore development.

Nor is it clear what issues Plaintiffs deem "irrelevant." If, for example, Plaintiffs lack standing or this Court lacks subject matter-jurisdiction, surely API can so argue even if neither Plaintiffs nor the Federal Defendants raise those issues. *See Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588, 593, 599–600 (D.C. Cir. 2015) (finding petitioner's NEPA claims unripe where ripeness issue was raised only by intervenor API, and was conceded by the Federal Defendants); *Ctr. for Biological Diversity v. U.S. EPA*, 937 F.3d 533, 536 (5th Cir. 2019) (finding petitioner lacked standing to raise NEPA and CWA challenge to EPA permit where "EPA initially agreed Petitioners had standing" but API "argued otherwise"); *Ctr. for Food Safety v. Hamburg*, 142 F. Supp. 3d 898, 900–01 & n.2 (N.D. Cal. 2015) (granting intervenor's motion to dismiss complaints for lack of administrative exhaustion where federal defendants initially declined to join motion, and only joined during oral argument on intervenor's motion to dismiss), *remanded by* 696 F. App'x 302, 303 (9th Cir. 2017) (agreeing that "district court properly held" that plaintiffs first had to raise claims with agency). Identifying such foundational infirmities in Plaintiffs' claims promotes, rather than reduces, "judicial efficiency." Pls.' Opp. at 11.

CONCLUSION

For the foregoing reasons, and those identified in API's Motion to Intervene, this Court should grant API's request for intervention, either as of right or permissively.

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Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 28th day of April, 2020, I caused a true and correct copy of the
3 foregoing to be filed with the Court electronically and served by the Court's CM/ECF System upon the
4 following:

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