IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALASKA COMMUNITY ACTION ON TOXICS, et al.,	)	
Plaintiffs,	)	
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	Civil Action No. 12-1299 (JDB)
Defendants.	)	

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

Alaska Community Action on Toxics, Cook Inletkeeper, Florida Wildlife Federation, Gulf Restoration Network, Louisiana Environmental Action Network, Louisiana Shrimp Association, Sierra Club, and Waterkeeper Alliance (collectively, "Plaintiffs") oppose the motion of American Petroleum Institute ("API") for leave to intervene in the above-captioned proceeding. Although API points to its members' engagement in offshore oil drilling and their general reliance on products listed on the National Contingency Plan Product Schedule ("NCP Product Schedule"), API fails to demonstrate that its members actually or will suffer concrete and particularized injuries necessary for standing and intervention as of right. The case before this Court is a matter of statutory interpretation, raising the question whether the United States Environmental Protection Agency ("EPA") is in violation of the Clean Water Act's mandate to identify on the NCP Product Schedule the waters and quantities in which dispersants and other listed products can be used safely. API fails to allege an interest in this question that is anything but speculative and further fails to assert a basis for finding that any such interest would

be inadequately represented by EPA. Moreover, permissive intervention is unwarranted in light of API's concession that its interests "in defending the claim of violations of law" in what is "a primarily legal dispute" can be expected to coincide with EPA's interests. Motion of the American Petroleum Institute for Leave to Intervene as Defendant 11, 12 ("API Mot.").

ARGUMENT

I. API IS NOT ENTITLED TO INTERVENE AS OF RIGHT

In the D.C. Circuit, intervention as of right under Federal Rule of Civil Procedure 24 depends on four factors:

> (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties.

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2009) (internal quotation marks omitted). A proposed intervenor also must establish standing under Article III of the Constitution. *See id.* at 731-32. Constitutional standing requires (1) an injury-in-fact that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical,'" (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A showing of Article III standing satisfies the second prong of the intervention-as-of-right test – that is, it demonstrates the existence of a legally protected interest. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998).

API is not entitled to intervene as of right because its members do not have Article III standing, and consequently API does not possess a legally protectable interest that may be impaired by the outcome of this action, as is required under Federal Rule of Civil Procedure 24. Moreover, although API fails to articulate a legally protected interest and refers only generally to

its members' engagement in offshore oil drilling and their obligation to prepare oil spill response plans, any such alleged interest will be adequately represented by EPA.

A. API fails to demonstrate Article III standing and therefore does not have the legally protected interest required for intervention as of right.

In order to intervene as of right, API must point to a "direct, non-contingent, substantial and legally protectable" interest, *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) – an interest "of such a direct and immediate character that the intervenor will either gain or lose by the *direct* legal operation and effect of the judgment," *Defenders of Wildlife v. Jackson*, 2012 WL 896141 *5 (D.D.C. Mar. 18, 2012) (internal quotation marks and citation omitted) (emphasis added). Here, API plainly fails to meet this requirement because it fails to demonstrate the requisite constitutional standing. *See Mova Pharm. Corp.*, 140 F.3d at 1076 (noting that a showing of constitutional standing "demonstrate[s] the existence of a legally protected interest for purposes of Rule 24(a)"); *see also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007) (finding that proposed intervenor's failure to make "the requisite showing of standing" translated into a failure to "demonstrate[] a right to intervene"). None of the ways that API alleges its members' interests would be affected, *see* API Mot. at 6, constitute "concrete and particularized" and "actual or imminent" injury causally connected to the outcome of the above-captioned proceeding and redressable by this Court, *see Lujan*, 504 U.S. at 560-61. API therefore lacks Article III standing and the legally protectable interest necessary for intervention as of right under Federal Rule of Civil Procedure 24.

1. Potential Injuries Alleged by API Are Indirect, Contingent, and Not Causally Connected to this Court's Decision.

API fails to articulate any concrete and particularized or actual or imminent injury that is causally connected to the outcome of this proceeding. Plaintiffs in this case seek to compel EPA

to engage in rulemaking and, specifically, to revise the NCP Product Schedule in order to identify the waters in which dispersants and other spill mitigating devices and substances may be used and the quantities in which they can be used safely in such waters. Compl. for Declaratory and Injunctive Relief at 41.[1] API argues that Plaintiffs' requested relief would affect the contents of its members' oil spill response plans and "*could also ultimately* impact [the products] that would be available to API members for use." API Mot. at 6 (second and third items on the list) (emphasis added); *see also id.* at 3. As explained in this section and the next, these alleged impacts to API's implied interests in maintaining a maximal number of products on the Product Schedule and in not revising oil spill response plans are speculative and would not be the direct result of any judgment by this Court, and, in any case, do not constitute cognizable injury to API's members.

Courts in this circuit have made clear that where a would-be intervenor's purported injuries are contingent on future substantive agency actions that are not before the Court, the causation and redressability prongs of Article III standing are not satisfied. In *In re Endangered Species Act Section 4 Deadline Litig.*, 270 F.R.D. 1 (D.D.C. 2010) ("*In re ESA*"), for instance, environmental groups brought suit against the U.S. Fish and Wildlife Service ("FWS") seeking to compel the agency to comply with statutory deadlines in making determinations about whether to list certain species under the Endangered Species Act. A landowner with one of the species on its property sought intervention on grounds that listing the species under the

[1] Plaintiffs also request that this Court set aside listings of products on the NCP Product Schedule made during the last six years for which EPA failed to identify either the waters in which the product may be used or the quantities of the product that can be used safely in such waters, which include 59 of the 111 products on the NCP Product Schedule. Compl. for Declaratory and Injunctive Relief at 38, 41. As discussed below, API's claim of injury as to this relief is also unavailing, as API fails to allege that any of its members actually rely on one or more of the products that Plaintiffs have requested be removed from the NCP Product Schedule. *See infra* Section I.A.3.

Endangered Species Act would precipitate restrictions on the use of the landowner's property. The court rejected the attempted intervention:

> With regard to the purported injury to [proposed intervenor's] property interests, the Court finds that [proposed intervenor] has failed to satisfy the causation and redressability prongs of the Article III standing test. [Proposed intervenor's] alleged injury is based entirely on the potential substantive outcome of the FWS's listing determination for the Tehachapi slender salamander, which is not before this Court. The case before this Court deals only with the FWS's alleged failure to complete a preliminary step in the listing process within the time period required by law. Because this Court will issue no order directly impacting [proposed intervenor's] use of its property, [proposed intervenor's] claims of injury from restrictions on its property use and business operations bear no relation to the present action.

Id. at 5. *See also In re Endangered Species Act Section 4 Deadline Litig.*, 277 F.R.D. 1 (D.D.C. 2011) (denying intervention by other groups on the same grounds).

In a recent case in this circuit citing *In re ESA* as a "close[] analogue," the court emphasized that where contingencies stand between a judgment in an action and identified injuries, the injuries are "too hypothetical and too far removed" to constitute "causally connected injury for standing purposes." *Ctr. for Biological Diversity v. EPA*, 274 F.R.D. 305, 310-11 (D.D.C. 2011). In *Center for Biological Diversity*, environmental organizations sought to compel EPA to regulate emissions from certain vehicles, including aircraft, under the Clean Air Act. An association representing manufacturers and operators of aircraft and aircraft engines sought to intervene. The court denied intervention, finding:

> In order for a judgment of this Court in plaintiffs' favor to result in the economic harms identified by movants, several contingencies would have to come about: EPA would have to make endangerment findings; those findings would have to be positive; EPA would have to initiate a rulemaking; that rulemaking would have to result in emissions standards that forced movants to spend money. The . . . *only* event that is guaranteed to flow directly from a judgment of this Court is the first. The rest are all contingent upon an affirmative endangerment finding by EPA, an outcome that will turn not on any order of this Court but rather on the application of agency expertise to scientific evidence.

Id at 310. Ultimately, the court found that because "[m]ovants' alleged injury is based entirely on the potential substantive outcome of EPA's endangerment determination," which was not before the court, "that injury is neither certainly impending nor fairly traceable to any judgment of this Court in the present action." *Id.* at 311. *See also Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 69 (D.D.C. 2004) ("[Proposed intervenors] ask[] the court to make many of [sic] inferential leaps, tie them together with inferential string, and come up with injury or impairment. The court understands the theoretical possibility that EPA will . . . come up with a rule that harms [proposed intervenors]. But at this point such a possibility is pure speculation.").

Like the unsuccessful intervenors in *In re ESA* and *Center for Biological Diversity*, API alleges injuries that are contingent and not a direct result of the action before this Court. Contrary to API's repeated claim that its members are the "object of" the agency action, API Mot. at 6; *see also id.* at 7, 8, in fact they are not. A plain reading of the challenged Subpart J regulations establishing the NCP Product Schedule, *see* National Oil and Hazardous Substances Pollution Contingency Plan, 59 Fed. Reg. 47,384, 47,453-57 (Sept. 15, 1994) (codified at 40 C.F.R. §§ 300.900-300.920), shows that the actual "subject of the contested regulatory action," API Mot. at 8, are manufacturers that seek to add their product to the Product Schedule, *not* API members who may ultimately use products that are listed on the NCP Product Schedule. *See* API Mot. at 2 (describing API's membership as companies that produce, refine, market and transport petroleum and petroleum products). The challenged regulations set forth the data requirements that *dispersant manufacturers* must submit, *see* 40 C.F.R. § 300.920; the tests their product must undergo, *see id.* Pt. 300, App. C; and the process by which EPA decides to add the product to the NCP Product Schedule, including the right of the dispersant manufacturer to request a review of a determination that its product is ineligible for listing, *see id.* § 300.920(a)(3). In contrast to the

facts in the case cited by API, where the challenged rule directly regulated the proposed intervenor's activities, *see* API Mot. at 7 (citing *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998)), nowhere in the challenged Subpart J regulations is there any reference to oil spill response plans or the obligations of API's members.

In other words, any decision by this Court to require EPA to revise Subpart J regulations in order to prepare a Product Schedule that identifies the waters in which dispersants and other agents may be used and the quantities in which they can be used safely in such waters will have no direct impact on API's members. Like the multiple steps outlined by the court in *Center for Biological Diversity*, several contingent steps necessarily intervene between this Court's decision and any alleged impact on API's members. First, EPA would have to undertake rulemaking to revise the Subpart J regulations establishing the NCP Product Schedule and promulgate a final rule.[2] Second, manufacturers seeking to list their products on the revised Product Schedule would have to follow the revised final rule in undertaking any necessary product testing and in submitting any required data. Next, EPA would review the submitted information and make final determinations as to whether to list particular products on the NCP Product Schedule. Only as a result of *this* agency action would API's members feel any potential impact. Assuming that one of API's members actually relies on the particular listed dispersant in its dispersant use plan, that member would have to revise the "required contents" of its dispersant use plan and the "required explanation in [its] oil spill response plan[]," API Mot. at 6, to reflect any changes in the NCP Product Schedule.

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[2] Moreover, API's interests would not be impaired because it would have an opportunity to comment on the rulemaking and is not precluded from challenging any final rule. *See Envtl. Def. v. Leavitt*, 329 F. Supp. 2d at 68 (finding no concrete injury or impairment to proposed intervenor where proposed intervenor could participate in future rulemaking or challenge the final rule); *Alternative Research & Dev. Found. v. Veneman*, 262 F.3d 406, 411 (D.C. Cir. 2001) (same).

API's additional allegation – that "[t]he lawsuit *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," *id.* (emphasis added) – requires an even greater inferential leap. API assumes that after EPA's rulemaking, after a manufacturer's submission of data and test results in compliance with the final rule, and after EPA's review of the submitted information, the agency will decide that a particular dispersant cannot be listed or cannot be used in certain waters, thereby limiting the products available to API's members. This result is plainly speculative and is not causally connected to or redressable by this Court's decision in the present case.

Ultimately, the case before this Court addresses only whether EPA must identify the waters and quantities in which dispersants can be used safely on the NCP Product Schedule. API's purported injuries are contingent on the substantive outcome of EPA's revision of the Subpart J rulemaking and subsequent agency decisions to list individual products on the NCP Product Schedule in compliance with the revised rule. Because, as the court pointed out in *In re ESA*, this Court "will issue no order directly impacting" proposed intervenor's revision of oil spill response plans or reliance on oil spill control agents, API's claims of injury "bear no relation to the present action" and do not meet the requirements for standing. *In re ESA*, 270 F.R.D. at 5; *see Ctr. for Biological Diversity v. EPA*, No. C09-0670 (W.D. Wa. Oct. 5, 2009) (attached hereto as Exhibit A) (denying API's intervention as of right in a Clean Water Act suit precisely because "[a]n interest that is contingent upon the occurrence of a train of contingent events, many of which require the discretion of public entities, cannot support intervention").

2. API Fails to Allege Impacts That Constitute Cognizable Injuries.

Even assuming API's members are ultimately required to revise their oil spill response plans or to rely on a narrower range of oil spill control agents, these impacts do not constitute

injuries to legally protected interests. As a matter of law, API's members already are required to review their oil spill response plans "at least every 2 years and submit all resulting modifications to the Regional Supervisor." 30 C.F.R. § 254.30(a). Additionally, API's members are required to "submit revisions . . . for approval within 15 days whenever" certain changes occur. *Id.* § 254.30(b). The Regional Supervisor is authorized, moreover, to require that an oil spill response plan be resubmitted if it becomes outdated. *Id.* § 254.30(c).

Within the context of these existing and ongoing obligations for API's members to revise their oil spill response plans, it is also significant that EPA already routinely revises the NCP Product Schedule. *See* Office of Emergency Mgmt., EPA, NCP Product Schedule (Oct. 2012), *available at* http://www.epa.gov/osweroe1/docs/oil/ncp/schedule.pdf . Over time, 116 products have been removed from the NCP Product Schedule. *See id. at* 2 (identifying each of the products that have been removed from the NCP Product Schedule). Assuming one of API's members relied on one of these 116 products, it would have been required to update its oil spill response plan accordingly. Certainly, changes and removals of products from the NCP Product Schedule could affect API's members by causing them to undertake required revisions to their oil spill response. But insofar as an "injury" by definition means some sort of *harm*, it is difficult to see how these impacts are *harmful* when API's members already regularly revise their oil spill response plans to incorporate changes in a regularly updated NCP Product Schedule.

3. API Fails To Allege Sufficient Factual Allegations of Concrete and Particularized Injuries.

API "must demonstrate that it has at least one member who . . . can establish the elements of standing." *Friends of the Earth v. U.S. Dep't of Interior*, 478 F. Supp. 2d 11, 17 (D.D.C. 2007). API alleges that removal of the 59 products identified in Plaintiffs' Complaint from the NCP Product Schedule would limit the products that API members "*could rely upon*" in their

dispersant use plans. API Mot. at 6 (emphasis added). Although "general factual allegations of injury" suffice at the current stage in the proceedings, *Lujan*, 504 U.S. at 561, API fails to allege that any of its members *actually* rely on one or more of these 59 products and thus does not meet even this standard.

Significantly, API does not allege that any of its members actually rely on one or more of the products that Plaintiffs have requested be removed from the NCP Product Schedule. API, in other words, does not make even the requisite "general factual allegations" as to its members' concrete and particularized injuries. The current version of the NCP Product Schedule, updated October 1, 2012, lists a total of 111 products. *See* Office of Emergency Mgmt., EPA, NCP Product Schedule 3 (Oct. 2012). Plaintiffs have asked this Court to vacate and set aside only the 59 products that were added to the Product Schedule in the last six years, *see* Compl. for Declaratory and Injunctive Relief at 38. That leaves 52 products on the NCP Product Schedule that API's members could rely on in their dispersant use plans.[3] API's assertion that removal of the 59 products would limit the products that its members "*could rely upon*," API Mot. at 6 (emphasis added), and failure to allege, even generally, that its members *actually* rely on these particular 59 products (rather than any of the remaining 52 products available on the NCP Product Schedule) amounts to an insufficiently concrete injury for purposes of standing. *See, e.g.*, *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007) (finding that proposed intervenor's assertion that its members "can be injured by ecological damages" – if a challenge to certain permits were successful and the resulting lack of regulation led to pollution – failed to "demonstrate a 'concrete injury' to [proposed intervenor's]

[3] For example, this list of 59 products does not include COREXIT products, which were used in response to the Deepwater Horizon disaster. Compl. for Declaratory and Injunctive Relief at 31, 39-40.

interests" and was "too speculative to satisfy the injury-in-fact requirement, even at the pleading stage").[4]

B. API's interests are adequately represented.

API also has failed to show that its interests are not adequately protected by the existing parties. "A putative intervenor does not have an interest not adequately represented by a party to a lawsuit simply because it has a motive to litigate that is different from the motive of an existing party." *Natural Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 834 F.2d 60, 62 (2d Cir. 1987) (upholding an order denying API's motion to intervene because although API "may be motivated to defend . . . because of economic interests not necessarily shared by the state and federal defendants," "there has been no showing that the nature of those economic interests is related to colorable legal defenses that the public defendants would be less able to assert"). Although API's burden to show inadequate representation is "not onerous," it must nevertheless "produce something more than speculation as to the purported inadequacy" of representation. *Aref v. Holder*, 774 F. Supp. 2d 147, 172 (D.D.C. 2011).

Here, API not only fails to produce more than speculation as to the purported inadequate representation, it concedes that "EPA's and API's interests *could be expected to coincide in defending the claim of violations of law* asserted in this action," API Mot. at 11 (emphasis added). In light of the straightforward statutory interpretation questions before the Court and

[4] The preceding subsections explain why the first three of API's four alleged injuries, *see* API Mot. at 6, are not cognizable for standing and intervention purposes. The last of API's allegations – that the relief sought "could prospectively change the process by which EPA reviews and approves the dispersants and other products that API members rely on," API Mot. at 6 – deserves no more than a mention. API fails to articulate any interests its members have in the *process* by which EPA decides to approve dispersants. As is explained in Section A.1., *supra*, API's members are not the subject or target of EPA regulations establishing the NCP Product Schedule, and are in no way involved in EPA's process for reviewing and approving products for the NCP Product Schedule.

API's concession that its interests converge with EPA's in litigating these legal questions, API's claims are adequately represented.

II. THIS COURT SHOULD NOT GRANT PERMISSIVE INTERVENTION

Permissive intervention is not warranted here because API's participation will not aid in the adjudication of the legal questions presented. In determining whether to grant permissive intervention, courts may consider "whether parties seeking intervention will significantly contribute to . . . the just and equitable adjudication of the legal question presented." *Aristotle Int'l, Inc. v. NGP Software, Inc.*, 714 F. Supp. 2d 1, 18 (D.D.C. 2010). In *Center for Biological Diversity*, discussed *supra*, the court questioned the proposed intervenor's "potential contribution" and denied permissive intervention, reasoning that:

> Movants argue persuasively that they have substantial expertise and a unique perspective regarding the manufacture and operation of aircraft and the engines thereof. Contrary to movants' assertions, however, aircraft and their engines are not at issue in this case. Rather, the Court has been asked to determine whether EPA has an enforceable obligation to make the findings sought by plaintiffs and, if so, whether it has breached that obligation. With regard to *these* questions, movants offer no more than conclusory assertions that their participation will be helpful, and fail to demonstrate an ability to contribute to the full development of the factual and legal issues presented.

274 F.R.D. at 313 (internal quotation marks and citations omitted). Similarly, the court denied permissive intervention in the second of the two *In re ESA* interventions on grounds that the proposed intervenor's "expertise and experience" with the particular species it sought not to have listed under the Endangered Species Act "have no bearing" on the legal questions actually before the court. *See* 277 F.R.D. at 9.

Here, API acknowledges this case's "basic simplicity as a primarily legal dispute," API Mot. at 12; concedes that its interests in "defending the claim of violations of law asserted" would coincide with EPA's, *id.* at 11; and does not claim to possess any particular expertise or

knowledge about the Clean Water Act that would lead to a more just and equitable adjudication of the statutory interpretation claims before this Court. Even if API and its members could be expected to have experience related to oil spill control, this expertise is unrelated to and has no bearing on the statutory interpretation of the Clean Water Act. In short, API has failed to demonstrate that it can add anything to the litigation that it could not add as *amicus curiae*.

CONCLUSION

For all the reasons set forth above, this Court should not grant API intervention in the above-captioned proceeding.

Respectfully submitted this 31st day of October 2012,

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Exhibit A

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CENTER FOR BIOLOGICAL DIVERSITY, a nonprofit organization; Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LISA JACKSON, Administrator, United States Environmental Protection Agency, MICHELLE PIRZADEH, Acting Region 10 Administrator, United States Environmental Protection Agency; Defendants.	Case No. C09-0670-JCC ORDER

This matter comes before the Court on Intervenor Defendants American Petroleum Institute, *et al.*'s Motion to Intervene in Support of Defendant EPA (Dkt. No. 18), Plaintiff Center for Biological Diversity's Response (Dkt. No. 23), Defendant United States Environmental Protection Agency's Response, (Dkt. No. 24), Intervenor Defendants' Replies to Federal Defendant (Dkt. No. 27) and to Plaintiff (Dkt. No. 28). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

I. BACKGROUND

The American Petroleum Institute ("API"), the Chamber of Commerce of the United States of America ("Chamber of Commerce"), the Utility Water Act Group ("UWAG"), and the Utility Air Regulatory Group ("UARG"), collectively "Proposed Intervenors," seek leave to intervene both permissively and as of right in this environmental action under Federal Rule of Civil Procedure 24.

The underlying lawsuit concerns the 2008 decision by the United States Environmental Protection Agency ("EPA") to approve Washington State's impaired-waters list.[1] Under Section 303(d) of the Clean Water Act, each state must identify those water bodies within its borders that are not attaining water quality standards. 33 U.S.C. § 1313(d)(1)(A). The states submit these "impaired waters" lists to the EPA every two years, and the EPA must approve or disapprove a state's impaired-waters list within thirty days of submission. *Id.* § 1313(d)(2). If the EPA disapproves of a list, it must identify impaired waters omitted by the state, and go through the notice and comment process. 40 C.F.R. § 130.7(d)(2).

The Complaint alleges the following: In 2008, the EPA approved Washington State's impaired-waters list. (Compl. ¶ 59 (Dkt. No. 1 at 14).) That list did not include any ocean water areas impaired by ocean acidification. *Id.* Ocean acidification is caused by the ocean absorbing carbon dioxide in the atmosphere. When atmospheric concentrations of carbon dioxide increase, the oceans absorb some of the excess, which changes seawater chemistry and increases ocean acidity. *Id.* ¶ 3. The Center for Biological Diversity ("CBD") challenges the

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[1] This factual statement is based only on the pleadings, including Plaintiff's Complaint and the Proposed Intervenors' Motion and Replies. In considering a motion to intervene, "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." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). Nothing in this background section establishes any factual matter conclusively; it is written to give context for considering this Motion to Intervene alone.

EPA's decision to approve an impaired-waters list that omitted Washington coastal waters. CBD argues that the EPA's decision was arbitrary and capricious under the Administrative Procedure Act. 5 U.S.C. § 706(2), and unlawful under the Clean Water Act, 33 U.S.C. § 1313(d). Among other relief, CBD seeks to compel the EPA to add ocean waters impaired by ocean acidification to Washington's list of impaired waters. (Compl. 15 (Dkt. No. 1).)

Once a water body is placed on the state's impaired-waters list, states undertake to decrease pollution in these areas by establishing a "total maximum daily load" ("TMDL") for pollutants in that water body. 33 U.S.C. § 1313(d)(1)(C), 40 C.F.R. § 130.7(c)(1). One of the ways in which Washington State regulates pollutants is by issuing discharge permits to private parties under the National Pollutant Discharge Elimination System ("NPDES"). (Chittim Decl. ¶ 3 (Dkt. No. 28-2 at 2).) Through the permitting process, the State of Washington places limits on, among other things, the pH of any discharge into impaired waters, informed in part by the limitations guidelines established under the Clean Water Act by the EPA. *Id.*

Proposed Intervenors, each of which is an organization representing a large number of members, claim an interest in this litigation based on these NPDES permits. API claims that an unspecified number of its members "have at least three facilities that are currently permitted to discharge directly into the Washington coastal zone . . ." (Mot. to Intervene (Dkt. No. 18 at 2).) The Chamber of Commerce claims to "have multiple members in Washington that have CWA permits to discharge into waters that feed into Washington's coastal waters and must comply with any CWA obligations that may result from the current litigation." (*Id.* at 3.) UWAG and UARG each claim to have "at least one member with a facility in Washington with discharges regulated by a CWA permit that reach the coastal waters in question." (*Id.*) The theory is that, should Washington coastal waters be listed as impaired, the permit obligations of these members will change.

Proposed Intervenors moved collectively for intervention on August 14, 2009. (Dkt. No. 18.) Both the EPA and CBD oppose intervention.

II. DISCUSSION

A. Intervention as of Right

Under Federal Rule of Civil Procedure 24,[2] an applicant is entitled to intervention as of right upon a four-part showing: (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 a 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. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). In general, courts construe Rule 24(a) liberally in favor of potential intervenors. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir.1995).

The burden is on the intervenors to demonstrate all four prongs. *See U.S. v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002). Because the Court finds that Potential Intervenors have not demonstrated a protectable interest that may be impaired by the outcome of this lawsuit, the Court need not discuss timelines or adequacy of representation.

Applicants must point to a protectable interest that is "concrete" and directly related to the underlying subject matter of the action. *U.S. v. Alisal Water Corp.*, 380 F.3d 915, 920 (9th Cir. 2004). There must be a relationship between that interest and Plaintiff's claims that is more than theoretical. *So. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (applicants' "contingent, unsecured claim" fell short of the "direct, non-contingent, substantial and legally protectable" interest required for intervention as a matter of right). Here, CBD and EPA oppose intervention by arguing that the connection between the permits held by the

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[2] "On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." FED. R. CIV. P. 24(a)(2).

Proposed Intervenors' members and the subject matter of this litigation is too attenuated to support intervention, and the Court agrees. The Court finds that Proposed Intervenors have not demonstrated a sufficiently direct interest that may be impaired by the outcome of this suit.

First, the underlying environmental action does not directly challenge any existing permit. Nonetheless, Proposed Intervenors argue that their permits would likely require alteration if CBD prevails. The chain of events, established by law, is as follows: If the 303(d) list is revised to include Washington coastal waters, the State must establish a TMDL, subject to public review, and submit the TMDL to the EPA for approval. (Fed. Def.'s Opp. at 3 (Dkt. No. 24)) (citing applicable statutes). If the EPA approves the TMDL, it becomes a "goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits." *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003), *aff'd* 411 F.3d 1103 (9th Cir. 2005). It is important to note that Washington State, not the EPA, issues NPDES permits pursuant to these TMDL goals. (*See* Chittim Decl. ¶ 2 (Dkt. No. 28-2 at 2).) Thus, if CBD is successful, Washington State *may* alter its TMDLs, EPA *may* approve that alteration, and the State *may* then adjust its permits to accommodate this new TMDL. Even if the impaired-waters list is altered, therefore, several steps stand between this action and changes to Proposed Intervenors' members' NPDES permits—steps that involve nebulous "goals," *two* public entities' discretion, and additional opportunities for public comment.

Proposed Intervenors, in a declaration submitted with their Replies, point to a State permitting manual that applies to impaired waters for which no TMDL has been established. (Chittim Decl. ¶¶ 5, 6 (Dkt. No. 28-2 at 2, 3).) The declarant interprets the State's manual as "automatically applicable" to all current permit-holders. (*Id.*) The questions regarding the application of the State's permitting manual to currently held permits, besides being untimely presented to the Court, require investigation into Washington State policy: extrinsic evidence inappropriate to consider on a motion to intervene. *Lake Investors Dev. Group, Inc. v. Egidi Dev.*, 715 F.2d 1256 (7th Cir. 1983). Even taking the declarant's word for it, the declarant

admits that subsequent administrative action will allow Proposed Intervenors an opportunity for notice and comment. (Chittim Decl. ¶ 7 (Dkt. No. 28-2 at 4).) His one complaint is that such action will be costly. (*Id.*) But where the substantive content of new regulations is not the subject of the underlying lawsuit, and applicants may protect their members' interests during a later administrative process, intervention is not mandated. *See Our Children's Earth Found. v. EPA*, No. C 05-05184 WHA, 2006 WL 1305223 at *2–*3 (N.D. Cal. May 11, 2006).

Second, and equally as important, *three* of the four Proposed Intervenors have no protectable interest because their members do not hold permits to discharge into the water body that is the subject of this action. Only one small group of permit-holders (three facilities owned by some of API's members) hold permits that discharge directly into Washington coastal waters. (Fed. Def.'s Opp. 6 (Dkt. No. 24); *see also* Mot. to Intervene (Dkt. No. 18 at 2).) The others only hold permits to discharge into the ocean's tributaries—hardly a radical concept on the west coast of this State. If the Court were to allow intervention by every permit-holder who could discharge into one of Washington's rivers that eventually flows into the sea, this suit would balloon out of control.

The Ninth Circuit does not require the axe to be poised above the intervenor's head to allow them a voice in the lawsuit, but intervention based on wholly contingent claims will not suffice. In *Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993), the case relied on most heavily by Proposed Intervenors, the Sierra Club sought a declaratory judgment compelling the EPA to "implement [control] strategies by promulgating final [NPDES] permits containing pollutant-specific, numerical, water quality-based effluent limitations that reduce toxics being discharged from each of the Arizona point sources." *Id.* at 1480. The City of Phoenix moved to intervene because it was discharging toxic pollutants into two protected water bodies pursuant to the precise types of permits challenged in the lawsuit. *Id.* The Ninth Circuit held that the City should be allowed to intervene as a right because the lawsuit "may compel EPA to change the terms of the City's NPDES permits." *Id.* at 1483. Proposed Intervenors zero in on this language

of contingency—along with another sentence in the opinion, that "[w]aters affected by City discharges *may* be listed." (*See* Repl. to Fed. Def.'s at 4 (Dkt. No. 27) (emphasis in motion).) But their quotation of dicta, out of context, is unavailing. A closer reading of the case reveals that the contingency language focused on the possible *outcome of the suit in Sierra Club's favor*, not the possible outcome of a subsequent chain of hypothetical administrative action.

This case presents different facts. Unlike in *Sierra Club*, the permits held by Proposed Intervenors are not the target of CBD's action. The Proposed Intervenors' economic interest in this suit requires the precipitation of a chain of events that involves several layers of administrative review by both the EPA and Washington State. This is insufficient to establish that their interest is more than theoretical. An interest that is contingent upon the occurrence of a train of contingent events, many of which require the discretion of public entities, cannot support intervention. *See also Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 992 F.2d 92, 97 (2d Cir. 1990).

B. Permissive Intervention

An applicant seeking permissive intervention must prove three threshold requirements: (1) it shares common questions of law or fact with the main action; (2) its motion is timely, and (3) the court has an independent basis for jurisdiction over the applicant's claims. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). Even if an applicant satisfies these threshold requirements, the district court has discretion to deny permissive intervention. *Id.* In exercising its discretion, the Court must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties. *See* FED. R. CIV. P. 24(b)(2).

The Court declines to allow permissive intervention in this case. In the first place, Proposed Intervenors have not established independent subject matter jurisdiction. NPDES permits are issued by the State, and Proposed Intervenors point only to Washington State permitting manuals. (*See* Chittim Decl. ¶ 5 (Dkt. No. 28-2 at 2).) Courts have denied permissive intervention where intervention may require the court to consider novel or difficult

issues of state law. *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989). Second, as discussed above, Proposed Intervenors have not established a common question of law or fact because their interests are not the subject of this lawsuit. Indeed, they have not submitted a pleading or answer in intervention, as required by Federal Rule of Civil Procedure 24(c), that establishes any claim or defense at all. *See Our Children's Earth Found.*, 2006 WL 1305223 at *7.

Even if Proposed Intervenors had demonstrated all three prongs, the Court would discretionarily deny intervention. Permissive intervention is not favored on the eve of settlement. *Aleut Corp. v. Tyonek Native Corp.*, 725 F.2d 527, 530 (9th Cir. 1984). Here, the parties have indicated that settlement talks are productive. (*See* Dkt. No. 12 at 2.) Allowing intervention will unduly complicate a case that is moving toward an amicable resolution. Moreover, the Court may deny permissive intervention when an applicant has not shown that its participation will significantly contribute to full development of the underlying factual issues in the suit. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). Proposed Intervenors have not alleged that they will bring anything factually different to the table other than speculative interests that are removed from the underlying dispute; otherwise, they seek the same result as the EPA. *See also id.* (district courts may consider whether the applicants' interest is adequately represented by existing parties).

III. CONCLUSION

For the foregoing reasons, the Motion to Intervene (Dkt. No. 18) is DENIED.

DATED this 5th day of October, 2009.

John C. Coughenour
UNITED STATES DISTRICT JUDGE