UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LIMITED, ALLCO FINANCE LIMITED AND THOMAS MELONE, Plaintiffs, v. DEB HAALAND, in her official capacity of Secretary of the Interior, GARY FRAZER, in his official capacity of Assistant Director for Endangered Species, U.S. Fish and Wildlife Service, JANET COIT, in her official capacity of Assistant Administrator for Fisheries, NOAA Fisheries Directorate, MARTHA WILLIAMS in her official capacity of Principal Deputy Director, U.S. Fish and Wildlife Service, COLONEL JOHN A. ATILANO II in his official capacity of Commander and District Engineer, Colonel, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Army Corps of Engineers, Bureau of Ocean Energy Management, and the U.S. Department of the Interior, Defendants.	Case No. 1:21-cv-11171 **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE BY SOUTH FORK WIND LLC**

Plaintiffs, Allco Renewable Energy Limited, Allco Finance Limited and Thomas Melone submit this opposition to the Motion to Intervene ("MTI"), ECF No. 80, of South Fork Wind LLC ("SFW").

ARGUMENT

I. SFW Does Not Meet The Threshold Requirements For Permissive Intervention.

A. SFW Does Not Share a Defense With The Main Action.

"[A] district court considering requests for permissive intervention should ordinarily give weight to whether the original parties to the action adequately represent the interests of the putative intervenors." *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 41(1st Cir. 2020) ("*T-Mobile*"). The Federal Defendants and Vineyard Wind 1 LLC ("VW") adequately represent the interests of SFW. For that reason alone, SFW's motion should be denied.

SFW's motion should also be denied because it does not qualify for permissive intervention. FRCP 24(b) allows the Court to "permit anyone to intervene who . . has a claim or

defense that shares with the main action a common question of law or fact." SFW does not meet that criterion. Under SFW's reading, anyone that wanted to uphold the Federal Defendants' actions would qualify for intervention, including all developers of the many offshore wind projects proposed on the Outer Continental Shelf that the Federal Defendants list as foreseeable actions in the final environmental impact statements for VW and SFW.

"[A] court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996). "[T]he putative intervenor [under Rule 24(b)] must ordinarily present: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *EEOC v. Nat'l Children's Ctr., Inc*., 146 F.3d 1042, 1046 (D.C. Cir. 1998).

SFW's motion is timely but it fails to present an independent ground for subject matter jurisdiction between Plaintiffs and SFW, and SFW does not present a defense in common with the action between Plaintiffs and the Federal Defendants.

Courts that have read Rule 24(b) in accordance with its plain language as imposing an actual substantive requirement have held in situations such as this case, that permissive intervention is not permitted. For example, in an identical case to this one, *Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 496 (E.D. Wis. 2004), the putative intervenors sought to intervene on the side of the government in a challenge to government approvals. There the plaintiffs claimed that the United States Forest Service violated the National Environmental Policy Act ("NEPA") and the National Forest Management Act in approving certain logging activities and timber sales in the Cayuga project area of the Chequamegon-Nicolet National Forest in northern Wisconsin. Two trade associations representing commercial logging businesses sought mandatory and permissive intervention claiming that a ruling in plaintiff's favor would reduce the amount of available timber. The court held that the proposed intervenors

did not share a claim or defense in common with a claim or defense in the suit reasoning that no claim was made *against* the putative intervenors and the statutes on which the plaintiffs' claims were based did not apply to the putative intervenor:

> In the present case, applicants' claim for permissive intervention fails because applicants have no claim or defense in common with a claim or defense in the suit. The only claim in the suit is plaintiffs' allegation that the forest service failed to comply with various statutory obligations. Applicants make no similar claim. The forest service's defense is that it did in fact comply with the relevant statutes. *Although applicants agree with the forest service's position, it would not be accurate to say that they therefore had a defense in common with the forest service. This is so because plaintiffs make no claim against the applicants and because the statutes on which plaintiffs' claims are based do not apply to applicants*.
>
> (Emphasis added.)

The case here is identical. Plaintiffs claim the Federal Defendants failed to comply with various statutory obligations. The Federal Defendants' defense is that they did comply. Plaintiffs make no claim against SFW. SFW simply agrees with the Federal Defendants' defense.

The fundamental question is whether Rule 24(b)'s threshold requirement means more than just the putative intervenor wants to line up on the same side as one party. If merely wanting to line up on the same side as a party and take shots at the other side qualifies, then the language "has a claim or defense that shares with the main action a common question of law or fact" is simply superfluous. Sharing a "claim or defense that shares with the main action a common question of law or fact" must be more than the putative intervenor agreeing with one side or wanting to help out with taking shots at the other side.

Another NEPA case is *Idaho Rivers United & Friends of the Clearwater v. Nez-Perce*, 2016 U.S. Dist. LEXIS 199798 (D. Idaho 2016) at *10 where the court denied intervention in a case like here where putative intervenors sought to intervene to defend the government's approvals based upon the putative intervenors' alleged economic interests. *Id.* ("The prospective intervenors have failed to identify any claim or defense on their behalf that shares a common question of law or fact with Plaintiffs' challenges to the Johnson Bar Fire Salvage Project under NEPA, the ESA, or WSRA. Although these two private companies seek to intervene in this

action to protect their economic interests in the two timber salvage contracts, these contracts are byproducts of the Project itself.")

Other cases illustrate why SFW does not share a common defense with the main action. In *DSMC, Inc. v. Convera Corp*., 273 F. Supp. 2d 14 (D.D.C. 2002) the plaintiff filed suit against the defendant alleging violations of trade secrets and federal copyrights laws. The claims against the defendant were related to a contract between the plaintiff and the putative intervenor, as a result of which, plaintiff claimed the putative intervenor was allowed to access plaintiff's trade secrets. The court held that there was a common defense: "Clearly the facts at issue in the arbitration and this litigation at least in part overlap: determining whether [the putative intervenor] violated its contract by revealing information to [defendant], and whether [defendant] conspired with [the putative intervenor] to receive the information will involve much of the same factual development. [The putative intervenor] and [the defendant] share the common defense of the arbitration clause of the [plaintiff-putative intervenor] contract and the Federal Arbitration Act." 273 F. Supp. 2d at 27. Here, there are no claims that Plaintiffs have made against SFW. There is no common defense that SFW has because there are no claims in the main action that relate to it.

B. SFW Lacks Standing.

SFW has also failed to show an independent basis for jurisdiction in an action between Plaintiffs and SFW, and lacks standing. Standing requires a "claim of injury . . . to a legally cognizable right." *McConnell v. FEC*, 540 U.S. 93, 227 (2003). Rule 24 "promotes the efficient and orderly use of judicial resources by allowing persons, *who might otherwise have to bring a lawsuit on their own* to protect their interests or vindicate their rights, to join an ongoing lawsuit instead." *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). "[J]udicial efficiency is not promoted by allowing intervention by a party with no interest upon which it could seek judicial relief in a separate lawsuit." *United States v. Metro. St. Louis Sewer Dist*., 569 F.3d 829, 840 (8th Cir. 2009).

Here, SFW has failed to articulate what legally protectable right SFW would be able to file suit in this Court to protect. There is no lawsuit that SFW could bring on its own against Plaintiffs or the Federal Defendants. Thus, SFW has failed to show an independent basis for jurisdiction in an action between Plaintiffs and SFW, and lacks standing. As a result, Rule 24 does not permit permissive intervention.

The absence of a claim that SFW could bring contrasts with *Cotter v. Mass. Ass'n of Minority Law Enf't Officers*, 219 F.3d 31, 35 (1st Cir. 2000) (cited by SFW), where the intervenors could have brought an independent claim against the Boston Police Department.[1]

II. SFW Does Not Qualify For Intervention As Of Right.

This Court has already held that the Federal Defendants adequately represent the interest of commercial offshore wind developers. *See*, ECF No. 43. Nothing has changed since the Court's ruling to change that conclusion. As a result, SFW does not qualify for intervention as of right. *T-Mobile*, 969 F.3d at 39 ("It is black letter law that a failure to satisfy any one of these four requirements sounds the death knell for a motion to intervene as of right.") Now in addition to the Federal Defendants, VW is also vigorously defending the government's actions. That results in SFW's purported interests being doubly protected. As this Court held in *Commonwealth v. U.S. Dep't of Health & Human Servs*., 289 F. Supp. 3d 259 (D. Mass. 2018), even intervenors that possess *existing* rights that would be specially affected, and perhaps extinguished, by an adverse outcome are not entitled to intervene in cases like this one "where the putative intervenor's ultimate objectives align with those of the representative party," *id.* at 265, unless there is a "a showing of 'adversity of interest, collusion or nonfeasance' or similar grounds." *Id*.

[1] The First Circuit explained in a subsequent opinion, *Cotter v. City of Boston*, 323 F.3d 160 (1st Cir. 2003), that the "promotions furthered compelling governmental interests by (a) remedying past discrimination in the Department's promotions of minority officers to sergeant; (b) avoiding the reasonable likelihood of Title VII litigation if the Department made strict rank order promotions." *Id*. at 165. Merely being promoted in 1997 did not wipe out the rights of those promoted officers to seek back-pay or other damages for what the City had conceded was past

CONCLUSION

For the reasons stated herein, the Court should deny the SFW motion to intervene.

Respectfully submitted,

Dated: March 27, 2022

/s/ Thomas Melone

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Certificate of Service

I HEREBY CERTIFY that on this 27th day of March 2022, a true and complete copy of the foregoing has been filed with the Clerk of the Court pursuant to the Court's electronic filing procedures, and served on counsel of record via the Court's electronic filing system.

/s/Thomas Melone

racial discrimination against those and other officers.