UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY et al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR et al., Defendants.	No. 1:22-cv-01716-TSC

ANSCHUTZ EXPLORATION CORPORATION'S MOTION TO INTERVENE

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INTRODUCTION

Anschutz Exploration Corporation ("AEC") is an independent oil-and-gas exploration and development company that operates in Colorado, Utah, and Wyoming. DeDominic Decl. ¶ 2 (Ex. 1). Since its founding, AEC has focused on responsible development of oil-and-gas resources in the Rocky Mountains, and it is actively involved in a drilling-and-development program that includes federal leases in the Powder River Basin of Wyoming. *Id.* ¶ 4.

Plaintiffs Center for Biological Diversity and WildEarth Guardians challenge over 3500 approvals of applications for permits to drill ("APDs") on federal land in New Mexico and Wyoming (including within the Powder River Basin) that were approved by the U.S. Department of Interior, the Secretary of Interior, the Bureau of Land Management, and the BLM Director. Compl. ¶ 1. They contend that, in approving these APDs, Defendants violated the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the Federal Land Policy and Management Act ("FLPMA"), and those statutes' implementing regulations. *Id.*

AEC holds 78 of the challenged permits, all for wells on federal leases in Wyoming's Powder River Basin. DeDominic Decl. ¶ 5. Of those 78 permits, AEC has not yet drilled wells for 32 of them. *Id.* ¶ 6. For 31 of them, AEC has drilled or is currently drilling wells. *Id.* ¶ 7. And for 15 of them, AEC has already drilled and those wells are connected to gathering systems and currently producing oil and gas. *Id.* ¶ 8. AEC also has at least 41 applications for permits to drill pending BLM review and approval, and AEC intends to continue submitting new applications to BLM on a regular basis. *Id.* ¶ 9.

Plaintiffs want the Court to vacate the challenged APD approvals and remand those APDs to BLM for additional review. Compl. ¶ 11. They also want the Court "to enjoin Federal Defendants from approving or otherwise taking action to approve any applications for permits to drill on

federal public lands and minerals until Federal Defendants have fully complied with NEPA and its implementing regulations, and the substantive provisions of the ESA and FLPMA." *Id.*

In seeking to vacate AEC's permits, Plaintiffs, in effect, are asking the Court to destroy AEC's property and contractual rights to explore and develop federal oil-and-gas wells for which AEC paid millions of dollars, and in which AEC has invested millions more. But like other plaintiffs who have tried the same tactic in recent cases,[1] Plaintiffs did not name AEC as a defendant, nor did they name any of the many other leaseholders whose permits to drill are at risk if Plaintiffs get their way. This is not a trivial matter. It's a matter of constitutional due process. AEC now seeks to intervene to defend its permits, including by moving to dismiss Plaintiffs' challenges to AEC's permits or to sever the portion of the case challenging AEC's permits and transfer venue over that portion to the District of Wyoming. As explained in the motion to dismiss filed concurrently, AEC is a required party under Rule 19, but joinder is not feasible because the Court lacks personal jurisdiction over AEC, so this case as it applies to AEC should be dismissed. But even if AEC were subject to personal jurisdiction here, the Court should still sever Plaintiffs' challenges to AEC's permits and transfer them to a more appropriate venue: the District of Wyoming.

The Court should allow AEC to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2).[2] AEC's motion is timely. It comes before the Federal Defendants have

[1] *See, e.g.*, *WildEarth Guardians v. Bernhardt*, No. 1:21-cv-00175-RC (D.D.C. filed Jan. 19, 2021); *W. Watersheds Project v. Zinke*, No. 01:18-cv-187, Doc. No. 165 (D. Idaho 2018) (Second Amended Complaint, which does not name AEC as a defendant); *Mont. Wildlife Fed'n v. Bernhardt*, No. 4:18-cv-69 (D. Mont. June 28, 2018), ECF No. 19 (Amended Complaint, which does not name AEC as a defendant).

[2] By moving to intervene, AEC does not consent to the Court exercising personal jurisdiction over it. To the contrary, as reflected in AEC's proposed response to the complaint under Rule 24(c) attached as Exhibit 2 to this motion, AEC intends to argue that the Court should dismiss Plaintiffs' challenges to AEC's permits under Rule 12(b)(7), because AEC is a required party under Rule 19,

answered and before the Court has entered a scheduling order. AEC "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 [its] ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). There is no question that AEC validly secured its permits through established BLM protocols. Plaintiffs do not argue to the contrary. And Plaintiffs' action threatens to impair AEC's unique interests. AEC's permits are directly affected by (a) the Federal Defendants' actions related to the oil-and-gas leasing and development at issue in this lawsuit, (b) Plaintiffs' claims that BLM violated the law, and (c) the Court's adjudication of this case. AEC moves to intervene as the only party that can adequately protect its interests.

Alternatively, the Court should grant AEC permissive intervention under Rule 24(b)(1) because AEC's defenses of its permits share common questions of law and fact with the positions and arguments of other parties to the lawsuit.

Whether under Rule 24(a) or 24(b), the Court should recognize that AEC—as the holder of permitted APDs that Plaintiffs hope to obliterate—should be a party to this case. The Court should grant this motion.

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but cannot be joined for lack of personal jurisdiction. *See SEC v. Ross*, 504 F.3d 1130, 1150 (9th Cir. 2007) (holding that a party may intervene by right under Rule 24(a)(2) and then assert a personal-jurisdiction defense at the appropriate time); *cf. MGM Global Resorts Dev., LLC v. U.S. Dep't of Interior*, No. 19-2377 (RC), 2020 U.S. Dist. LEXIS 169262, at *14–20 (D.D.C. Sept. 16, 2020) (holding that a party may intervene by right specifically to contest the court's jurisdiction to hear the case).

CONFERRAL WITH PARTIES

Under Local Civil Rule 7(m), AEC conferred with counsel for the parties about this motion. Plaintiffs take no position on this motion. Defendants take no position on this motion. Proposed Intervenors Oxy USA Inc. and Oxy USA WTP LP (collectively "Oxy"), Anadarko E&P Onshore LLC ("Anadarko"), Chevron U.S.A. ("Chevron"), Peak Powder River Resources, LLC ("PPRR"), and the American Petroleum Institute ("API") do not oppose this motion. Proposed Intervenor Petroleum Association of Wyoming ("PAW") takes no position on this motion. Proposed Intervenor Wyoming does not oppose this motion.

ARGUMENT

The Court should allow AEC to intervene for two reasons. First, AEC has standing to participate as a defendant and has a right to intervene under Rule 24(a)(2). Second, at a minimum, AEC should be permitted to intervene under Rule 24(b)(1)(B).

1. AEC has a right to intervene under Rule 24(a).

1.1 AEC has standing to intervene.

In the D.C. Circuit, a party seeking to intervene must establish the same constitutional standing it would have to establish had it commenced the lawsuit in the first place. *Building & Const. Trades Dep't., AFL–CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). A potential intervenor's Article III standing "presents a question going to this [C]ourt's jurisdiction" and is thus addressed first. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003); *see also Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 9 (D.D.C. 2019). A defendant-intervenor is no different than a plaintiff-intervenor: it also must demonstrate standing. *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 318 (D.C. Cir. 2015). But a

defendant-intervenor's burden to show standing is not heavy: "[f]or standing purposes, it is enough that a plaintiff seeks relief, which, if granted, would injure the prospective intervenor." *See id.*

An entity seeking to intervene as a party in a case challenging agency action must establish injury in fact from the agency's action, that the injury was caused by the agency's action, and that the injury will be redressed by the court setting aside the agency's action. *Castro Cnty v. Crespin*, 101 F.3d 121, 126 (D.C. Cir. 1996). "It would follow that, when a party seeks to intervene as a defendant to uphold what the government has done, it would have to establish that it will be injured in fact by the setting aside of the government's action it seeks to defend, that this injury will have been caused by that invalidation, and the injury would be prevented if the government action is upheld." *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001) (citing *Crespin*, 101 F.3d at 126).

Applying these principles to the facts here yields an easy answer: AEC has standing. The injury AEC would suffer if Plaintiffs were to prevail and the Court were to order BLM to cancel AEC's permits would be the loss of AEC's property interests and financial investments in the permitted wells. This is thus a paradigmatic case where Plaintiffs seek relief, which, if granted, will injure AEC. That is enough to establish AEC's standing. *See Crossroads*, 788 F.3d at 318.

Finally, as this Court has recognized, a putative intervenor who satisfies Rule 24(a) will also have Article III standing. *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1, 7 (D.D.C. 2008). Because AEC satisfies Rule 24(a), as shown below, AEC meets this Court's Article III standing requirement.

1.2 AEC meets all the requirements of Rule 24(a).

"The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are

afforded an opportunity to be heard." *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972). Under Rule 24(a), the movant must satisfy four elements: (1) the motion to intervene is timely; (2) the applicant claims an interest relating to the property or transaction thatb is the subject of the action; (3) 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) the applicant's interest is not adequately represented by existing parties. *Fund for Animals*, 322 F.3d at 731; *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008); Fed. R. Civ. P. 24(a)(2). Courts construe Rule 24(a) liberally in favor of intervention. *See, e.g.*, *S. Utah Wilderness v. Norton*, No. CIV.A. 01-2518 (CKK), 2002 WL 32617198, at *5 (D.D.C. June 28, 2002) (describing the D.C. Circuit's position on Rule 24(a)(2) as a "liberal approach").

1.2.1 The first element is met because this motion is timely.

A district court has discretion when considering the timeliness element. *See Fund for Animals*, 322 F.3d at 732. Courts evaluate timeliness based on (a) the time elapsed since the inception of the action, (b) the probability of prejudice to those already party to the proceedings, (c) the purpose for which intervention is sought, and (d) the need for intervention as a means for preserving the putative intervenor's rights. *WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 12 (D.D.C. 2010); *see also United States v. AT&T*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). Timeliness is "judged in consideration of all the circumstances," including "the need for intervention as a means of preserving the applicant's rights." *AT&T*, 642 F.2d at 1295. In particular, the Court should look to the date that the party seeking to intervene "knew or should have known that any of [his] rights would be directly affected" by the litigation. *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422, 434 (D.C. Cir. 1989), *rev'd on other grounds sub nom. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

All of these timeliness factors favor AEC.

First, no significant time has elapsed between when Plaintiffs filed this lawsuit and when AEC filed this motion. Plaintiffs filed the lawsuit on June 15, 2022. AEC seeks to intervene less than two months later, before Federal Defendants have answered, and after carefully analyzing Plaintiffs' allegations and concluding that this case may affect AEC's unique property and contractual rights, and investments in its wells—and possibly eviscerate them. *Cf. Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 12 (D.D.C. 2019) (motion to intervene timely when tribe filed intervention motion 16 days after government filed answer); *City of Williams v. Dombeck*, 2000 WL 33675559, at *2 (D.D.C. Aug. 17, 2000) (intervenor filed motion three months after Plaintiffs initiated case, and before defendants filed answer; because intervention would occur "at the earliest stage of the litigation, it meets the timeliness requirement"). AEC has filed this motion before Federal Defendants have answered, and the Court has not yet entered a scheduling order. *Cf. WildEarth Guardians v. Haaland*, No. 1:21-cv-00175-RC, slip op. at 3 (D.D.C. July 14, 2021), ECF No. 37 (finding that AEC's motion to intervene in a similar case was timely because "AEC moved to intervene less than three months after the initial complaint was amended," the court had not entered a scheduling order, and the Federal Defendants had not yet responded to the amended complaint).

Second, as to the prejudice factor, AEC's intervention would not cause prejudice to any party or proposed defendant-intervenor. Each party will have the full opportunity to make every possible argument moving forward and to protect its own interests. Because AEC's intervention will occur before Federal Defendants have responded to the complaint, before any scheduling order has been entered, and before any substantive activity has occurred, no party will be required to relitigate issues or duplicate its efforts, and no party will suffer any other prejudice.

Third, as to the final two timeliness factors, AEC's purpose in intervening cannot be overstated: it is to protect its permits and wells from destruction. AEC is the only entity that can do so because it is intimately familiar with its own property, its own investments, and its own operations.

For these reasons, AEC's motion is timely.

1.2.2 The second element is met because AEC has a significantly protected interest in the permits at the heart of this lawsuit.

The D.C. Circuit has held that constitutional standing alone is sufficient to establish that a proposed intervenor has "an interest relating to the property or transaction which is the subject of the action." *Fund for Animals*, 322 F.3d at 735 (citing Fed. R. Civ. P. 24(a)(2)); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) ("[A proposed intervenor] need not show anything more than that it has standing to sue in order to demonstrate the existence of a legally protected interest for purposes of Rule 24(a)."); *Env't Def. v. Leavitt*, 329 F. Supp. 2d 55, 66 n.7 (D.D.C. 2004) (noting that "a person who satisfies constitutional standing requirements fulfills [] the second of the four Rule 24(a) requirements"). AEC has standing to participate, so it satisfies the second Rule 24(a) element. *See supra* pp. 4–5.

AEC satisfies the Rule 24(a) test in its own right too. Rule 24(a) requires that a prospective intervenor "demonstrate a legally protected interest in the action." *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). This "test operates in large part as a practical guide, with the aim of disposing of disputes with as many concerned parties as may be compatible with efficiency and due process." *WildEarth Guardians v. Salazar*, 272 F.R.D. at 12–13.

AEC's permits—and the property and contractual rights they embody—are at the center of this lawsuit and subject to cancellation if Plaintiffs succeed. AEC's permits are not merely "relat[ed] to … the property or transaction that is the subject of the action"—*they are the property*

at issue here, and they allow AEC to put to beneficial use the leases it owns. *See* Fed. R. Civ. P. 24(a)(2); *Fund for Animals*, 322 F.3d at 735 (citing *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) ("An intervenor's interest is obvious when he asserts a claim to property that is the subject matter of the suit.…")). Federal oil-and-gas permits constitute binding, enforceable, contractual arrangements that govern the rights and obligations of BLM and permittees like AEC. *Cf. W. Watersheds Project v. Haaland*, No. 20-35693, slip op. at 5 (9th Cir. Jan. 5, 2022), ECF No. 50-1, (per curiam) (noting that "AEC has invested tens of millions of dollars acquiring and developing the leasehold interests imperiled by this litigation, and therefore has a substantial due process interest in the outcome of this litigation by virtue of its contract with the federal government"). This contractual arrangement creates a significant, legally protectable property interest in the permits.

The mere threat of economic injury—like the impending economic injury that would flow from an order directing BLM to cancel AEC's permits, forcing AEC to stop its drilling and production—is a legally protected interest that warrants intervention as a matter of right. *See Fund for Animals*, 322 F.3d at 733 (D.C. Cir. 2003) (threatened loss of revenue sufficient interest to support intervention); *Akiachak Native Cmty.*, 584 F. Supp. 2d at 6 (potential loss of right to tax constitutes sufficient interest).

Plaintiffs want the Court to tell BLM to erase AEC's permits. That request poses a direct and substantial threat to AEC's legally protectable interests in defending its property rights and avoiding economic injury. *See Theodore Roosevelt Conserv. P'ship v. Salazar*, 605 F. Supp. 2d 263, 269 (D.D.C. 2009) (allowing oil-and-gas operators with federal drilling permits to intervene in suit challenging BLM's NEPA compliance after issuing those permits). Plaintiffs also want a nationwide injunction barring Federal Defendants "from approving or otherwise taking any action to approve any applications for permits to drill on federal public lands and minerals until Federal

Defendants have fully complied with NEPA and its implementing regulations, and the substantive provisions of the ESA and FLPMA." Compl. ¶ 11. That request similarly poses a direct and substantial threat to the 41 APDs that AEC has pending before BLM, and to the future APDs that AEC intends to submit to BLM on a regular basis. *See* DeDominic Decl. ¶¶ 9–10.

At bottom, the Court has been asked to wipe out AEC's multimillion-dollar real-property interests in its oil-and-gas permits in Wyoming, and AEC should be allowed to defend itself and its property and contractual rights. *See Levin v. Ruby Trading Corp.*, 333 F.2d 592, 595–96 (2d Cir. 1964) (lessee who asserted invalidity of lease cancellation by receiver entitled to intervene as of right). AEC has a vital, significantly protectable interest in the permits at the center of this dispute. That satisfies the second element of the test.

1.2.3 The third element is met because disposition of this case may impair AEC's ability to protect its interests in its wells.

AEC is "so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect [its] interest." Fed. R. Civ. P. 24(a)(2). This Court has recognized that where an agency's decision was favorable to the proposed intervenor, and the present action is a direct attack on that decision, the present action threatens to impair the proposed intervenor's protected interests. *WildEarth Guardians v. Salazar*, 272 F.R.D. at 12. BLM's decision to grant AEC's APDs was favorable to AEC: BLM approved 78 of AEC's APDs that Plaintiffs now seek to cancel. DeDominic Decl. ¶ 5. Of those 78 permits, AEC has not yet drilled wells for 32 of them. *Id.* ¶ 6. For 31 of them, AEC has drilled or is currently drilling wells. *Id.* ¶7. And for 15 of them, AEC has already drilled and those wells re connected to gathering systems and producing oil and gas, such that the leases associated with those wells are held by production. *Id.* ¶ 8. If Plaintiffs succeed in vacating these permits, AEC's interests in developing and producing from these wells

would be impaired—so much so that operating wells would be forced to shut down. *Cf. WildEarth Guardians*, No. 1:21-cv-00175-RC, slip op. at 3–4 (concluding that AEC satisfied elements two and three because AEC held 51 of the oil-and-gas leases the plaintiffs sought to vacate, and a ruling for the plaintiffs would impair AEC's interests in developing those leases).

1.2.4 The fourth factor is met because the current parties do not adequately represent AEC's interests.

The final factor is whether AEC's interests are "adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). They are not. The Supreme Court has held that this "requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). The D.C. Circuit has described this requirement as "not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *see also Foster*, 655 F.2d at 1325; *AT&T Co.*, 642 F.2d at 1293 (stating that a petitioner "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee").

No party or proposed intervenor adequately represents AEC's interests.

As the D.C. Circuit held in *Fund for Animals*, AEC's interests are "plainly are not adequately represented by the federal defendants." 322 F.3d at 735–37. "It is well-established that governmental entities generally cannot represent the 'more narrow and parochial financial interest' of a private party." *Fund for Animals*, 322 F.3d at 737. The D.C. Circuit has consistently taken this position. *See, e.g.*, *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) ("The [D.C.] Circuit has repeatedly held that private companies can intervene on the side of the government, even if some of their interests converge."); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912–13 (D.C. Cir. 1977). Defendants are federal agencies and government officials charged with

representing the interests of the American people; and Proposed Intervenor Wyoming seeks to participate to protect its "sovereign" property, regulatory, and economic interests, *see* Wyoming Mem. in Support of Mot. to Intervene at 1–6, 9–11, EFC No. 27-1. AEC's interests are narrower because they are tied to its particular permits. *Cf. WildEarth Guardians*, No. 1:21-cv-00175-RC, slip op. at 4 (D.D.C. July 14, 2021), ECF No. 37 (concluding that "the Federal Defendants do not adequately represent AEC because AEC represents its private interest in its lease rights whereas the Federal Defendants must consider the interests of all the American people").

Proposed Intervenors' interests, although similar to AEC's interests, depart from AEC's where Plaintiffs specifically target AEC's permits. The Proposed Intervenors operating oil-and-gas interests—Oxy, Anadarko, Chevron, and PPRR—all seek to participate in this case to represent their specific interests in their own approved APDs and operations. Oxy Mot. to Intervene at 1–3, 6–8, ECF No. 8; Chevron Mot. to Intervene at 1–3, 6–9, EFC No. 17. To be sure, many of the operators are likely to be aligned to some degree, but as Chevron explained in its motion to intervene, competitors are "incapable of adequately representing" others' interests because "their interests pertain to their own APDs and leases" and not to those of other operators. Chevron Mot. to Intervene at 11, ECF No. 17. Other companies do not know about AEC's business plans for its operations, its project development, or its economic and contractual interests and obligations. They cannot defend the facts found in the administrative record that are specific to AEC's permits, nor can they attest to the current status of AEC's planning and operations for the permits and permitted wells, the costs AEC has incurred thus far, and the potential economic and other harms that will befall AEC if Plaintiffs are successful in vacating AEC's permits. Indeed, in most instances,

Chevron's, Oxy's, and Anadarko's APDs were issued for leases in New Mexico, not Wyoming—where all of AEC's leases for the permits at issue in this case are located.[3]

As for the organizational Proposed Intervenors, although AEC is a member of PAW, trade associations represent the collective interests of their members only on a broad, aggregated scale. *See, e.g.*, *W. Watersheds Project v. Haaland*, No. 20-35693, slip op. at 4–5 (9th Cir. Jan. 5, 2022), ECF No. 50-1 (per curiam) (reversing order denying AEC's motion to intervene, and concluding that trade association Western Energy Alliance did not adequately represent AEC's interests, even though AEC is a member of the Alliance); *Env't Def. Ctr. v. Bureau of Safety and Env't Enforcement*, No. CV 14-9281, 2015 WL 12734012, at *4 (C.D. Cal. Apr. 2, 2015) ("Whereas Exxon seeks to protect its financial investment, [the oil-and-gas trade association] API seeks to address 'industry-wide concerns and to protect the collective interests of its 600-plus members.'"). PAW seeks to intervene, at least in part, to defend "its core mission as an organization." PAW Mot. to Intervene at 5, ECF No. 12. AEC has "specific knowledge regarding the permitted activities at issue," *id.*, and has "much more narrowly focused, direct and specific … financial interests" than PAW's more general, membership-wide interests, *see Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.*, No. 10-0254-WS-C, 2010 WL 5139101, at *3 (S.D. Ala. Dec. 9, 2010); *see also In re Consol. Salmon Cases*, 688 F. Supp. 2d 1001, 1010 (E.D. Cal. 2010) (members' unique interests not adequately represented by trade organization representing "only the common interests of its diverse membership").[4] Moreover, AEC seeks to protect its individual property interests. PAW has no

[3] All 90 of Chevron's challenged permits are in the Permian Basin in New Mexico. Chevron Mot. to Intervene at 1–3, EFC No. 17. And only 27 of Oxy and Anadarko's 139 permits were issued for drilling in Wyoming. Oxy Mot. to Intervene at 1, ECF No. 8.

[4] Similarly, if AEC's permits are cancelled, then BLM would refund AEC for its losses, not PAW. As a result, PAW cannot represent AEC's interests, because "[a] proposed intervenor's interest is not represented … if the intervenor is entitled to damages that the existing parties cannot

property at issue, so it cannot adequately represent property owners like AEC. *See WildEarth Guardians v. Haaland*, No. 1:21-cv-00175-RC, slip op. at 4–5 (D.D.C. July 14, 2021), ECF No. 37 (finding "compelling AEC's argument that API cannot adequately represent the unique interests of leaseholders like AEC because it has no property at issue"); *United States v. Colo. Organic Chem. Co.*, No. 98-CV-1600-WYD, 2015 WL 6590783, at *2 (D. Colo. Oct. 30, 2015). Even if PAW's and AEC's interests may sometimes "coincide," AEC cannot be required to "rely on a doubtful friend to represent its interests, when it can represent itself." *Crossroads*, 788 F.3d at 321.

Moreover, Proposed Intervenor API has intervened to protect "API members' property and contractual interests," *see* API Mot. to Intervene at 5, ECF No. 20, but AEC is not a member of API. DeDominic Decl. ¶ 11; *see also* API's Members List, *https://www.api.org/membership/members* (last visited July 29, 2022). API is clear that it seeks to intervene "to protect [its members'] interests," including competitor operators, service companies, and other entities "spread throughout each stage of oil and gas development across the United States." API Mot. to Intervene at 2, 11–12, ECF No. 20. It never purported to (nor could it) represent *all* of the oil-and-gas industry's interests. Even though an oil-and-gas trade association has intervened, companies that are not members of that association should be allowed to intervene to protect their specific, unrepresented interests. *See, e.g.*, *W. Watersheds Project v. Zinke*, No. 1:18-cv-00187-REB, slip op. at 3–6 (D. Idaho 2018), ECF No. 111 (allowing oil-and-gas companies to intervene for purposes of raising non-duplicative arguments because they were not members of trade association Western Energy Alliance, which purported to represent its members' interests). Moreover, API argued in its motion to intervene that it brings "points of view to the litigation not presented by" other operators such

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recover." *Abrams v. Blackburne & Sons Realty Cap. Corp.*, No. 2:19-CV-06947-CAS (AS), 2020 WL 1445712, at *5 (C.D. Cal. Mar. 25, 2020).

as Proposed Intervenors Oxy, Anadarko, and Chevron. API Mot. to Intervene at 12, ECF No. 20 (alteration and quotation marks omitted).

In sum, Federal Defendants and Proposed Intervenors cannot adequately protect AEC's constitutionally protected property interests or its contractual interests in its permits. Nor would Defendants or Proposed Intervenors be certain to do so even if they could, especially with the same level of urgency and priority that AEC now possesses. AEC, for example, is in a unique position to argue that the Court lacks the power to adjudicate Plaintiffs' challenges to AEC's permits because the Court lacks personal jurisdiction over AEC. AEC would also be best able to explain how it will be injured, the disruptions to its business, and its economic harm. AEC has a narrow yet tremendously significant interest that is distinct from Federal Defendants' and Proposed Intervenors' interests. As a result, AEC has met the requisite "minimal" showing under the adequate-representation factor.

* * *

Because AEC meets the rule's four requirements, the Court should allow it to intervene by right under Rule 24(a)(2).

2. In the alternative, the Court should permit AEC to intervene under Rule 24(b)(1)(B).

Under Rule 24(b), "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." Fed. R. Civ. P. 24(b)(1)(B). The Rule also requires courts to consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Permissive intervention "is an inherently discretionary enterprise" that affords the Court "wide latitude." *EEOC v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Federal Rule of Civil Procedure 24(b) provides, in pertinent part, that "'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.'" *Aristotle Int'l, Inc. v. NGP Software, Inc.*, 714 F. Supp. 2d 1, 18 (D.D.C. 2010). "In order to litigate a claim on the merits" under Rule 24(b), "the putative intervenor 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*, 146 F.3d at 1046. "In exercising its discretion" to decide whether permissive intervention is warranted, the Court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

On the jurisdictional question, the requirement of an independent basis of jurisdiction arises almost exclusively in diversity cases, not federal-question cases. Thus, it is black-letter law that "[i]n federal-question cases there should be no problem of jurisdiction with regard to an intervening defendant." 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1917, at 601 (3d ed. 2007). The independent-grounds-for-jurisdiction factor concerns a movant who seeks to inappropriately expand the court's jurisdiction, and thus it "does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims"—which is the case here. *Freedom from Religion Found., Inc v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011); *see also* Compl. ¶¶ 12–13 (alleging that the Court's subject-matter jurisdiction rests on federal-question jurisdiction); For this reason, the Court need not consider independent grounds for its jurisdiction over AEC.

As to the second inquiry, "Rule 24(b)'s timeliness analysis largely mirrors that of Rule 24(a)." *Roane v. Gonzales*, 269 F.R.D. 1, 5 (D.D.C. 2010), *vacated in part sub nom. Roane v. Tandy*, No. 12-5020, 2012 WL 3068444 (D.C. Cir. July 6, 2012), and *rev'd and remanded sub nom. Roane v. Leonhart*, 741 F.3d 147 (D.C. Cir. 2014). And even though "many courts analyze

the timeliness factor under Rule 24(b) more strictly than they analyze timeliness under Rule 24(a)," *id.*, AEC's motion is timely for the reasons detailed above, *supra* pp. 6–8.

AEC satisfies the third factor: its defenses share common questions of law and fact with those raised in this case because it is a permittee whose property rights this Court has been asked to vacate, and it seeks to intervene to defend those property rights. To be sure, many of AEC's defenses are likely to be aligned to some degree with Defendants' and Proposed Intervenors' defenses, presuming Defendants and Proposed Intervenors intend to defend the permit approvals that Plaintiffs challenge. But AEC's defenses go further because it is AEC that may be directly affected, as a permit holder, by the claims in this case. AEC's existing interests in its wells reflect AEC's investment of millions of dollars and all of AEC's existing interests are subject to Plaintiffs' challenge. Should Plaintiffs' action prove successful, AEC would suffer economic injury and harm.

Finally, AEC's intervention will not unduly delay or prejudice the adjudication of any of the rights of the parties to the lawsuit. AEC's entry comes in the earliest stage in the case. Federal Defendants have not yet responded to the complaint, and the Court has not yet issued a scheduling order. Because AEC's defenses are aligned with the central issues in the case and its presence will not delay or otherwise alter the course of the proceedings to any party's prejudice, it should be permitted to intervene under Rule 24(b)(1)(B).

CONCLUSION

Granting AEC's motion to intervene would accord with both the liberal approach to intervention and the purpose behind Rule 24. The Court should therefore grant this motion and allow AEC to intervene under Rule 24.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 16, 2022, I filed this document with the Clerk of Court for the United States District Court for the District of Columbia using the CM/ECF system, which will serve this document on all counsel of record.

/s/ Andrew C. Lillie
Andrew C. Lillie