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UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SIERRA CLUB, *et al.*, Plaintiffs, v. UNITED STATES DEFENSE ENERGY SUPPORT CENTER, *et al.* Defendants.	Case No. 3:10-cv-02673-JSW **NOTICE OF MOTION AND MOTION TO INTERVENE OF AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA;** Date: November 12, 2010 Time: 9:00 a.m. Judge: Hon. Jeffrey S. White

MOTION TO INTERVENE AND NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on November 12, 2010, at 9:00 a.m., or as soon thereafter as counsel may be heard in the courtroom of the Hon. Jeffrey S. White, located at Courtroom 11, 19th Floor, San Francisco Federal Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, the American Petroleum Institute ("API"), the National Petrochemical and Refiners Association ("NPRA"), and the Chamber of Commerce of the United States of America ("Chamber"), (collectively, "National Business Organizations" or "Defendant-Intervenors") will and hereby do respectfully move this Court to intervene as defendants as of right pursuant to Federal Rule of Civil Procedure 24(a), or in the alternative, respectfully request leave for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

The National Business Organizations are entitled to intervention of right because this Motion is timely and without delay or prejudice to any parties; because the Organizations have legally protectable interests in their members' economic interests and legal rights, which may be directly impacted by Plaintiffs' challenge to government contracts with and purchases from those members; because Plaintiffs' challenge may harm those members directly and indirectly harm other members, including many industrial sectors that support or depend upon the oil and gas industry, and thereby harm the interests of the National Business Organizations; and because the private interests of the Organizations may not be adequately represented by the government Defendants and will not be adequately represented by the Plaintiffs. In the alternative, the National Business Organizations should be granted permissive intervention in whole or in part for the reasons noted above and because the Organizations will raise common legal issues and defenses with the main action.

The National Business Organizations move to intervene based on this Notice of Motion and accompanying Memorandum of Points and Authorities in Support, the concurrently filed Declarations of Robert Greco III, Gregory M. Scott, and Karen A. Harbert (Exhibits A, B, and C, respectively, to this Motion to Intervene), and such other matters as may be presented to the Court at the time of the hearing.

Counsel for Defendant-Intervenors have also provided to counsel for Plaintiffs Sierra Club and Southern Alliance for Clean Energy and counsel for Department of Defense prior notice of the National Business Organizations' intent to file this Motion and have attempted to obtain consent to the National Business Organizations' intervention. Counsel for Defendants has indicated that Defendants do not object to this Motion to Intervene. As of the date of this filing, counsel for Plaintiffs has not responded with views on whether this Motion to Intervene should be granted.

Dated: September 29, 2010

Respectfully submitted,

/S/ Elizabeth R. Toben

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UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SIERRA CLUB, *et al.*, Plaintiffs, v. UNITED STATES DEFENSE ENERGY SUPPORT CENTER, *et al.*, Defendants.	Case No. 3:10-cv-02673-JSW **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE OF AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA** Date: November 12, 2010 Time: 9:00 a.m. Judge: Hon. Jeffrey S. White

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FACTUAL BACKGROUND

Sierra Club and Southern Alliance for Clean Energy (collectively "Plaintiffs") have brought suit against the U.S. Defense Energy Support Center, U.S. Department of Defense, U.S. Defense Logistics Agency, and individual officers of those agencies in their official capacity (collectively "Department of Defense" or "Defendants"). *See* Sierra Club, *et al*., Complaint for Declaratory and Injunctive Relief ("Complaint") (Document No. 1 in Docket). Plaintiffs specifically challenge Department of Defense's entry into various contracts to purchase mobility-related fuels[1] and the agency's other purchases of such fuels. *Id*. at ¶¶ 1, 3-4, 20.

A. Plaintiffs' Challenge to Existing and Future Contracts

Plaintiffs allege that Defendants' actions violate Section 526 of the Energy Independence and Security Act of 2007 ("EISA"), 42 U.S.C. § 17142. Complaint at ¶¶ 61-63 (Doc. 1). EISA Section 526 states in relevant part that

> No Federal agency shall enter into a contract for procurement of an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources, for any mobility-related use … unless the contract specifies that the lifecycle greenhouse gas emissions associated with the production and combustion of the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources.

42 U.S.C. § 17142.

Plaintiffs assert that one of the Defendants, the U.S. Defense Energy Support Center ("DESC"), is the primary supplier of refined petroleum products, including mobility-related fuels, for the U.S. military; that it also supplies other federal agencies, including the U.S. Postal Service, and private military contractors; and that DESC's supply of mobility-related fuels comes principally from domestic petroleum refiners. Complaint at ¶¶ 38-39 (Doc. 1). Plaintiffs

[1] "[M]obility-related use" is a term used, but not defined, in EISA Section 526. *See* 42 U.S.C. § 17142. Plaintiffs' use of the term "mobility-related fuels" appears intended to track the EISA and to correspond generally to fuels used in automobiles, aircraft, and other military, private military contractor, and defense agency vehicles. *See* Complaint at ¶¶ 1, 3-4, 20 (Doc. 1).

contend that the DESC purchases over 100 million barrels of fuels each year for use in the United States. *Id*. at ¶ 51. Plaintiffs also contend that, as a general matter, most oil which is refined domestically comes from other countries. *Id*. at ¶ 40. They also assert in their Complaint that the largest proportion of United States crude oil imports, in general, are from Canada, and that half of Canada's national oil production is from the Alberta oil sands. *Id*. at ¶¶ 40-41.

Further, Plaintiffs allege that DESC's purchases of and contracts for the supply of refined petroleum products for "mobility-related use" contain some proportion of Canadian oil sands crude oil. Plaintiffs contend that these purchases fail to comply with EISA because: (1) Canadian oil sands crude is purportedly a "nonconventional petroleum source[], and (2) the contracts have not specified "that the lifecycle greenhouse gas emissions associated with the production and combustion of the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources." *Id*. at ¶¶ 1, 54-55, 61-62. Plaintiffs purport to proceed under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq*., in challenging this alleged violation. Complaint at ¶¶ 22-25, 63 (Doc. 1).

In addition, Plaintiffs challenge the interim policy adopted by DESC to implement EISA Section 526, alleging that the policy is in violation of the rulemaking requirements of the APA. *Id*. at ¶¶ 65-68. Finally, Plaintiffs also rely on the APA as a basis to challenge DESC's alleged failure to comply with the National Environmental Policy Act ("NEPA") Section 102(2)(C), 42 U.S.C. 4332(2)(C), and its implementing regulations, in contracting for fuel purchases which include some petroleum derived from Canadian oil sands and in implementing the DESC's EISA Section 526 policy. Complaint at ¶¶ 70-73 (Doc. 1).

Plaintiffs seek declaratory relief in the form of an order stating that Department of Defense's activities at issue, including existing contracts and purchases, fail to comply with the

APA, NEPA, and EISA Section 526 and are therefore contrary to law. *Id* at pp. 18-19. In addition, Plaintiffs seek preliminary and permanent injunctive relief to prevent Department of Defense from entering into such contracts for the purchase of mobility-related fuels which contain any petroleum derived from Canadian oil sands unless and until: (1) DESC imposes on those contracts and purchases the lifecycle greenhouse gas emissions requirement contained in EISA Section 526, which Plaintiffs allege is applicable; and (2) DESC's fuel purchasing program is subjected to the environmental analysis that Plaintiffs allege is required by NEPA. *Id*. at p. 19. Until those steps are completed, Plaintiffs also ask the Court to preliminarily and permanently enjoin DESC's interim Section 526 policy. *Id*.

B. Interests of Defendant-Intervenors in Existing and Future Contracts

The moving parties are National Business Organizations with members that will be directly impacted by the outcome of this litigation.

The American Petroleum Institute ("API") is a national trade association that represents all aspects of America's oil and natural gas industry. *See* Declaration of Robert Greco III (Exh. A). API has approximately 400 members, from the largest major oil company to the smallest of independents. *Id*. Its members represent all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. *Id*. Among API's mandates is advocacy – including representation of the oil and natural gas industry in legal proceedings. *Id*.

The National Petrochemical and Refiners Association ("NPRA") is a national trade association of more than 450 companies. *See* Declaration of Gregory M. Scott (Exh. B). Its members include virtually all U.S. refiners and petrochemical manufacturers. *Id*. NPRA members supply consumers with a wide variety of products and services used daily in their homes and businesses. *Id*. These products include gasoline, diesel fuel, home heating oil, jet

fuel, lubricants and the chemicals that serve as "building blocks" in making diverse products, such as plastics, clothing, medicine and computers. *Id.*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and organizations of every size, sector and region. *See* Declaration of Karen A. Harbert (Exh. C). Its membership includes businesses across all segments of the oil and natural gas industry, including producers, refiners, suppliers, transporters, pipeline owners and service and supply companies that support all aspects of the industry. *Id.* In addition, the Chamber represents many other industry sectors that support, or depend upon, the oil and natural gas industry. *Id.* These other sectors would also be economically harmed by the relief requested by the Plaintiffs in this action. *Id.* The Chamber advocates on behalf of these members, and others, before Congress, federal and state regulatory agencies, the courts, and various industry organizations. *Id.*

The membership of the National Business Organizations will be directly impacted by the outcome of this litigation and thus each has a protectable interest at issue in Sierra Club's suit. Plaintiffs seek a declaration that current and future contracts between members of the National Business Organizations and Department of Defense are contrary to law and ask the Court to preliminarily and permanently enjoin that agency from entering into such contracts. *See* Complaint at p. 19 (Doc. 1). Such an outcome would harm the refiners (all or nearly all of which are members of the National Business Organizations) that hold those contracts and with which future contracts would be created, as well as other members which supply, transport, support or depend upon the petroleum and distribution processes for those current and future contracts. *See* Declaration of Robert Greco III (Exh. A); Declaration of Gregory M. Scott (Exh. B); Declaration of Karen A. Harbert (Exh. C). If the Plaintiffs in this action are successful, their requested relief

would threaten the economic and contractual rights and interests of not only API and NPRA members, but also impact significantly Chamber members in industries that support, or otherwise depend upon, the oil and natural gas sector. Declaration of Karen A. Harbert (Exh. C). Such relief would have a "ripple" effect upon the Chamber members who support or depend upon the oil and gas industry. *Id*. Many of the businesses which are involved in the supply chain providing petroleum products to the Department of Defense and to the other agencies subject to Plaintiffs' suit are Chamber members. *Id.*

Thus, each of these National Business Organizations has significant economic, legal, and policy interests in this lawsuit, because if Plaintiffs' claims are successful, it would threaten the economic interests and contractual rights of the Organizations' membership. *See* Declaration of Robert Greco III (Exh. A); Declaration of Gregory M. Scott (Exh. B); Declaration of Karen A. Harbert (Exh. C). In addition to economic interests in current and future purchases and the legal interests in existing contracts, the National Business Organizations and their members have a protectable interest in the legitimacy of Department of Defense's purchases of and contracts for domestically-refined mobility-related fuels and DESC's policy regarding those purchases. *Id.*

ARGUMENT

I. The National Business Organizations are Entitled to Intervene as of Right Pursuant to Federal Rule of Civil Procedure 24(a)

Federal Rule of Civil Procedure 24(a) states in relevant part:

> On timely motion, the court must permit anyone to intervene who . . . (2) 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.

The Ninth Circuit applies a four part test for determining if an applicant has a right to intervene under Rule 24(a): (1) the motion must be timely; (2) the applicant must assert a 'significantly protectable' interest relating to property or a transaction that is the subject matter

of litigation; (3) the applicant must be situated so that disposition of action may as a practical matter impair or impede the interest; and (4) the applicant's interest must be inadequately represented by the parties. *See, e.g., Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1493 (9th Cir. 1995). There is "'[a] liberal policy in favor of intervention [which] serves both efficient resolution of issues and broadened access to the courts.'" *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002)(citations omitted). The purpose of this liberal interpretation is to involve "as many apparently concerned persons as is compatible with efficiency and due process." *Forest Conservation Council*, 66 F.3d at 1496; *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) ("[W]e are guided primarily by practical and equitable considerations. We generally interpret the requirements broadly in favor of intervention.").[2] The National Business Organizations satisfy each prong of this test and therefore should be permitted to intervene as of right.[3]

First, intervention is appropriately granted on all counts in this case, including Plaintiffs' Third Count. There, Plaintiffs allege that the various actions by the federal defendants that are subject to challenge in Counts One and Two are also in violation of NEPA. We recognize that the Ninth Circuit and this Court have had occasion to deny intervention of right under Rule 24(a)

[2] In the Ninth Circuit, a movant is not required also to satisfy the requirements for Constitutional Article III standing when it satisfies the requirements for intervention as of right under Rule 24(a). *See Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 308 n. 1 (9th Cir. 1989). But in any event, the interests alleged as grounds for intervention are also sufficient to demonstrate that the National Business Organizations satisfy the test of constitutional standing and associational standing on behalf of their members. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[3] Because this Motion to Intervene is being filed so early in the litigation, the time in which to file an answer or dispositive motion has not yet run, notwithstanding the Federal Rule of Civil Procedure 24(c) requirement that an applicant for intervention accompany its motion with "an original of the pleading setting forth the claim or defense for which intervention is sought[.]" These Defendant-Intervenors understand that, at the appropriate time, they will be required to file an answer or other response to the Complaint. Consequently, the National Business Organizations have included in the attached Proposed Order a provision stating that the requirement to plead or file a motion in response to the Complaint is deferred until the date that such filing by Department of Defense is due.

by private parties in some cases where the merits of the federal government's NEPA compliance was the centerpiece of those cases. *See, e.g., Kootenai Tribe of Idaho v. Veneman,* 313 F. 3d 1094, 1108 (9th Cir. 2002); *Center for Food Safety v. Connor,* 2008 WL 3842889 (N.D. Cal. Aug. 15, 2008). It is also true that the Ninth Circuit has found that when a third party's legally protected interests will be harmed by the injunction plaintiff seeks, intervention even in NEPA cases is permitted. *See, e.g., Forest Conservation Council,* 66 F.3d at 1494. Also, there are some NEPA cases decided by the Ninth Circuit where the right of a third party to intervene seems not to have been subject to challenge. *See, e.g., Center for Biological Diversity v. United States Department of the Interior,* No. 07-16423 (9th Cir. Sept. 23, 2010) (where Asarco LLC appears as Defendant-Intervenor-Appellee).

Second, whatever limitations the Ninth Circuit or this Court may have imposed on certain Rule 24(a) motions for intervention as of right in NEPA matters, there is no indication that similar constraints apply with regard to the remedy phase of such litigation. *Forest Conservation Council,* 66 F. 3d at 1494-97. At this point, there is no indication that the liability and remedy phases of this litigation will be bifurcated, and therefore, questions of remedy for NEPA violations are necessarily intertwined with a determination of the merits of such a violation. *See, e.g., Idaho Watersheds Project v. Hahn,* 307 F. 3d 815, 824 (9th Cir. 2002) (finding that a NEPA violation on the merits is a "necessary predicate for the court's later grant of injunctive relief to remedy the NEPA violation and [is] inextricably bound up with the grant of injunctive relief") (*abrogated on other grounds, Winter v. Natural Resources Defense Council, Inc.* 129 S. Ct. 365, 380-82 (2008)).

Moreover, Plaintiffs' allegations that Department of Defense's mobility-related fuel purchases and DESC's Interim Section 526 Policy with respect to those purchases violate NEPA are closely interconnected with Plaintiffs' other two Counts – *i.e.*, that (1) those purchases

violate EISA Section 526 and (2) the interim policy violates the APA. For those reasons, the National Business Organizations are not barred from intervening as of right at this stage with respect to Plaintiffs' NEPA claims.

A. This Motion to Intervene is timely. Under the test applicable in this Circuit, timeliness is evaluated based on (i) the stage of the proceedings, (ii) the prejudice to the other parties, and (iii) the reasons for and length of delay, if any. *See, e.g.*, *State of Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1319 (9th Cir. 1997); *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990), *cert denied*, 501 U.S. 1250 (1991). Nevertheless, "[t]imeliness is a flexible concept." *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1156 (9th Cir. 1981). Indeed, a motion to intervene may be timely even where "the litigation has entered a new stage, where the would-be intervenor's rights would be jeopardized." *See Natural Resources Defense Council, Inc. v. Gutierrez*, 2007 WL 1518359 at *14 (N.D.Cal. May 22, 2007) (*citing United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984)).

Plaintiffs filed their Complaint on June 18, 2010. (Doc. No. 1). On Sept. 1, 2010, the federal defendants declined the assignment of this matter to U.S. Magistrate Judge Larson, and the following day, the case was assigned to the Honorable Jeffrey S. White. (Doc. No. 18). On Sept. 3, 2010, this Court issued an order calling for a Case Management Conference on Oct. 1, 2010. (Doc. No. 19). Because only these limited actions have been taken, this case is still in the initial phase. As of the date of filing of this Motion to Intervene, neither party has filed any procedural or dispositive motions, no substantive orders have been issued by this Court, and Department of Defense has not yet filed an Answer. *Cf. N.W. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (holding that a "motion to intervene does not appear to have prejudiced either party in the lawsuit, since the motion was filed before the district court had made any substantive rulings"). Consequently, there is no delay in the National Business

Organizations' Motion. Furthermore, because Defendant-Intervenors agree to comply with the Court's Scheduling Order and any forthcoming such order, and endeavor to avoid the duplication of issues with other parties, there is no danger of prejudice to Plaintiffs or to Department of Defense. In short, under any test of timeliness, this Motion clearly satisfies this provision of Rule 24 (a)(2). *Cf. Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (allowing environmental groups to intervene four months after the complaint was filed, even though plaintiff had already moved for a preliminary injunction); *In re Cal. Micro Devices Sec. Litig.*, 168 F.R.D. 276, 277 (N.D. Cal. 1996) (finding timely a motion for permissive intervention filed at pleading stage).

B. The National Business Organizations have a protectable interest in contracts, oil purchases, and DESC policy relating to such purchases, which are subject to Plaintiffs' suit. "An applicant for intervention has a significantly protectable interest if the interest is protected by law and there is a relationship between the legally protected interest and the plaintiff's claims[,]" *United States v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir. 2004), but "[w]hether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry [and] [n]o specific legal or equitable interest need be established[,]" *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (*citing Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993)). Because the interest requirement is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process[,]" *City of Los Angeles*, 288 F.3d at 398, "[i]t is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue[,]" *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993); *see also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (intervenor's interest need not be protected by statute put at issue by complaint so long as it is

protected by law and relates to claim). That relationship requirement is met where "'resolution of plaintiffs claim actually will affect the applicant.'" *City of Los Angeles*, 288 F.3d at 398 (quotation omitted).

Plaintiffs' claims in this suit would affect the National Business Organizations because those organizations have a direct interest in the economic vitality and legal rights of their members, and those members include all or nearly all domestic refiners from which Department of Defense purchases the refined petroleum products at issue in this suit, as well as other sectors of the national economy that support or depend upon those refiners. *See* Declaration of Robert Greco III (Exh. A); Declaration of Gregory M. Scott (Exh. B); Declaration of Karen A. Harbert (Exh. C). Plaintiffs ask this Court to declare that current and future contracts between members of the National Business Organizations and Department of Defense are contrary to law and ask this Court to enjoin Defendants from entering into such contracts until such time as those agencies complete environmental analyses under NEPA and impose a lifecycle greenhouse gas emissions requirement on fuels supplied pursuant to the contracts. *See generally* Complaint (Doc. 1). Indeed, Plaintiffs have identified specific existing contracts, with specific domestic refiners, as (among others) subject to this challenge. *Id*. at ¶¶ 52-53.

The relief sought by Plaintiffs would likely harm economically not only domestic refiners, but also other members of the National Business Organizations which supply, transport, support or otherwise depend upon the petroleum and distribution processes for those current and future contracts. *See* Declaration of Robert Greco III (Exh. A); Declaration of Gregory M. Scott (Exh. B); Declaration of Karen A. Harbert (Exh. C). Members of the National Business Organizations are firms with roles throughout the supply chain providing petroleum products to the Department of Defense and the other agencies subject to Plaintiffs' suit. *Id*.

Among such firms under threat of economic harm are those that supply or transport the petroleum underlying the current and future fuel purchase contracts being challenged by Plaintiffs' suit. *Id*. For example, a court order enjoining the Department of Defense from purchasing fuels that contain crude oil produced from the Canadian oil sands where the Department cannot make certain certifications regarding lifecycle greenhouse gas emissions would harm economically owners and operators of pipelines which carry such unrefined crude oil. Many of those pipeline owners and operators are members of the National Business Organizations. *Id*. The relief requested by Plaintiffs also threatens to harm firms that design, produce, operate and service equipment used for exploration of oil sands-derived fuel – many of which are members of the Chamber. *See* Declaration of Karen A. Harbert (Exh. C). In the current economic environment, equipment manufacturers, operators and service providers will face difficulty in securing buyers for equipment well-designed for use in the oil sands.

Thus, the National Business Organizations, on behalf of their membership, have a direct economic interest in the subjects of Plaintiffs' suit. Because the "injunctive relief sought by the [P]laintiffs will have direct, immediate, and harmful effects upon" those legally protectable interests, intervention as of right is necessary. *Forest Conservation Council*, 66 F.3d at 1494.

C. The disposition of this case may impair or impede the National Business Organizations' ability to protect their interests and the interests of their members. To show impairment of interests for the purposes of Rule 24(a)(2), a proposed intervenor need show only that the disposition of an action "*may* as a practical matter," impede the intervenor's ability to protect its interests in the subject of the action. Fed. R. Civ. P. 24(a)(2) (emphasis added). In evaluating this question "the court is not limited to consequences of a strictly legal nature." *Forest Conservation Council*, 66 F.3d at 1497-98. Where the relief sought by the Plaintiffs would have direct, immediate and harmful impact on a third party's interests, that adverse impact

is sufficient to satisfy Rule 24(a)(2). *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C.Cir. 2003); *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760 (9th Cir. 1986); *see also Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) ("Where a party seeking to intervene in an action claims an interest in the very property and very transaction that is the subject of the main action, the potential *stare decisis* effect may supply that practical disadvantage which warrants intervention as of right").

As noted previously, Plaintiffs seek declaratory and injunctive relief against Department of Defense's current and future contracts with and purchases from the National Business Organizations' members. Plaintiffs' action, if successful, would harm not only those refiner members that directly supply fuel to Department of Defense but also harm their members involved in other aspects of the petroleum industry. Intervention of right is warranted where there is even a *possibility* that the remedies sought by Plaintiffs will harm the interests of the National Business Organizations' members, and thereby the Organizations themselves. *See* Fed. R. Civ. Pro. 24(b). Particularly given that Plaintiffs seek preliminary and permanent injunctive relief, intervention of right is appropriate. *See City of Los Angeles*, 288 F.3d at 399; *Sagebrush Rebellion*, 713 F.2d at 528 (where relief sought by plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests, the party satisfies the "interest" test), *aff'd by Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760 (9th Cir. 1986); *see also* Fed. R. Civ. P. 24 advisory committee's notes to 1966 Amend. ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene ….").

D. The National Business Organizations' interests may not be adequately represented by the Government and will not be adequately represented by Plaintiffs. The requirement under Federal Rule of Civil Procedure 24(a)(2) to show inadequate representation "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 of America*, 404 U.S. 528, 538 n.10 (1972) (citation omitted); *Sagebrush Rebellion*, 713 F.2d at 528. The Ninth Circuit offers three factors to use in evaluating the adequacy of such a demonstration. A court must assess whether "the interests of a present party to the suit are such that it will *undoubtedly* make all of the intervenor's arguments[;]" whether "the present party is capable of and willing to make such arguments[;]" and whether "the intervenor would not offer any necessary element to the proceedings that the other parties would neglect." *County of Fresno*, 622 F.2d at 438-39 (emphasis added).

The National Business Organizations' interests here include protecting the economic interests and legal rights of their members with respect to the contracts, purchases, and policy at issue in this suit. *See* Declaration of Robert Greco III (Exh. A); Declaration of Gregory M. Scott (Exh. B); Declaration of Karen A. Harbert (Exh. C). The National Business Organizations' interests are directly opposed to those of Plaintiffs – and hence it is self-evident that Plaintiffs will not adequately represent the Defendant-Intervenors' interests.

While the National Business Organizations propose to align with Department of Defense in this suit, the Organizations' interests may differ from those of that federal agency to the extent that the contracts and purchases at issue in this suit involve arms-length negotiations between that agency and the Organizations' members. Moreover, the Organizations' private party interests may differ from those of a federal agency – federal agencies must represent not only their own narrow interests in a matter, but also the public interest more broadly. This private interest – public interest distinction has been sufficient to justify intervention in many other cases. *See, e.g., Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994); *County of Fresno v. Andrus*, 622 F.2d 436, 438-39 (9th Cir. 1980); *Natural Resources Defense Council, Inc. v.*

Costle, 561 F.2d 904, 912 (D.C. Cir. 1977); *Forest Conservation Council*, 66 F.3d at 1499 (nothing that a government agency was "required to represent a broader view than the more narrow, parochial interests of" the intervenors); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003); *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345-46 (10th Cir. 1978).

II. In the Alternative, the National Business Organizations Should Be Granted Leave for Permissive Intervention Under Federal Rule of Civil Procedure 24(b)

Federal Rule of Civil Procedure 24 contemplates two forms of intervention – intervention of right and permissive intervention – and a court may grant an intervenor's motion on either basis, *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Regarding the latter basis, Rule 24(b) provides "on timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."

In the Ninth Circuit, the prerequisites for permissive intervention under Rule 24(b) are whether: (1) the applicant has independent grounds for jurisdiction; (2) the applicant's 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. "Rule 24(b) plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Kootenai Tribe of Idaho*, 313 F. 3d at 1108, quoting *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940); *see also N.W. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996). A court has the discretion to grant permissive intervention to a movant meeting these factors. *See Kootenai Tribe*, 313 F.3d at 1108-10. Under this standard, neither the inadequacy of representation, nor a direct interest in the subject matter of the action need be shown. *Id.* at 1108. In exercising its discretion, however, the court must also consider "whether the

intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. Pro. 24(b)(3).

As previously demonstrated, the National Business Organizations' Motion to Intervene is timely, will not cause undue delay, and will not prejudice Plaintiffs or Department of Defense. Moreover, as discussed above, the Organizations possess legally protectable interests in their members' economic interests and legal rights in the current and future contracts and transactions subject to Plaintiffs' challenge. The potential for harm to those interests from Plaintiffs' suit provides an independent basis for jurisdiction, particularly given the minimal showing required by Federal Rule of Civil Procedure 24(b). *See, e.g., Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) (finding a project developer satisfied the jurisdiction requirements because the suit pertained to whether its development could be constructed).

Also, the National Business Organizations' members' economic and legal interests are directly at issue in this suit, and thus the Organizations' own interests are at issue. The Organizations are asserting a concrete interest in present and future contracts and oil sales made between its refiner members and Department of Defense. Those contracts and sales are directly challenged in this litigation and may be preliminarily or permanently enjoined by the Court if the Plaintiffs are successful. For that reason, the Organizations will raise common legal issues and defenses with the main action between the Plaintiffs and Department of Defense. *See, e.g., Conservation Northwest v. U.S. Forest Service*, 2005 WL 1806364 (E.D. Wash. July 28, 2005) (finding private company's interest in defending a lumber harvesting project in order to guard against a court order barring it was sufficient to establish common claims and defenses). Because intervention would contribute to the just and equitable adjudication of the legal questions presented, it should be permitted.

Additionally, while the Ninth Circuit has held that private parties are not entitled to intervention as of right as to the *merits* of NEPA compliance claims, *see discussion supra*, district courts may still grant permissive intervention under FRCP Rule 24(b) to such parties. Accordingly, if the Court decides that the merits of Plaintiffs' NEPA claim can and must be separated from consideration of the remedies associated with that claim and from the Plaintiffs' other claims, permissive intervention on the merits of the NEPA claim should also be granted. *See, e.g.*, *Sierra Club v. EPA*, 995 F.2d 1478, 1483 (9th Cir. 1993) (granting third party intervention as "[o]ur adversary process requires that we hear from both sides before interests of one side are impaired by a judgment").

CONCLUSION

The National Business Organizations respectfully request leave to intervene of right in this matter, pursuant to Federal Rule of Civil Procedure 24(a), and to file their own responsive pleading in support of Department of Defense on or before the date on which the Government is required to file a responsive pleading. In the alternative, the National Business Organizations respectfully request leave for permissive intervention, pursuant to Rule 24(b), and to file their own responsive pleading in support of Department of Defense on or before the date on which the Government is required to file its responsive pleading.

Dated: September 29, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 29, 2010, a copy of the foregoing was filed electronically. I understand that a notice of this filing will be sent to all parties by operation of the Court's electronic filing system, through which the parties may access this filing.

/S/ Elizabeth R. Toben