Hornbeck Offshore Services, L.L.C. v. Salazar et al Doc. 35

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, LLC, Plaintiff, v. KENNETH LEE "KEN" SALAZAR, in his official capacity as Secretary, United States Department of the Interior; ROBERT "BOB" ABBEY, in his official capacity as Acting Director, Mineral Management Service; and MINERALS MANAGEMENT SERVICE, Defendants.	)	CIVIL ACTION NO. No. 10-1663(F)(2) SECTION F JUDGE FELDMAN MAGISTRATE 2 MAGISTRATE WILKINSON

PROPOSED DEFENDANT-INTERVENORS'
MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT

On June 7, 2010, Hornbeck Offshore Services, LLC ("Hornbeck") filed an action under the Outer Continental Shelf Lands Act ("OCSLA" or the "Act") and Administrative Procedure Act ("APA") against the Minerals Managements Service ("MMS") and Kenneth Lee Salazar, and Robert Abbey, in their official capacities as Secretary of the Department of the Interior and Acting Director of MMS, respectively. A first supplemental and amended complaint was filed two days later by Hornbeck and a number of other parties (collectively, "Plaintiffs"). Plaintiffs contend that the six-month moratorium on certain deepwater oil drilling in the outer continental

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shelf that Secretary Salazar issued on May 28, 2010 was arbitrary and capricious, in violation of APA and OCSLA, and accordingly have sought an order enjoining this moratorium. Amended Complaint at 13-14, 38. Defenders of Wildlife, Sierra Club, Florida Wildlife Federation, Center for Biological Diversity, and Natural Resources Defense Council (collectively, "Applicants") submit this memorandum of law in support of their motion to intervene as Defendants-Intervenors. Applicants seek to intervene in this action in order to protect their aesthetic, recreational, and economic interests in the lands and waters in and around the Gulf of Mexico – interests that would be at risk if the moratorium is enjoined by this court. Applicants have contacted the parties to this action about this motion. Plaintiffs have stated that they oppose the motion to intervene and the government has stated that it takes no position.

BACKGROUND

On April 20, 2010, an offshore oil rig in the outer continental shelf ("OCS") of the Gulf of Mexico exploded and caught fire, causing the deaths of 11 workers and spilling millions of gallons of oil into the water. The oil rig at the site, the Deepwater Horizon, sank shortly thereafter, and the well it was digging continues to spew oil at a tremendous rate. According to current governmental estimates, between 35,000 and 60,000 barrels (or about 1.5 to 2.5 million gallons) of oil per day are being spilled. The oil slick created by this spill is estimated to cover at least 9400 square miles of surface and has reached the shores of Louisiana, Alabama, and Florida. There is even a reasonable possibility that sea currents will carry the spill around the Florida panhandle and up the Atlantic seaboard.

In response to this disaster, President Obama ordered Secretary Salazar to commence a 30-day examination of all exploration and production operations on the OCS. At the culmination of this 30-day review, the Secretary issued a report entitled "Increased Safety Measures for

Energy Development on the Outer Continental Shelf." Based on the results of this review and further evaluation, Secretary Salazar concluded that the drilling of new deepwater wells in the OCS "poses an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment" and "that the installation of additional safety or environmental protection equipment is necessary to prevent injury or loss of life and damage to property and the environment." Memorandum from Secretary Salazar to Director, MMS Re: Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells, May 28, 2010 ("Moratorium") at 1. He therefore ordered a "six month suspension of all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico and the Pacific regions" as well as a suspension of all new applications for permits to drill connected to those drilling operations. *Id.*

Proposed Defendant-Intervenor Defenders of Wildlife ("Defenders") is a national nonprofit organization dedicated to the protection and restoration of all native wild animals and plants in their natural communities. Based in Washington, D.C., and with offices spanning from Florida to Alaska, Defenders has over 415,000 members across the nation, including over 34,000 members from the states of Louisiana, Mississippi, Alabama, and Florida. Defenders is a leader in the conservation community's efforts to protect and recover threatened and endangered species, including sea turtles, whales, birds, and manatees impacted by the Deepwater Horizon spill and other Gulf of Mexico OCS activities. *See* Declaration of Michael Senatore, attached as Ex. 1.

Proposed Defendant-Intervenor Natural Resources Defense Council ("NRDC") is a national not-for-profit membership organization committed to the preservation, protection, and defense of the environment, public health, and natural resources. For forty years, NRDC has

engaged in scientific analysis, public education, advocacy, and litigation on a wide range of environmental and health issues. NRDC has long been active in efforts to protect marine and coastal environments from pollution. In particular, NRDC has worked for over 35 years to protect sensitive coastal and marine areas from the harmful effects of offshore drilling, including the impacts of oil spills. NRDC maintains offices in New York City; Washington, D.C.; Chicago; San Francisco and Santa Monica, California; and Beijing, China. NRDC has more than 1.2 million members and e-activists nationwide. NRDC has 42,489 members in the states of Louisiana, Texas, Mississippi, Alabama, and Florida. *See* Declaration of Alison Granshaw, attached as Ex. 2.

Proposed Defendant-Intervenor Center for Biological Diversity ("the Center") is a nonprofit corporation that works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is dedicated to the preservation, protection, and restoration of biodiversity and ecosystems throughout the world. Center members, staff, and board members include people with aesthetic, professional, recreational, spiritual, educational, scientific, moral, and conservation interests in the species and habitats of the Gulf of Mexico that will be harmed if the relief sought by the Plaintiffs is granted. The Center has over 42,000 members, including those who have viewed, photographed, and otherwise appreciated the species, habitats and ecosystems of the Gulf of Mexico, and who intend to visit and enjoy these species, habitats and ecosystems in the future. The Center's members and staff use the Gulf of Mexico for wildlife observation, research, nature photography, aesthetic enjoyment, recreational, educational, and other activities. The Center, its members, staff, and board have worked and plan to continue to work to protect and preserve the Gulf of Mexico ecosystem, and others at risk from offshore oil development, to ensure the survival and

recovery of imperiled species such as sea turtles, whales, and seabirds and their habitats. For many years the Center has also worked to improve the regulatory oversight and environmental compliance of offshore oil and gas activities. Therefore, not only do the Center's members, staff, and/or board have strong aesthetic, recreational, moral and spiritual interests in the species and ecosystems of the Gulf, they also have strong professional, conservation, education, and scientific interests in them as well. *See* Declaration of Peter Galvin, attached as Ex. 3.

Proposed Defendant-Intervenor Sierra Club is a non-profit public-benefit corporation with its principal place of business in San Francisco, California. Sierra Club is one of the oldest and largest conservation groups in the country, with over 700,000 members nationally, with sixty-four chapters in all 50 states, the District of Columbia and Puerto Rico. Approximately 3000 members of the Sierra Club are residents of Louisiana and 30,000 members are residents of Florida. Sierra Club brings this action for itself and as a representative of its members in the States of Louisiana and Florida. The Sierra Club represents the interests of its members in state and federal litigation, public policy advocacy, administrative proceedings, and before state, local, and federal lawmakers. The Sierra Club is now and has in the past been very involved in advocacy regarding issues related to oil drilling in the Gulf of Mexico and in keeping Gulf of Mexico waters free from pollution. All of these activities support Sierra Club's mission to explore, enjoy, and protect the wild places of the earth and educate and enlist humanity to protect and restore the quality of the natural and human environment.

Members of the Louisiana Chapter of the Sierra Club use and enjoy the waters of the Gulf of Mexico for recreational fishing, for recreational shellfish harvesting, and for traditional purposes such as swimming and wildlife observation, and intend to continue using those waters for those purposes in the future. Members and staff of the Florida Chapter of the Sierra Club

frequently use and enjoy the waters of the Gulf of Mexico and the estuarine and coastal waters that border Florida's Gulf Coast shoreline. These waters provide an environment for a variety of activities which members of the Sierra Club engage in, including, but not limited to, wading, walking, swimming, canoeing, kayaking, sailing, sport boating, wildlife observation, photography, personal and commercial research, and sport fishing. These members and staff also frequently use and enjoy Florida's Gulf Coast beaches, which provide an environment for a various activities which members of Sierra Club engage in, including, but not limited to, walking, wildlife observation, photography, and sport fishing. Members of the Sierra Club intend to continue engaging in all of these activities. *See* Declaration of Frank Jackalone, attached as Ex. 4.

Proposed Defendant-Intervenor Florida Wildlife Federation ("the Federation") is a Florida statewide non-profit conservation and education organization which is headquartered in Tallahassee, Florida. It is a membership-based organization with approximately 13,000 members throughout Florida. The organization's mission includes the preservation, management, and improvement of Florida's marine water resources and the fish and animals which use those waters for wildlife habitat. The Federation represents its members in state and federal litigation brought to preserve and protect Florida's water's resources and the animals that use those waters for habitat. Members of the Federation use and enjoy Gulf Coast waters including open waters, coastal waters, and estuarine waters in the Florida Panhandle region for sport and commercial fishing, boating, wildlife observation, recreational shellfish harvesting, canoeing, and kayaking and intend to continue using those waters for those purposes. *See* Declaration of Manley Fuller, attached as Ex. 5.

Applicants and their members will be affected by the outcome of this litigation. The relief sought by Plaintiffs will harm the concrete interests Applicants, their members, staffs, and boards have in the fish, wildlife and ecosystems of the Gulf of Mexico. The six-month moratorium on deepwater drilling in the Outer Continental Shelf was instituted to implement safety measures and conduct further analyses to better protect against the risk of oil spills and other potential harms to workers and the environment from both accidents and routine operations. Lifting the temporary moratorium will harm Applicants' and their members' interests in the wildlife and their habitat by increasing the risk that deepwater drilling could adversely affect these interests and impair the organizations' interests in ensuring meaningful environmental and safety review of deepwater drilling. To date, the potential harmful effects of deepwater drilling has not been properly disclosed, analyzed or mitigated. This has already resulted in uninformed and unwise decision-making. Such poor decision-making can and does have severe impacts on the fish, wildlife and ecosystems of the Gulf and makes accidents such as the Deepwater Horizon oil spill more likely to occur as a result.

The recreational, aesthetic, conservation, educational, and scientific interests of Applicants, their members, and their staff in the fish, wildlife and ecosystems of the Gulf, have been, are being, and, if the relief prayed for by Plaintiffs is granted, will continue to be adversely affected and irreparably injured by the Secretary's actions and inactions related to the deepwater drilling without full and proper environmental review. Because the outcome of this case would significantly impact Applicants' interests in protecting the waters and lands in and around the Gulf of Mexico, Applicants seek intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure or, alternatively, permissive intervention under Rule 24(b)(2). The Court should grant Applicants' motion, for the reasons stated below.

ARGUMENT

I. APPLICANTS ARE ENTITLED TO INTERVENTION AS OF RIGHT.

Pursuant to Rule 24(a)(2), a party is entitled to intervene as of right in a case when it "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 [that party's] ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The Fifth Circuit has set forth a four-part test to establish whether a party is entitled to intervention by right:

> Intervention as of right under Rule 24(a)(2) is based on four requirements: (1) the applicant must file a timely application; (2) the applicant must claim an interest in the subject matter of the action; (3) the applicant must show that disposition of the action may impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties to the litigation.

Heaton v. Monogram Credit Card Bank of Ga., 297 F.3d 416, 422 (5th Cir. 2002) (quotation marks and citation omitted). Although an applicant must satisfy all of these elements, the Fifth Circuit has indicated that "the inquiry under subsection (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application" and that "intervention of right must be measured by a practical rather than technical yardstick." *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005) (quotation marks and citation omitted). As discussed below, Applicants meet all of the requirements of Rule 24(a)(2) and are therefore entitled to intervene in this action as of right.

A. The Motion for Intervention Is Timely.

"There are no absolute measures of timeliness; it is determined from all the circumstances." *Heaton*, 297 F.3d at 423. The Fifth Circuit has identified four factors a court must consider when assessing the timeliness of a motion to intervene under Rule 24: (1) the

period of time during which the potential intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the degree of prejudice the existing parties would suffer due to the would-be intervenor's failure to move to intervene as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if he is not permitted to intervene; and (4) the presence of unusual circumstances militating either for or against a determination that the application is timely. *See Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977). In applying these factors, a court should keep in mind that "[t]he requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994).

Here, there is no question that Applicants' motion is timely. Most importantly, Applicants diligently and promptly filed their motion to intervene upon discovering that their interests were implicated in this matter. Applicants were made aware of this action from news reports published two days after it was filed on June 7, 2010. *See, e.g.*, *Deepwater Drilling Moratorium Challenged by Louisiana Company*, Associated Press (June 9, 2010), *available at* http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/deepwater_drilling_moratorium.html. After learning this information, Applicants diligently moved to intervene to protect their interests, filing their motion less than ten days after the commencement of the action. Given the promptness of Applicants' response, none of the parties to the suit has experienced or will experience prejudice, particularly since the motion has been filed within the filing deadlines for the upcoming preliminary injunction hearing.

On the other hand, Applicants would suffer prejudice if their motion was denied. As detailed below, the moratorium is protecting Applicants' environmental, aesthetic, and economic

interests by reducing the likelihood that they would be affected by future oil spills or would suffer harm in addition to that resulting from the Deepwater Horizon spill. If Applicants are not permitted to intervene and this court enjoins the moratorium, Applicants would be unable to seek redress, thereby impairing these interests. In light of all of these circumstances, Applicants' motion should be deemed timely. *See Heaton*, 297 F.3d at 422 ("Federal courts should allow intervention where no one would be hurt and the greater justice could be attained.") (quotation marks and citation omitted).

B. <u>Applicants Have a Direct and Substantial Interest in This Litigation.</u>

"To demonstrate an interest relating to the property or subject matter of the litigation sufficient to support intervention of right, the applicant must have a direct, substantial, legally protectable interest in the proceedings." *Edwards v. City of Houston*, 78 F.3d 983, 1004 (5th Cir. 1996) (quotation marks and citation omitted). To meet this requirement, the applicant should have an interest "which the *substantive law* recognizes as belonging to or being owned by the applicant." *Ross*, 426 F.3d at 757 (quotation marks and citation omitted). The intervenor also "should be the real party in interest regarding his claim." *Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2004). The Fifth Circuit has described this test as "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Ross*, 426 F.3d at 757 (quotation marks and citation omitted). Additionally, courts may judge the interest requirement by a lenient standard if the case involves a substantial public interest. *See San Juan County v. U.S.*, 503 F.3d 1163, 1201 (10th Cir. 2007) ("[T]he requirements for intervention may be relaxed in cases raising significant public interests."); Moore's Federal Practice 3D § 24.03[2][c].

Here, Applicants have legally protectable interests in protecting endangered species and their habitat and in ensuring the continuing existence and preservation of the outer continental shelf and the lands along the shores of the Gulf for the aesthetic and recreational enjoyment of their members. They also have protectable interests in the economic livelihood of those members, such as commercial and recreational fisherman, whose economic livelihood and/or enjoyment depends on the protection of that environment and who would suffer severe harm if future spills occurred as a result of the moratorium being enjoined. These interests are sufficient to meet the direct and substantial interest requirement. *See San Juan County*, 503 F.3d at 1200 (noting that Rule 24(a)(2) requires the applicant to have an interest *relating to* the property, not an interest in the property itself).

Applicants' interests in wildlife and their habitat are directly related to this case because offshore drilling adversely impacts the marine ecosystems at issue here. Deepwater oil and gas exploration and development exposes wildlife and habitat to a variety of threats. For example, drilling in deepwater habitat increases the likelihood of vessels striking sperm whales and pollution from routine drilling and accidental oil releases can poison and harm wildlife. Additionally, a history of poor safety and environmental oversight of offshore oil and gas activities makes it more likely that harmful environmental impacts will occur from deepwater drilling. This case challenges the Federal government's moratorium on deepwater drilling, which aims to provide better oversight and regulation of safety and environmental measures that would protect Applicants' interests.

Other circuit courts have deemed it "indisputable that a prospective intervenor's environmental concern is a legally protectable interest." *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, at *15 (10th Cir. 2010) (quotation marks and citation omitted); *see also*

Mausolf v. Babbitt, 85 F.3d 1295, 1302 (8th Cir. 1996); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (holding that wildlife organizations were entitled to intervene as a matter of right in an action challenging a government decision to establish a conservation area). In *Utah Association of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001), for example, the court granted a motion to intervene submitted by a coalition of environmental groups in a suit regarding the President's designation of a national monument. In so doing, the court found the groups' asserted interests relating to the monument and its continued existence – which were based on "their support of its creation, their goal of vindicating their conservationist vision through its preservation, their use of the monument in pursuit of that vision, and their economic stake in its continued existence" – were "sufficiently related to the subject of the action to support intervention as of right." *Id.* at 1252-53. Similarly, Applicants here have economic, aesthetic, and recreational stakes in ensuring the continuing viability of the land and waters in and around the Gulf of Mexico. Since the Moratorium reduces the potential risks to that ecosystem, Applicants thereby have an interest sufficiently related to the topic of this litigation to warrant intervention as of right.

Furthermore, the Fifth Circuit has recognized that, although parties seeking to intervene as of right need not satisfy Article III standing requirements, the ability to claim standing can show a legally protectable interest sufficient to meet the requirements of Rule 24(a)(2). *See Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001); *see also Utah Ass'n of Counties*, 255 F.3d at 1252 n.4 ("[B]ecause Article III standing requirements are more stringent than those for intervention under Rule 24(a), a determination that intervenors have Article III standing compels the conclusion that they have the requisite interest under the rule."). As the Supreme Court has noted, "the desire to use or observe an animal species, even for purely esthetic purposes, is

undeniably a cognizable interest for purpose of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992). Since Applicants' interests include aesthetic enjoyment of species in and around the Gulf, they have a valid interest for standing purposes, and, as a result, should likewise be deemed to have a sufficient legally protected interest to meet that prong of the test for intervention as of right.

C. The Outcome of this Litigation May, as a Practical Matter, Impair the Ability of Applicants to Protect Their Interests.

An applicant for intervention as of right must show that the "the disposition of the case into which he seeks to intervene may, as a practical matter, impair or impede his ability to protect" the legally protectable interest identified in the second prong of the test. *Ross*, 426 F.3d at 757 (quotation marks and citation omitted). Since Applicants' ability to protect their interests would be impaired by the outcome of this litigation, they meet this standard.

Plaintiffs seek a declaratory judgment that the Moratorium was arbitrary and capricious and an order enjoining Secretary Salazar and MMS from enforcing the Moratorium. As Secretary Salazar discussed in issuing the Moratorium, deepwater drilling "poses an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment." Moratorium at 1. Deepwater drilling operations exposes marine wildlife and habitat to a range of adverse effects, such as the discharge of drilling wastes, noise pollution, vessel traffic, and marine debris associated with routine activities, as well as the ever-present risk of an accidental oil spill. Additionally, offshore drilling operations in the Gulf of Mexico have been permitted without meaningful environmental review, increasing the potential for greater environmental harm. The Moratorium thus helps to reduce the risk to Applicants' legally protectable aesthetic, economic, and recreational interests in the Gulf by ensuring that the government has an opportunity to evaluate and impose measures to ensure safety and reduce the

potential environmental effects of drilling. The Moratorium also affords better opportunities for the government and Applicants to secure compliance with environmental laws, and thus to protect Applicants' interests. If this court decides to enjoin the Moratorium, there is an increased likelihood that harm would result to Applicants' interests – a fact made sadly evident by the devastation caused by the Deepwater Horizon incident, Exxon Valdez spill, and similar incidents worldwide.

The outcome sought by the Plaintiffs therefore would adversely affect Applicants' protectable interests. If harm to those interests occurred, it would likely be irreparable, and thus Applicants would be unable to take effective action to protect their interests if an accident occurred. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable."). This harm is sufficient to meet this prong of the 24(a)(2) test, since a party need show only that there *may* be an impairment to its legally protectable interests, not that such harm is likely to occur. *See Ross*, 426 F.3d at 757.

Moreover, a decision in this case in favor of Plaintiffs may impair Applicants' ability to enjoy and protect other ecosystems throughout the country. This action requires this court to interpret OCSLA and its accompanying regulations to determine the scope of the Secretary's authority under the Act and the degree to which environmental considerations can affect his decisions about the safety requirements that can be imposed on drilling rigs. Depending on how the Court resolves this legal issue, a decision in favor of Plaintiffs may, as a practical matter, impair not only Applicants' interests in the ecosystems at issue in this litigation but also its interest in all other areas in which offshore deepwater drilling occurs.

D. Applicants' Interests May Not Be Adequately Represented by the Parties to the Pending Litigation.

Rule 24(a)(2)'s inadequate representation requirement "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 Am.*, 404 U.S. 528, 538 n.10 (1972). If "the putative representative is a governmental body or officer charged by law with representing the interests of the absentee," there is a presumption of adequate representation, which can be rebutted by a showing that the potential intervenor's interest is in fact different from the governmental entity in question and that this interest will not be represented by that entity. *Edwards*, 78 F.3d at 1005. There is a similar presumption of adequacy if "the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Id.* "In such cases, the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption." *Id.*

Applicants' interests, although partially aligned with those of the government are sufficiently distinct to make the government an inadequate representative of those interests. Importantly, in issuing regulations under OCSLA, the Secretary is required to take into consideration both the economic potential of development on the OCS and the environmental impact of those developmental actions.[1] *See* 43 U.S.C. § 1332(3). This explicit requirement may mean that the positions taken by the Secretary or the regulations he issues could, in some instances, promote development at the expense of the environment if such a course of action is deemed to be in the larger public interest. Since Applicants' interests exclusively concern the environmental benefits and long-term sustainability of the waters and lands of the Gulf, such

[1] Although OCSLA requires consideration of both of these factors, Applicants disagree with Plaintiffs' interpretation that this provision requires that any regulation issued by the Secretary must derive from an explicitly balancing of those factors.

actions inevitably would mean that the government's interests would be different from Applicants.

In particular, Applicants' interests are adverse to the government with respect to actions and inactions of the MMS leading up to the Deepwater Horizon blowout and spill and subsequent moratorium. Applicants have challenged decisions by the Minerals Management Service that resulted in inadequate environmental review and permit requirements in the authorization of BP's Deepwater Horizon exploration well and other drilling activities in the Gulf of Mexico. *See Defenders of Wildlife v. Minerals Mgmt. Serv.*, C.A. No. 10-254 (S.D. Ala.) (challenge to categorical exclusion of exploration plans from environmental review and regarding failure to supplement environmental impact statement); *Center for Biological Diversity v. Salazar*, No. 1:10-cv-00816-HHK (D.D.C.) (challenge to categorical exclusion of exploration plans); *Gulf Restoration Network v. Salazar*, No. 2:10-cv-1497 (E.D. La.) (challenge by Sierra Club and others to MMS Notice to Lessees exempting offshore exploratory drilling operations from various blowout scenarios and oil spill response requirements as well as to five exploration plans adopted without a blowout scenario in reliance on the waiver); *Gulf Restoration Network v. Salazar*, Nos. 10-60411, 10-60413, 10-60414, 10-60415, 10-60416 (challenge by Sierra Club and others to five exploration plans approved by MMS after the Deepwater Horizon incident); *Center for Biological Diversity v. Salazar*, No. 10-60417 (5th Cir.) (challenge alleging NEPA violations by MMS with respect to 37 exploration and development plans issued for sites in the Gulf of Mexico). Collectively, these lawsuits take MMS to task for its lax oversight of offshore drilling in the Gulf, which has resulted in a lack of preparedness for the type of oil spill that is now taking its toll on the region.

As these suits make clear, Applicants have an interest in assuring implementation of legally mandated environmental review and permitting requirements prior to a resumption of deepwater drilling that may differ from the government's view of these requirements. While both the government and Applicants have an interest in the six-month moratorium to allow review of the BP disaster and spill, the government and Applicants may have substantially differing views on the reform of offshore drilling regulation that is required, and the importance of the moratorium in reducing the risk of additional disasters before necessary regulatory reforms are in place. As a result, there is a very realistic possibility that the positions the government takes in this lawsuit are ones with which Applicants would disagree. *See In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991) (noting that "although the interests of the Sierra Club and [the Government] may converge" with respect to certain legal points "they may [also] diverge" with respect to others); *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 870 (8th Cir. 1977) (finding that, although "both the applicants and defendants are interested in upholding the constitutionality of the ordinance," the defendants would not be adequate representatives for the applicants because "their respective interests, while not adverse, are disparate"). Furthermore, since Secretary Salazar and MMS are the defendants in each of these lawsuits, they may be unwilling to take positions in this case that will undermine their defense in the environmental cases.

The situation here is similar to that seen in *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996), which involved a suit seeking to enjoin the enforcement of snowmobile restrictions in Yellowstone National Park. A series of conservation groups sought to intervene in the case. Although both the government and the conservation groups had an interest in protecting wildlife, the court found that the groups' interests were not adequately represented by the government.

See id. at 1303-04. This conclusion was based on the notion that, in promoting the public interest, "the Government "must inevitably favor some uses over others," and, as a result "the Government's interest in promoting recreational activity and tourism in the Park, an interest many citizens share, may be adverse" to the interests of the conservation groups. *Id.*

For much the same reason, Applicants might not have the same ultimate objective as the government even though, at present, both they and the government oppose Plaintiffs' request for a preliminary injunction. As multiple courts have recognized, because of the multitude of interests the government must represent, "it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998); *see also Utah Ass'n of Counties*, 255 F.3d at 1256. Furthermore, the fact that the government has taken no position of Applicants' motion for intervention may indicate a less than wholehearted support for Applicants' interests. *See Conservation Law Found., Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992); *see also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (finding representation inadequate when government changed positions only in response to lawsuits brought by potential intervenors, thereby suggesting that it was unlikely to argue on their behalf). Such a "silence on any intent to defend [Applicants'] special interests is deafening." *Utah Ass'n of Counties*, 255 F.3d at 1256 (quotation marks and citation omitted).

As indicated by Applicants' various lawsuits against MMS and other forms of advocacy, they disagree with many of the policies and practices adopted by MMS and the Secretary. Based on these differing views about the effectiveness of existing regulatory mechanisms, the government may be more open to settling the suit on terms different than the Applicants would accept. *See Clark v. Putnam County*, 168 F.3d 458, 462 (11th Cir. 1999) ("A greater willingness

to compromise can impede a party from adequately representing the interests of a nonparty."). The existence of such differences is sufficient to establish that representation of an intervenor's interest by the governmental agency may be inadequate. *See id.* These potentially opposing views reflect an adversity of interests sufficient to overcome any potential presumption of adequate representation.

At a minimum, the scope of the interests represented by the United States may cause it to approach this case differently than if it represented Applicants' more targeted focus on the environmental and sustainability implications of the moratorium. *See CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1578 (N.D. Ga. 1996) (finding a likely divergence of interests of governmental agency from those of private intervenor sufficient to meet minimal burden of showing inadequate representation). The government must represent the public interest, not just the particular interests of Applicants. The fact that these interests "may diverge in the future, even though, at this moment, they appear to share common ground, is enough to meet [Applicants'] burden on this issue." *Heaton*, 297 F.3d at 425. In such a situation, "there is sufficient doubt about the adequacy of representation to warrant intervention." *Trbovich*, 404 U.S. at 538 n.10.

II. IN THE ALTERNATIVE, APPLICANTS SHOULD BE GRANTED PERMISSIVE INTERVENTION IN THIS ACTION.

If the Court denies Applicants' request for intervention as of right, it should nevertheless exercise its discretion to grant Applicants' motion for permissive intervention under Rule 24(b)(2). The court has discretion to allow a party to intervene under Rule 24(b)(2) if the party makes a timely motion to intervene and that party "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(2). In deciding whether to

grant the motion, the Court must "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

As discussed above, Applicants' motion to intervene is timely since it was filed within ten days of the filing of the complaint. There also is no indication that there will be any undue delay or prejudice to the original parties as a result of Applicants' motion. Furthermore, Applicants' claims and defenses have common issues of fact and law with the underlying claims and defenses in Plaintiffs' action. This case challenges the Federal government's moratorium on deepwater drilling which aims to provide better oversight and regulation of safety and environmental measures that would protect Applicants' interests. Since Applicants directly oppose this challenge, their claims and defenses

Applicants' intervention will not unduly delay this case or otherwise prejudice any party. Additionally, as other courts have noted, courts should resolve any doubts or concerns regarding the propriety of granting a motion to intervene "in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993). Bearing all of this in mind, the court should grant the Applicants leave to intervene under Rule 24(b)(2).

CONCLUSION

For all of the foregoing reasons, Applicants respectfully request that they be granted the right to intervene in this proceeding.

Respectfully submitted, this 17th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2010, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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