THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, ATLANTIC OFFSHORE LOBSTERMEN'S ASSOCIATION, LONG ISLAND COMMERCIAL FISHING ASSOCIATION, GARDEN STATE SEAFOOD ASSOCIATION, and RHODE ISLAND FISHERMEN'S ALLIANCE, *Plaintiffs*, v. WILBUR ROSS, BENJAMIN FRIEDMAN, RYAN ZINKE, DONALD J. TRUMP, and JANE DOE, *Defendants*, and NATURAL RESOURCES DEFENSE COUNCIL, INC., CONSERVATION LAW FOUNDATION, CENTER FOR BIOLOGICAL DIVERSITY, and R. ZACK KLYVER, *Defendant-Intervenor Applicants.*	Case No. 17-cv-00406 (JEB) **Reply in Support of Defendant-Intervenor Applicants' Motion to Intervene**

REPLY IN SUPPORT OF DEFENDANT-INTERVENOR APPLICANTS' MOTION TO INTERVENE

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INTRODUCTION

Applicants for intervention—Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and Mr. R. Zack Klyver—have presented sufficiently specific, plausible allegations in support of their motion to intervene. Plaintiffs oppose the motion, but notably, they do not dispute that Applicants have met Rule 24(a)'s four requirements for intervention as of right: Applicants filed a timely motion demonstrating that they have legally protectable interests, that those interests will be impaired if Plaintiffs prevail in this litigation, and that the existing parties may not adequately represent Applicants' interests. Nor do Plaintiffs dispute that Applicants have met Rule 24(b)'s criteria for permissive intervention. Plaintiffs' sole basis for opposing Applicants' intervention is their contention that Applicants have not demonstrated standing. *See* Opp. at 2 (ECF No. 16). As explained below, Plaintiffs misconstrue D.C. Circuit standing law. Applicants' allegations satisfy this Circuit's standing requirements at the pleading stage.[1]

[1] Federal Defendants have not yet taken a position on Applicants' motion, and they have sought an extension of time until May 22, 2017, to respond. *See* Mot. for Extension (ECF No. 17). Per the Court's order of April 14, 2017, Applicants are filing a separate opposition to Federal Defendants' extension request. Applicants certainly agree that the Federal Defendants should have "an opportunity to weigh in" before the Court decides the intervention motion, Opp. at 8, and Applicants do not oppose a reasonable extension for that purpose. As explained in Applicants' separate filing, however, the lengthy extension that Federal Defendants seek, if granted, would prejudice Applicants' ability to participate in this litigation. If and when Federal Defendants file an opposition to Applicants' motion to intervene, Applicants respectfully reserve the right to file a reply.

ARGUMENT

As the D.C. Circuit has held, "[i]f one [applicant-intervenor] has standing in an action, a court need not reach the issue of standing of other [applicants] when it makes no difference to the merits of the case." *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (internal quotation marks omitted). So long as at least one of the four Applicants has adequately alleged standing, therefore, the Court should grant the motion to intervene. In fact, as explained below, all four Applicants have offered sufficient allegations regarding their standing to participate as intervenors.[2] Plaintiffs' arguments to the contrary misapprehend longstanding Supreme Court and D.C. Circuit law.

I. Plaintiffs seek to impose a heightened evidentiary standard at the pleading stage that is contrary to Supreme Court and D.C. Circuit law

Plaintiffs misconstrue Supreme Court and D.C. Circuit standing law when they argue that, "[t]o establish standing," Applicants must proffer "affidavit[s] or

[2] Plaintiffs incorrectly contend that the bar for standing is "even higher" for permissive intervention than for intervention as of right. Opp. at 2 n.1. In fact, it is unclear whether the D.C. Circuit would require permissive intervenors to show standing at all, *see In re Endangered Species Act Section 4 Deadline Litig., MDL No. 2165*, 704 F.3d 972, 980 (D.C. Cir. 2013) ("It remains . . . an open question in this circuit whether Article III standing is required for permissive intervention."), and even if permissive intervenors must show standing, there is nothing in Article III that suggests different levels of standing would be required for different types of intervenors. The case on which Plaintiffs rely, *EEOC v. National Children's Center*, 146 F.3d 1042 (D.C. Cir. 1998), does not address standing; the passage Plaintiffs cite simply recognizes that an applicant for permissive intervention "typical[ly] . . . asks the district court to adjudicate an *additional claim* on the merits," over which the court must have subject-matter jurisdiction. *Id.* at 1046 (emphasis added). Applicants have raised no additional claims here.

other evidence" along with their motion to intervene. Opp. at 3 (ECF No. 16). That is the standard that applies at the *summary judgment stage*—not at the pleading stage. At the pleading stage, the Supreme Court and D.C. Circuit have long held that "general factual allegations"—not evidentiary submissions—are sufficient to satisfy Article III's standing requirements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

It is black-letter law that a party's assertion of standing "must be supported in the same way as any other matter on which . . . [that party] bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990)); *accord Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace the specific facts that are necessary to support the claim.'" *Defs. of Wildlife*, 504 U.S. at 561 (internal quotation marks and brackets omitted); *see also Osborn v. Visa Inc.*, 797 F.3d 1057, 1064 (D.C. Cir. 2015) (when assessing standing at the pleading stage, "we grant plaintiff the benefit of all inferences that can be derived from the facts alleged" (internal quotation marks and brackets omitted)). The burden on plaintiffs at this stage "is not onerous," *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1141 n.3 (D.C. Cir. 2011), as courts look to the well-pleaded allegations in the complaint. Declarations and other evidentiary

support may be considered, but they are not required at this stage. *See, e.g.*, *Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8-9 (D.C. Cir. 2015).[3]

To be sure, the burden on the party asserting standing "increases . . . as the case proceeds." *Equal Rights Ctr.*, 633 F.3d at 1141 n.3. At summary judgment, the party asserting standing "can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Defs. of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted); *accord Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015); *Equal Rights Ctr.*, 633 F.3d at 1141 n.3. This is why, in *Defenders of Wildlife*—which was decided on a motion for summary judgment—the Supreme Court held that "respondents had to submit affidavits or other evidence showing, through specific facts," that their members faced an injury in fact. *Defs. of Wildlife*, 504 U.S. at 563.

The standing framework described above applies to intervenors just as it does to plaintiffs under this Circuit's precedent. *See Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015) ("The

[3] In fact, this Court recently held that although "it was necessary and reasonable for [organization]'s counsel to assure themselves that they had a good faith basis for the allegations pled in the Complaint"—including allegations that the organization "has members in the affected states, and that the interests of those members have been harmed"—the organization was not entitled to recover attorney fees for time spent drafting members' declarations prior to filing the complaint because "written declarations *were not necessary*" at the pleading stage. *Sierra Club v. McCarthy*, -- F. Supp. 3d ----, No. 15-2264, 2017 WL 394484, at *4 (D.D.C. Jan. 27, 2017) (emphasis added; internal quotation marks omitted).

standing inquiry for an intervening-defendant is the same as for a plaintiff[.]").[4] When deciding a motion to intervene, "there is no requirement that the district court make findings of fact and conclusions of law." *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981). Rather, consistent with the usual approach at the pleading stage, courts assess a movant-intervenor's standing "on the tendered pleadings"—*i.e.*, the complaint or answer in intervention—and accept all well-pleaded factual allegations as true. *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988); *accord Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013); *SEC v. Prudential Secs. Inc.*, 136 F.3d 153, 156 n.4 (D.C. Cir. 1998); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980); *see also* 7C Charles Alan Wright et al., Federal Practice and Procedure § 1914 (3d ed.) ("The pleading is construed liberally in favor of the pleader-intervenor and the court will accept as true the well-pleaded allegations in the pleading." (footnotes omitted)). Naturally, at each successive stage of the litigation, intervenors must continue to show standing in "the manner and [with the] degree of evidence required at . . . [that] stage," just as plaintiffs must do. *Defs. of Wildlife*, 504 U.S. at 561. At the outset of the case, however, there is no requirement that

[4] The courts of appeals are split on the question whether a prospective intervenor must demonstrate standing in addition to meeting the requirements of Rule 24, and the Supreme Court recently granted certiorari to resolve that question. *See Town of Chester v. Laroe Estates, Inc.*, 2017 WL 125674 (U.S. Jan. 13, 2017) (No. 16-605). The Court heard oral argument in the case on April 17, 2017. This Court need not await resolution of that case, however, because Applicants have adequately pleaded standing.

intervenors come forward with evidence supporting their allegations, just as there is no such requirement for plaintiffs.

Plaintiffs here urge the Court to depart from these well settled rules and impose a heightened evidentiary standard for intervenors. *See* Opp. at 3 (arguing that "Applicant-Intervenors cannot rest on 'mere allegations,' but must set forth by affidavit or other evidence specific facts."). That is not the law. Plaintiffs cite not a single case holding that, *at the pleading stage*, a party must attach declarations or other evidentiary support to its complaint or answer to prove its standing. *See id.* at 3-4.

The cases on which Plaintiffs rely are readily distinguishable. Both *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002), and *Agricultural Retailers Association v. U.S. Department of Labor*, 837 F.3d 60 (D.C. Cir. 2016), were petitions for review of agency decisions. As the D.C. Circuit has explained, where a party files a petition for review directly with the court of appeals, "[t]he petitioner's burden of production in the court of appeals is . . . the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing 'by affidavit or other evidence.'" *Sierra Club*, 292 F.3d at 899 (quoting *Defs. of Wildlife*, 504 U.S. at 561); *see also Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 49 n.2 (D.C. Cir. 2016) (because petitions for review "bypass the district court and come to us directly, we treat them as a district court would in deciding a motion for summary judgment"). Accordingly, the D.C. Circuit typically requires that a party or intervenor "set forth the basis for the claim of standing" at the same time

as it files its opening brief on appeal. Circuit Rule 28(a)(7). The rationale behind this rule is straightforward: in a petition for review, the administrative record is already set; there will be no further opportunity for factual development, nor any later stage in the proceedings when evidence of standing might be considered. *See Sierra Club*, 292 F.3d at 899. But the D.C. Circuit's treatment of standing in the petition-for-review context does not change the well settled pleading standard applicable to civil actions, like the present case, filed in district court.

Plaintiffs also rely on *Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003), *see* Opp. at 3-4, but that case expressly declined to reach the proposition that Plaintiffs urge here. In that case, a Mongolian government agency intervened defensively at the pleading stage in an action challenging the Interior Department's failure to list a species of sheep as endangered. 322 F.3d at 730-31. The Mongolian agency's intervention motion contained allegations and argument describing the agency's interest, but it was not supported by declarations. *See id.* at 733. As here, the plaintiffs opposed intervention, arguing that the agency's "standing cannot rest on 'mere allegations,'" and that its motion must be denied because it had "offered neither affidavits nor other evidence." *Id.* at 733 (quoting *Sierra Club*, 292 F.3d at 899). The D.C. Circuit rejected this argument, holding that regardless of the applicable standard, the agency's motion met it; the agency's standing was "self-evident" from the motion itself. *Id.* at 733-34.

If anything, *Fund for Animals* undercuts Plaintiffs' position. Although not necessary to the outcome, the Court questioned the plaintiffs' reliance on *Sierra*

Club and their conflation of the different procedures applicable to petitions for review and district-court actions: "We note that the above quotations from *Sierra Club* [on which plaintiffs rely] refer to a party's obligations at the summary judgment stage, but not at the pleading stage where general factual allegations of injury may suffice." *Fund for Animals*, 322 F.3d at 733 n.4 (internal quotation marks, ellipses, and citations omitted). Although *Fund for Animals* ultimately did not "need . . . [to] decide whether the [agency]'s motion to intervene is closer to a motion for summary judgment or to a pleading," *id.*, decades of settled D.C. Circuit law provide the answer to that question: in the district court, a motion to intervene is assessed "on the tendered pleadings," accepting all well-pleaded factual allegations as true. *Williams & Humbert Ltd.*, 840 F.2d at 75; s*ee supra* at 4-6.

Finally, Plaintiffs' assertion that the D.C. Circuit has "upheld the denial of intervention based on the inadequacy of supporting affidavits" is misleading. Opp. at 3-4 (citing *Agricultural Retailers Association*, 837 F.3d at 66, and *Perciasepe*, 714 F.3d at 1324). As explained above, *Agricultural Retailers Association* involved "petitions for review" filed directly with the court of appeals, 837 F.3d at 62, so it has no bearing on the pleading standard in a civil action filed in district court. And *Perciasepe*, contrary to Plaintiffs' suggestion, did not imply that a supporting affidavit is required at the pleading stage, or that an intervention motion is "inadequa[te]" without one. Opp. at 3. In fact, *Perciasepe* recognized that "we treat [an intervenor's] factual allegations as true and must grant [it] the benefit of all inferences that can be derived from the facts alleged." 714 F.3d at 1327. *Perciasepe*

denied intervention simply because the intervenor's assertion of standing depended on too "speculati[ve]" a causal link between the outcome of the case and the alleged future harm. *Id*. Plaintiffs have made no such argument here; nor could they. Their own complaint alleges that, but for the Monument's protections, their members would be engaging in extensive commercial fishing activities in the Monument area. *See* Complaint at ¶¶ 10-13 (ECF No. 1). And Applicants' proposed answer describes in detail the harmful impacts of such commercial fishing activities if Plaintiffs prevail in this litigation and the Monument's protections are lifted. *See* Answer at ¶¶ 80-82, 120-24.

In sum, Plaintiffs ask the Court to depart from decades of Supreme Court and D.C. Circuit law. At the pleading stage, intervenors—just like plaintiffs—must plausibly allege facts that, if proven, establish their standing. Like the other criteria for intervention, standing is assessed "on the tendered pleadings," taking all well pleaded allegations as true. *Williams & Humbert Ltd.*, 840 F.2d at 75. Plaintiffs' attempt to depart from this settled law and instead hold intervention motions at the pleading stage to a summary judgment standard—insisting on "affidavit[s] or other evidence" to demonstrate standing, Opp. at 5—has no support in the law.

II. Organizational Applicants have alleged standing with sufficient specificity for this stage of the proceedings

A. Parties asserting associational standing are not required to name individual members in their pleadings

Plaintiffs next argue that Organizational Applicants cannot establish associational standing unless they "identify at least one member who has individual

standing" in their motion or proposed answer. Opp. at 5. Again, Plaintiffs misstate the standard that applies at the pleading stage. There is no requirement under D.C. Circuit law that a party asserting associational standing must identify an individual member by name in its initial pleading. Such a requirement would contravene the Supreme Court's clear holding that, in assessing standing at the pleading stage, courts must "presume that *general* allegations embrace those *specific* facts that are necessary to support the claim." *Defs. of Wildlife*, 504 U.S. at 561 (emphasis added; internal quotation marks and brackets omitted).

Indeed, the D.C. Circuit has held that organizations asserting associational standing need not "identify particular individuals" by name in their pleadings. *Pub. Citizen v. FTC*, 869 F.2d 1541, 1551 (D.C. Cir. 1989). Applying *Defenders of Wildlife*, numerous other courts have reached the same conclusion. *See, e.g.*, *Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d 19, 31 (D.D.C. 2012), *aff'd on other grounds*, 746 F.3d 468 (D.C. Cir. 2014); *Hancock Cty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012); *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1180 (11th Cir. 2009); *Bldg. & Const. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 804 (W.D. Tex. 2015); *Equal Rights Ctr. v. Abercrombie & Fitch Co.*, 767 F. Supp. 2d 510, 527 (D. Md. 2010).

To be sure, "it will often be expedient (if not necessary) to identify particular individuals" at some point in the litigation. *Pub. Citizen*, 869 F.2d at 1551. For example, an individual member who testifies at summary judgment or at trial in

support of standing would normally have to be identified.[5] But the *name* of a standing witness need not be pleaded, unless there is a specific reason that fact is necessary to the court's assessment of whether the allegations plausibly assert standing. *See Pub. Citizen*, 869 F.2d at 1551-52.

Applicants acknowledge that this Court has in some instances dismissed an organization's complaint where it did not identify individual members. *See Int'l Acad. of Oral Med. & Toxicology v. U.S. Food & Drug Admin.*, 195 F. Supp. 3d 243, 264-67 (D.D.C. 2016); *W. Wood Preservers Inst. v. McHugh*, 292 F.R.D. 145, 148 (D.D.C. 2013); *Californians for Renewable Energy v. U.S. Dep't of Energy*, 860 F. Supp. 2d 44, 48 (D.D.C. 2012). To the extent these cases suggest that an organizational party's initial pleading must necessarily name individual members to establish standing, such an interpretation is inconsistent with the D.C. Circuit's decision in *Public Citizen* and with the settled pleading rules set forth in Supreme Court and D.C. Circuit precedent, as discussed above. *See supra* Section I.[6]

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[5] Even at these later stages in the litigation, however, identifying individual members may not always be necessary. For example, in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), the Supreme Court held that an organizational plaintiff's evidence at trial was "sufficient to meet . . . [its] burden of establishing standing" even though it "did not clearly identify" individual members living in specific voting districts affected by gerrymandering. *Id.* at 1269 (internal quotation marks omitted). "At the very least," the Court held, the district court should have given the organization "an opportunity to provide evidence of member residence" at trial if it viewed that evidence as relevant. *Id.*

[6] For example, the chief cases on which *Californians for Renewable Energy* relies—*Summers v. Earth Island Institute*, 555 U.S. 488 (2009), and *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011)—are inapplicable at the pleading stage in district court. *Summers* was an appeal from the grant of a nationwide injunction. *See* 555 U.S. at 500 (noting that "trial is over, [and] judgment has been

Nevertheless, if the Court concludes that Applicants in the present case must identify individual members with standing at this stage, Applicants submit the attached Amended Proposed Answer, which provides the names of several individual members with standing. *See* Amended Answer at ¶¶ 95, 102-03, 108 (naming individual members). If the Court determines that Applicants must support their motion with declarations from these members, Applicants respectfully request that the Court permit them to file such declarations, and Applicants will do so promptly. *Cf. Ala. Legislative Black Caucus*, 135 S. Ct. at 1269-70.

B. Organizational Applicants' allegations plausibly assert standing based on injuries to their members' interests

Plaintiffs also contend that Organizational Applicants cannot establish standing because they do not point to a member who has "concrete plans to visit" the Monument area "at a[] particular time in the near future." Opp. at 6; *see also id.* at 5-7. For this proposition, Plaintiffs cite only one case: *Defenders of Wildlife*. *See id.* Again, they misread that decision.

First, as explained above, the "manner and degree of evidence required" in *Defenders of Wildlife* was explicitly a function of that case's procedural posture: it was decided on a motion for summary judgment. 504 U.S. at 561. *See also id.* at 563 ("*To survive . . . [a] summary judgment motion*, respondents had to submit affidavits or other evidence showing, through specific facts, . . . that one or more of

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entered"). *Chamber of Commerce* was a petition for review filed directly at the court of appeals. 642 F.3d at 199. Neither case altered the settled law regarding "the manner and degree of evidence required" at the pleading stage in district court. *Defs. of Wildlife*, 504 U.S. at 561.

respondents' members would . . . be directly affected" by the challenged government actions (emphasis added; internal quotation marks omitted)). Reviewing the affidavits and deposition testimony, *see id.* at 563-64, the Supreme Court concluded that respondents had not demonstrated a concrete injury. The challenged government actions were occurring overseas in Egypt and Sri Lanka, and the respondents' members testified that they would be harmed by those actions *if* they traveled to Egypt and Sri Lanka in the future—but they did not testify to any specific plans to do so. *Id.* at 564. "Such 'some day' intentions," without more, did not "support a *finding* of . . . 'actual or imminent' injury," as required to survive summary judgment. *Id.* (emphasis added). Here, in contrast, the case is at the pleading stage. The Court does not make findings of fact at this stage. Instead—as *Defenders* itself stated—the Court must determine only that the "general factual allegations" make out a plausible case for standing. *Id.* at 561; *see supra* Section I.

Second, *Defenders of Wildlife* did not hold that "concrete travel plans" are a necessary prerequisite of standing in every case. The Court's insistence on "concrete plans" in *Defenders of Wildlife* made sense in the factual context of that case, where the respondents' members lived "a great distance away" from the asserted harm in Sri Lanka and Egypt, where they had only visited the affected habitat once in the past, and where they would not be "perceptibly affected by the unlawful action in question" *unless* they traveled there again. *Defs. of Wildlife*, 504 U.S. at 564-66. *See also Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 181-82, 184 (2000) (distinguishing between members' "conditional statements" about their use

or avoidance of an affected area with which they had ongoing contacts, which were sufficient to establish standing, and the "speculative 'some day' intentions to visit endangered species halfway around the world" in *Defenders of Wildlife*, which were not sufficient).

Here, Organizational Applicants allege that they have members with an ongoing connection to the Monument. For example, the Natural Resources Defense Council (NRDC) and the Conservation Law Foundation (CLF) have members who are scientists who presently use the Monument area for research purposes and intend to continue doing so. *See* Amended Answer at ¶¶ 95 (alleging that NRDC member Peter Auster "has visited the Monument area on numerous occasions over the past decade to conduct research," is "currently analyzing data gathered from the Monument," and "is actively planning a return expedition to the Monument (tentatively in 2018)"), 102-03 (alleging that CLF member Scott Kraus "has flown over the Monument area conducting aerial surveys of marine mammals," that he "is currently involved in ongoing efforts to collect and analyze marine mammal data from . . . the Monument," and that he "intends to continue gathering data and imagery from the Monument area . . . for purposes of advancing his research and educating the public"). These members have an interest in maintaining the Monument's protections so that they may continue to research this unique ecosystem without disturbance by commercial fishing vessels. *See id.* at ¶¶ 95-96, 103, 105. Similarly, CLF has members who plan and participate in bird-watching excursions to the Monument area, who "want to continue planning and

participating in observation trips in the Monument," and who have an interest in preserving an area where the seabirds they view "can forage and overwinter with minimum human disturbances." *Id.* at ¶ 104.

These allegations of members' ongoing connection to and use of the Monument area are sufficient to make out a plausible case for standing. The D.C. Circuit has recognized that allegations of an ongoing connection to the affected area may suffice at the pleading stage, even without specific plans to return at a particular time. *See Dearth v. Holder*, 641 F.3d 499, 503 (D.C. Cir. 2011) (U.S. citizen living in Canada who "alleges in his complaint he has many friends and relatives in the United States whom he intends to continue visiting on a regular basis," and that he "intends to purchase firearms within the United States," had standing to challenge firearm regulations (internal quotation marks omitted)).[7]

In addition, Organizational Applicants allege that they have other members who have not traveled to the Monument itself, but who nevertheless benefit from

[7] Even at later stages in the proceedings, when the burden on the party asserting standing is higher, standing may still be established without proof of "concrete plans to visit" the affected area at a "particular time" in the "near future." Opp. at 6. On the contrary, a demonstrated ongoing connection to an affected area may suffice. *See, e.g.*, *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1030-31 (D.C. Cir. 2008) (per curiam) (holding, on a petition for review, that organization's members had standing to challenge approval of communications towers because they "engage in recreational birdwatching and research on birds in the Gulf Coast region" and migratory birds may collide with towers); *Defs. of Wildlife v. Norton*, 257 F. Supp. 2d 53, 62-63 (D.D.C. 2003) (holding, on summary judgment, that organization's members had standing where they "work [in the affected region] on an ongoing basis . . . [or] have visited the region repeatedly and aver that they will be returning there within a period of months or a few years for study, work, and recreation").

the Monument's protections in their use, study, and enjoyment of nearby areas. *See* Answer at ¶¶ 95, 100, 104, 108. Scientist members benefit from information gathered from the Monument that facilitates their study of the Monument's ecosystems and the impacts of climate change on the animals they study, even when that information is collected by remote operated vehicle. *See id.* at ¶¶ 95-96, 102-03, 105, 123-24. Whale- and bird-watcher members benefit from viewing migratory species (like puffins and sperm and fin whales) that rely on the Monument as an overwintering habitat, feeding ground, and migration route, even when they view these species outside the Monument's boundaries. *See id.* at ¶¶ 95-96, 104, 108, 119-22. These allegations offer an additional, independent basis for standing as explained in the following section. *See infra* at Section III.

In sum, Organizational Applicants' proposed answer plausibly alleges that their members' interests will be harmed if Plaintiffs prevail in this litigation and the Monument's protections are lifted. Nothing more is required at this stage.

III. Mr. Klyver has alleged standing with sufficient specificity for this stage of the proceedings

Turning to Mr. Klyver, Plaintiffs argue that he lacks standing to intervene because he has not traveled inside the Monument's boundaries in the past and has not alleged "concrete plan[s]" to do so in the future. Opp. at 7. In fact, Mr. Klyver is part of a team planning a trip to the Monument using a remote operated vehicle in summer 2017, *see* Amended Answer at ¶ 113, but his standing does not depend on traveling inside the Monument itself. Rather, as a professional naturalist and whale-watch guide in the northwest Atlantic, Mr. Klyver's interest is in viewing,

studying, and educating others about particular marine species "that depend[] upon the Monument as habitat and feeding ground." *Id.* at ¶ 114.

Specifically, Mr. Klyver alleges that he has an interest in viewing, studying, and educating others about "humpback, sperm, fin, and sei whales" that travel through the Monument area, as well as "seabirds, including the population of Atlantic puffins that nest in the summer on six islands near Bar Harbor and overwinter in the Monument area." *Id.* These migratory whale and seabird populations use the Monument area as habitat and feeding ground, but they are not confined inside the Monument's boundaries; they also travel to areas closer to shore, where Mr. Klyver views them. *Id.* at ¶¶ 83, 114. His interest in these animal populations would be adversely affected if the Court were to rule in Plaintiffs' favor, resulting in a re-opening of the Monument to commercial fishing and other human disturbances. *See id.* at ¶¶ 115, 120-21. As the Answer alleges, "[t]he Monument's protections are crucial to ensuring the health of endangered, threatened, and vulnerable species like whales and puffins. . . . Re-opening the Monument to commercial fishing would decrease the likelihood of successfully viewing these species in the wild." *Id.* at ¶ 121.

Mr. Klyver need not travel inside the Monument itself to be harmed by a ruling in Plaintiffs' favor. This Court and others have repeatedly recognized that parties injured by the downstream or spillover effects of allegedly unlawful conduct have standing to challenge that conduct. *See, e.g.*, *Laidlaw Envtl. Servs.*, 528 U.S. at 181-83 (plaintiffs had standing to challenge hazardous waste facility's discharge

of pollutants into river based on effect pollutants had on aesthetic and recreational resources several miles downstream); *Sierra Club v. Jewell*, 764 F.3d 1, 6 (D.C. Cir. 2014) (organization's members who viewed battlefield from nearby roads had standing to challenge its removal from the National Register of Historic Places, even though they had no right to enter the battlefield itself); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (plaintiffs had standing to challenge development project because it would impair wildlife viewing opportunities on adjacent land). So long as the parties allege that they use an area or resource "*affected* by the challenged activity," that is sufficient. *Defs. of Wildlife*, 504 U.S. at 565-66 (emphasis added; internal quotation marks omitted).

For example, in a case closely analogous to the present matter, this Court rejected the government's argument that an environmental organization lacked standing to challenge military training exercises that harmed migratory birds because its member had never visited the island where the training activities took place. *See Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 171-72 (D.D.C. 2002), *vacated as moot sub nom. Ctr. for Biological Diversity v. England*, No. 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003) (per curiam). The uninhabited island was an important breeding colony for several species of migratory birds. *Id.* at 164. Although the member had never visited the island, he regularly made bird-watching trips to neighboring islands. *Id.* at 172. Because it was "undisputed" on summary judgment "that the birds being killed and harmed by defendants' activities . . . do not stay on [the affected island], but travel to the nearby islands,"

the Court concluded that the government's action harmed the member's aesthetic and scientific interest in viewing the birds. *Id.*

Similarly, here, resuming commercial fishing activities or other extractive activities currently prohibited in the Monument could affect the populations of whales and seabirds in which Mr. Klyver has an interest. Like the uninhabited island in *Center for Biological Diversity*, the Monument's largely pristine nature makes it an important habitat for overwintering, feeding, and migration for whales and seabirds. *See* Answer at ¶¶ 83, 121. And, like the migratory birds in that case, the whales and seabirds that Mr. Kyver enjoys viewing and studying do not live in the Monument year-round. *See id.* Re-opening the Monument to commercial fishing or other commercial extractive activities, which would be the consequence of Plaintiffs' requested remedy, would likely harm these species through catch and entanglement in fishing gear, disturbance and harassment, and by depleting or otherwise adversely affecting the fish and invertebrate populations upon which the species rely while overwintering or traveling through the Monument. *See id.* ¶¶ 83, 120-22. Because these migratory species "[b]y definition . . . do not stay" in the Monument year-round, Mr. Klyver's ability to see them in the surrounding areas of the northwest Atlantic "will be diminished" if Plaintiffs succeed in obtaining the relief they seek. *Ctr. for Biological Diversity*, 191 F. Supp. 2d at 172. These allegations identify a "sufficient injury to support standing." *Id.*

IV. The Court should deny Plaintiffs' request to limit the scope of Applicants' participation in this litigation

Finally, Plaintiffs argue that if the Court grants Applicants' intervention motion, it should limit the scope of Applicants' participation in the litigation. *See* Opp. at 8. There is no cause for doing so here. As a general rule, "an intervenor participates on equal footing with the original parties to a suit." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009) (per curiam) (internal quotation marks omitted). Applicants are committed to the efficient adjudication of this case; they do not intend to inject new claims or to burden the Court with duplicative briefing. Absent a showing that Applicants' involvement would cause "actual delays or other hardships," there is no justification for Plaintiffs' request to limit Applicants' participation. *Am. Great Lakes Ports Ass'n v. Zukunft*, No. 16-1019, 2016 WL 8608457, at *5-6 (D.D.C. Aug. 26, 2016) (denying party's request to limit scope of intervenor's participation).

CONCLUSION

For the reasons set forth above, Applicants have adequately alleged facts giving them standing in this matter. Because Plaintiffs raise no other objections relating to Applicants' intervention motion, the Court should grant the motion to intervene.

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Respectfully submitted,

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