IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALFA INTERNATIONAL SEAFOOD INC., et al.,	)	
Plaintiffs,	)	
v.	)	
THE HONORABLE WILBUR ROSS[1], et al.,	)	
Defendants,	)	
OCEANA, INC., 1350 Connecticut Ave. N.W. Washington, D.C. 20036	)	Case No. 1:17-cv-31-APM
NATURAL RESOURCES DEFENSE COUNCIL, INC., 40 West 20th Street New York, NY 10011;	)	
CENTER FOR BIOLOGICAL DIVERSITY, 378 N. Main Ave. Tucson, AZ 85701	)	
Defendant-Intervenor-Applicants.	)	

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

[1] Wilbur Ross is substituted for Penny Pritzker as Secretary of Commerce pursuant to Fed. R. Civ. P. 25(d).

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Oceana, Natural Resources Defense Council, and Center for Biological Diversity ("Applicants") seek to intervene as defendants in this case to protect their interests in the Seafood Import Monitoring Program, 81 Fed. Reg. 88,975 (Dec. 9, 2016) ("the Seafood Traceability Rule"), which the National Marine Fisheries Service ("NMFS") promulgated in 2016 after years of rulemaking pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "MSA"). The National Fisheries Institute and eight individual seafood processing, distribution, and retail companies ("Plaintiffs") seek an order vacating this rule and enjoining NMFS from implementing its protections. Stopping seafood fraud – the mislabeling and misidentification of seafood — and protecting fish populations and the ocean ecosystems they support from illegal fishing are at the core of the missions of each of the Applicants. Applicants' members have protectable interests in consuming sustainably caught seafood, in stopping seafood fraud, and in protecting species and ocean ecosystems from the harms caused by illegal, unregulated, and unreported "(IUU") fishing. Applicants have advocated to protect their members' interests through the development and adoption of the Seafood Traceability Rule and through the promotion of responsible and sustainable fisheries in general. Under the intervention standards discussed below, Applicants' motion should be granted.

Pursuant to LCvR 7.1(m), counsel for Applicants contacted counsel for Plaintiffs and Federal Defendants to ascertain their positions on this motion prior to filing: Counsel for Plaintiffs indicated that Plaintiffs will oppose the motion; counsel for Federal Defendants stated that Federal Defendants take no position on the motion to intervene at this time, but reserve their right to take a position after filing.

INTRODUCTION

The Seafood Traceability Rule was developed after over five years of advocacy by Applicants and others, and after years of extensive study and public input. The rule was developed to implement the recommendations of a White House task force established — at Applicants' urging — in 2014 to create a comprehensive framework for preventing seafood fraud and combating IUU fishing. The Rule requires importers of 13 at-risk species and species groups — including commonly-consumed species like tuna, grouper, swordfish, red snapper, and blue crab — to file specific catch and landing information before their products may enter and be sold in the United States. The rule requires that importers report where, when, and how the fish was caught, the vessel identification information, the scientific species name, when the fish was landed, the name of the buyer, and other chain-of-custody information. These reporting and recordkeeping measures work together to provide the traceability and accountability necessary to ensure that IUU seafood is kept out of the supply chain and out of U.S. markets and restaurants. These protections and benefits provide Applicants with a demonstrable interest in defending the Seafood Traceability Rule against Plaintiffs' challenge.

Applicants' interests are threatened by Plaintiffs' suit, which seeks a declaratory judgment, vacatur, and injunctive relief, and advances interpretations of several statutes that would undermine the regulatory framework intended to protect the ocean resources in which Applicants and their members have an interest. Applicants therefore respectfully request that this Court grant their motion to intervene (either as-of-right or permissively) as defendants to protect their and their members' interests in ensuring that the Seafood Traceability Rule is not weakened, vacated, or rendered ineffective, and to oppose Plaintiffs' efforts to undermine federal authority to regulate seafood imports into the United States.

BACKGROUND AND PROCEDURAL HISTORY

I. IUU FISHING AND SEAFOOD FRAUD

IUU fishing is a scourge on our oceans. It jeopardizes ocean health and has been estimated to cost the global economy $10 to $23.5 billion annually.[2] "Illegal fishing" refers to fishing that does not comply with national, regional, or global fisheries conservation and management obligations. "Unreported" fishing refers to catch that is not reported or is misreported to relevant authorities. "Unregulated" fishing occurs in areas or for fish populations where there are no applicable conservation measures and the fishing is conducted in a manner inconsistent with the responsibility to conserve marine resources under international law. Not only is IUU fishing a key cause of overfishing, IUU vessels are less likely to observe rules designed to protect the marine environment and the rights of their workers. IUU fishing is also linked to human trafficking and forced labor, referred to as seafood slavery.

Seafood fraud refers to mislabeling and other forms of deceptive marketing of seafood products with respect to their species (species substitution), quality, quantity, and origin. Seafood fraud overlaps with IUU, as mislabeling often results from efforts to conceal IUU fishing. For example, the labeler at the point of sale may have been deceived by inaccurate or fraudulent information supplied far up the supply chain intended to hide the fact that the seafood was caught in violation of another country's laws.

Combatting IUU fishing and seafood fraud is a challenge. Full surveillance of the coast and ocean is nearly impossible, many countries have weak fisheries laws or poor enforcement, and seafood products have complex supply chains. Key drivers of continued IUU fishing and

[2] David J. Agnew, et al., *Estimating the Worldwide Extent of Illegal Fishing*, 4 PLOS ONE e4570 4 (2009), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2646833/pdf/pone.0004570.pdf

seafood fraud include the high profit it yields (which is inflated by lack of compliance costs) and the low chance of detection due to regulatory gaps (such as lack of full traceability along the seafood supply chain, and low enforcement levels at sea and at ports).[3]

The United States is the world's second-largest seafood importer and has a pivotal role to play in thwarting seafood fraud and IUU fishing. The United States imports roughly 90 percent of the seafood that Americans consume, and an estimated 20 to 32 percent of wild-caught imported seafood is illegal or unreported.[4] IUU fishing hurts U.S. fishermen who comply with fishing regulations, through both direct market competition and market price suppression. The Seafood Traceability Rule at issue here, which will regulate and prevent the import of many types of seafood commonly subject to illegal fishing and seafood fraud, marks a significant step toward ending this problem.

II. PROCEDURAL HISTORY

In 2014, the White House established a Presidential Task Force on Combating Illegal, Unreported, and Unregulated Fishing and Seafood Fraud (Task Force). *See* Memorandum Establishing a Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud, 2014 *Daily Comp. Pres. Doc.* 464 (June 17, 2014). The memorandum declared it in the national interest to combat IUU and seafood fraud, and directed all executive departments and agencies to work toward this goal. *Id.* § 1. It called on the interagency Task Force to develop, within 180 days, "recommendations for the implementation of a comprehensive framework of integrated programs to combat IUU fishing and seafood fraud

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[3] For further discussion of the causes and externalities of IUU fishing, *see* Presidential Task Force on Combatting IUU and Seafood Fraud, Action Plan for Implementing the Task Force Recommendations (2015), http://www.nmfs.noaa.gov/ia/iuu/noaa_taskforce_report_final.pdf.

[4] Ganapathiraju Pramod, et al., *Estimates of illegal and unreported fish in seafood imports to the USA*, 48 Marine Policy 102 (2014) (available at http://www.sciencedirect.com/science/article/pii/S0308597X14000918 (visited March 3, 2017).

that emphasizes areas of greatest need." *Id.* § 4(a). It further directed the Task Force to consider "a broad range of strategies, including implementation of existing programs, and, if appropriate, development of new, voluntary or other, programs for seafood tracking and traceability." *Id.*

The Task Force, co-chaired by the Departments of State and Commerce and overseen by the National Ocean Council, solicited public comments on development of its recommendations, and later developed 15 recommendations for enhancing existing agency tools to combat IUU fishing and seafood fraud. 79 Fed. Reg. 75,536 (Dec. 18, 2014). Among them were recommendations that the appropriate agency create a risk-based traceability program to track seafood (Recommendation 14), and establish specific requirements that would track fish from the point where it is caught to entry into U.S. commerce as a pre-requisite for entry into commerce (Recommendation 15). *Id.* at 75,541.

On March 15, 2015, the Task Force published a more detailed Action Plan for implementing its recommendations. This document identified NMFS as the lead agency for the traceability program (proposed in Recommendations 14 and 15) and provided a draft timeline for implementing the program with a goal of finalizing the program by August 2016. *See supra* note 1, at 36–39.

In August 2015, NMFS and an interagency Working Group began to implement Recommendations 14 and 15 by identifying fish species at significant risk of IUU fishing or seafood fraud. NMFS solicited public comments at three points during this process. NMFS first asked for public input on what principles should be used to determine the seafood species "at risk" for IUU fishing or seafood fraud. 80 Fed. Reg. 24,246 (April 30, 2015). NMFS then published and requested public comments on a draft list of principles for determining at-risk species, which included, among other factors, enforcement capability for the species, the

complexity of chain-of-custody for the species, and history of species substitution or mislabeling. 80 Fed. Reg. 45,955 (Aug. 3, 2015). NMFS also requested comment on a draft list of at-risk species for inclusion in the traceability program, developed using the draft principles. *Id.*

After this extensive public process, NMFS applied the factors and developed a preliminary list of at-risk species and species groups, which it analyzed for inclusion in the traceability program. The list comprised 13 species and species groups: abalone, Atlantic cod, blue crab, dolphinfish (Mahi Mahi), grouper, red king crab, Pacific cod, red snapper, sea cucumber, sharks, shrimp, swordfish, and tunas. For each species and group considered, NMFS identified associated risks — *e.g.*, lack of enforcement capability, history of violations, and history of mislabeling or species substitutions. *See id.* at 45,956.

In October 2015, NMFS published a final list of at-risk species and species groups to which the first phase of the traceability rule would apply. 80 Fed Reg. 66,867 (Oct. 30, 2015). In this notice, NMFS described the basic methodology and findings used by the Working Group to finalize the species list.

NMFS then developed the traceability requirements that would apply to imported fish or fish products of the above species and species groups. In February 2016, NMFS published and sought public comment on the proposed Seafood Import Monitoring Program, or Seafood Traceability Rule, which would set baseline permitting, recordkeeping, and reporting requirements for importers of certain seafood into the United States. 81 Fed. Reg. 6,210 (Feb. 4, 2016). After considering the comments received on the proposed rule, NMFS published the final Seafood Traceability Rule in December 2016. 81 Fed. Reg. 88,975 (Dec. 9, 2016). According to NMFS, the rule puts in place the first phase of a program that will combat both IUU fishing and seafood fraud:

> The information to be reported and retained . . . under this rule will help authorities verify that the fish or fish products were lawfully acquired by providing information to trace each import shipment back to the initial harvest event(s). The rule will also decrease the incidence of seafood fraud by requiring the reporting of this information to the U.S. Government at import and requiring retention of documentation so that the information reported (*e.g.,* regarding species and harvest location) can be verified.

Id. The final rule has an effective date of January 1, 2018, requiring that importers of these species begin to work with exporters to obtain catch and supply chain records. *Id.* at 88,983.

The requirements of the Seafood Traceability Rule apply to importers of record. Under the rule, importers are responsible for two types of documentation: entry records and chain-of-custody records. At the time of entry into U.S. commerce, importers of record are required to electronically report information detailing seafood catch and landing (including where, when, how, and in what quantity; and pursuant to what authorization). *Id*. at 88,997-98. In addition, importers of record are required to maintain chain-of-custody records "sufficient to trace the fish or fish product from point of entry into U.S. commerce back to the point of harvest," including records identifying previous custodians of the fish (such as any transshipper, processor, storage facility, or distributor). *Id*. Both the entry records and chain-of-custody records must be available for inspection or audit by NMFS, and importers of record are required to retain both types of records for two years from the date of import. *Id*.

APPLICANTS FOR INTERVENTION

Each Applicant has members who rely on the requirements of the Seafood Traceability Rule and the protections that it will provide to seafood consumers and at-risk fish species and their habitats threatened by IUU fishing and laundering through international and unaccountable supply chains. The past, present, and future enjoyment of these benefits by Applicants and their members will be irreparably harmed by Plaintiffs' requests for relief. *See generally* Declarations of Rachel Golden Kroner, Beth Lowell, Sarah Chasis, and Todd Steiner, filed concurrently. As

explained below, these interests — and the injuries to them if Plaintiffs' requested relief is granted — satisfy the requirements for intervention as-of-right, as well as the additional requirement in this Circuit for applicants to demonstrate standing. *Fund for Animals v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003).[5] To protect these interests of their members, Applicants have been at the forefront of efforts for the prevention of seafood fraud and illegal fishing and for sustainable domestic and international fisheries for decades. Applicants and their members have been key moving forces behind the development and adoption of the Seafood Traceability Rule and in stopping seafood fraud and IUU fishing through participation in administrative processes, public education, policy advocacy, and litigation.

Oceana is a non-profit international advocacy organization dedicated to protecting and restoring the world's oceans through policy, advocacy, science, law, and public education. *See generally* Lowell Decl. Oceana is headquartered in Washington, D.C. and has over 736,064 and supporters members worldwide, including 612,389 in the United States. Ensuring the conservation and sound management of tuna, sharks, and other species is a central focus of Oceana's work. Oceana devotes considerable resources to studying and communicating the ecological and economic importance of sound management of fisheries throughout the world. Since 2011, Oceana has deployed its Seafood Fraud Campaign to expose seafood fraud through extensive DNA testing and to campaign for policy change that would put in place traceability requirements that would result in fish being tracked from boat to plate in order to bring transparency to the seafood supply chain, help prevent seafood mislabeling and fraud, and stamp out markets for illegally fished products. Oceana's members consume seafood imported into the

[5] The Supreme Court recently granted certiorari to determine whether a prospective intervenor must demonstrate standing in addition to meeting the requirements of Rule 24. *Town of Chester v. Laroe Estates, Inc.*, No. 16-605, 2017 WL 125674 (Jan. 13, 2017).

United States and want to ensure that the seafood they consume is not contributing to environmental damage or to human rights violations which are both rampant in illegal fishing. They also are concerned about and directly affected by environmental injury caused by unsustainable fishing throughout the world. Injuries to Oceana's members include injuries to their consumption and recreational and commercial use of fish populations, as well their interest in healthy populations of fish populations and the species that depend on them. Oceana's members also use and enjoy the oceans for numerous activities, including fishing, wildlife observation, scuba diving, snorkeling, boating, swimming, beach walking, research, and study. Oceana's members value and depend upon healthy marine ecosystems for these activities.

The Natural Resources Defense Council (NRDC) is a national, non-profit environmental and public health organization with several hundred thousand members nationwide. NRDC's mission is to safeguard the earth — its people, its plants and animals and the natural systems on which all life depends. *See generally* Chasis Decl. For more than three decades, NRDC has advocated extensively for the protection and long-term sustainability of our shared ocean resources. Through its Oceans Program, NRDC has worked to end overfishing and destructive fishing practices, promote sustainable fisheries management, and protect important marine habitats nationally and internationally. NRDC has dedicated substantial resources to its work to combat illegal, unreported, and unregulated fishing, which threatens ocean health by contributing to overfishing, marine habitat destruction, and bycatch, and is also closely linked to human rights violations. NRDC has advocated for the Federal government to leverage its role as a top seafood importer and implement robust requirements to ensure that seafood entering U.S. borders, at minimum, complies with national and international conservation requirements. NRDC followed the Seafood Traceability Rule closely, submitting comments on the proposed rule. As a key first

step in combating IUU fishing and seafood fraud, the successful implementation of the rule's traceability requirements is a priority for NRDC and its members. NRDC's members include individuals who consume seafood, care about the sustainability of seafood, and want to make informed choices about the seafood they eat. NRDC's members also include individuals who derive recreational and aesthetic enjoyment, or scientific and professional value, from observing or studying in the wild some of the at-risk species identified in the Seafood Traceability Rule.

The Center for Biological Diversity ("the Center") is a non-profit environmental organization whose primary mission is to ensure the long-term health and viability of animal and plant communities around the world and to protect both the natural world and humans from environmental harms. *See generally* Steiner Decl. The Center has over 52,000 members worldwide. In furtherance of this mission, the Center has devoted considerable resources to ensuring the conservation and sound management of numerous fish species that are overexploited and at risk of illegal, unregulated, and unreported catch. The Center has also committed significant resources to reducing fisheries bycatch, including bycatch of sea turtles, marine mammals, and sea birds. The Center closely followed development of the Seafood Traceability Rule, submitting comments at several stages. Center members regularly use the oceans to view and study marine wildlife, including species directly affected by IUU fishing such as tuna and sharks and species commonly bycaught in IUU fishing, such as sea turtles. IUU fishing harms many of the marine wildlife species that Center members enjoy viewing and studying, decreasing their likelihood of viewing these species in the wild. The Seafood Traceability Rule will reduce IUU fishing and the harms the Center's members suffer. Additionally, Center members also consume seafood imported into the United States and seek to make sustainable purchasing choices.

Because each Applicant has standing and meets the four requirements for intervention as of right as defendants under Fed. R. Civ. P. 24(a) or, alternatively, the broad standard for permissive intervention under Rule 24(b), Applicants respectfully request the Court grant this motion to intervene.

ARGUMENT

The Seafood Traceability Rule protects Applicants' interests and their members' interests in maintaining sustainable fisheries protecting marine ecosystems worldwide. Applicants have long worked toward the development of a national seafood traceability program, and specifically advocated for the challenged rule. This litigation threatens to vacate the protection the rule provides to Applicants' interests. Under the intervention standards discussed below, Applicants' motion should be granted so that they may have the chance to participate in this case and seek to protect their interests and the interests of their members.

I. APPLICANTS HAVE STANDING TO INTERVENE AS DEFENDANTS

As a threshold matter, Applicants have Article III standing. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (holding that applicants for intervention in this Circuit also must demonstrate Article III standing).[6] To demonstrate associational standing an organization "must demonstrate that at least one member would have standing under Article III to sue in his or her own right, that the interests it seeks to protect are germane to its purposes, and

[6] Standing to intervene, like other aspects of intervention, "should be viewed on the tendered pleadings." *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988). The allegations in the proposed pleading in intervention must be accepted as valid. *U.S. v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980). Courts treat a proposed intervenor's "factual allegations as true and must grant [the intervenor] the benefit of all inferences that can be derived from the facts alleged." *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (citation omitted); *see also* 7C Charles Alan Wright , et al., *Federal Practice and Procedure* § 1914 (3d ed.) (stating that an intervenor's "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)).

that neither the claim asserted nor the relief requested requires that an individual member participate in the lawsuit." *Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1370 (D.C. Cir. 2007) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977)). Article III standing requires a showing of: (1) injury in fact; (2) a causal relationship between the injury and the challenged action, such that the injury can be fairly traced to the challenged action; and (3) the likelihood that a favorable decision will redress the injury. *Sierra Club v. EPA*, 755 F.3d 968, 975–76 (D.C. Cir. 2014); *Nat. Res. Def. Council v. EPA*, 489 F.3d at 1370 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Applicants' members have Article III standing in their own right.

The Seafood Traceability Rule serves to reduce the extent and likelihood of IUU fishing and seafood fraud. Applicants' members benefit from the challenged rule and would be harmed by an order vacating or remanding the rule. First, Applicants' members include individuals who want to limit their consumption of seafood to products that are sustainably harvested and not illegally caught or fraudulently represented in the marketplace. Proposed Answer at 11; *see, e.g.*, Kroner Decl. ¶¶ 5, 8, 12-19. The Seafood Traceability Rule protects and advances Applicants' members' interests in making informed consumer choices about the seafood they eat. *See, e.g.*, Kroner Decl. at ¶¶ 19-20 (explaining that the Seafood Traceability Rule "helps to prevent illegally caught fish from being imported into the country and sold to consumers like me").

Second, Applicants' members include individuals who derive recreational and aesthetic enjoyment, or scientific and professional value, from observing or studying in the wild some of the at-risk species and marine ecosystems protected by the Seafood Traceability Rule. *See* Proposed Answer at 13; Steiner Decl. ¶¶ 8, 11, 12, 14. Applicants' members also derive recreational and aesthetic enjoyment, or scientific and professional value, from observing or

studying in the wild certain species that are harmed by bycatch associated with IUU fishing of the at-risk species identified in the Seafood Traceability Rule. Steiner Decl. ¶¶8–12. The Seafood Traceability Rule protects and advances these interests because it will serve to reduce IUU fishing and the resulting direct harm to at-risk species—and indirect harm to the ecosystems damaged by IUU fishing—that Applicants' members depend on. *See* Proposed Answer at 14; Steiner Decl. ¶¶ 11–17; *cf., e.g.*, *Lujan*, 504 U.S. at 562–63 ("[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing"); *cf. Nat. Res. Def. Council v. EPA*, 489 F.3d at 1371 (finding standing where organization's members "use or live in areas affected" by the action at issue "and are persons for whom the aesthetic and recreational values of the area" would be lessened as a result of the action (citation omitted)).

Protecting each of the above interests is both germane and an important part of Applicants' organizational missions. *See, e.g.*, Kroner Decl. ¶ 1; Lowell Decl. ¶¶ 2–19; Steiner Decl. ¶¶ 4–5; Chasis Decl. ¶¶ 3–6, 10; Chasis Decl. ¶ 2; Steiner Decl. ¶¶ 4-5.[7] Removing these protections, as Plaintiffs seek to do in this case, would erase the Seafood Traceability Rule's benefits to Applicants' members and harm their interests in consuming healthy and sustainable food, making informed choices about what they are eating, and reducing the harms caused by IUU fishing. *See*, e.g., Kroner Decl. ¶¶ 19–20; Steiner Decl. at ¶ 17. These harms to Applicants' members' legally protected aesthetic, consumer, scientific, and recreational interests from the relief Plaintiffs seek in this case satisfy the injury in fact prong of Article III standing.

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[7] Protecting these interests does not require the participation of the Applicant organizations' individual members. *See Friends of the Earth v. Laidlaw Envtl. Services*, 528 U.S. 167, 181 (2000).

Because the harms to Applicants' members from vacating the rule "suffice[] for standing purposes," causation and redressability "rationally follow[]." *Crossroads v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015). The injuries described above are "directly traceable" to the outcome of this proceeding and redressable by a decision of this Court denying Plaintiffs' requested relief. *See id.*[8] Vacating or remanding the Seafood Traceability Rule would harm Applicants' consumer, aesthetic, recreational, scientific, and professional interests. Applicants seek to participate in this case to explain the harm Plaintiffs' request would cause to these interests, to the environment, and to the law, and to prevent Plaintiffs' request for relief from being granted.

In sum, because a ruling in favor of Plaintiffs would eliminate the increased reliability of legally-caught and properly identified seafood provided through the recordkeeping, reporting, and import restrictions required by the Seafood Traceability Rule, and would sanction an interpretation of the Magnuson-Stevens Act that Plaintiffs believes precludes implementation of a seafood traceability program, Applicants have standing to intervene as defendants. *See, e.g.*, *Crossroads*, 788 F.3d at 317–18.

II. APPLICANTS ARE ENTITLED TO INTERVENE AS OF RIGHT

This Court applies a four-part test to evaluate motions to intervene under Federal Rule of Civil Procedure 24(a): "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that

[8] While the Seafood Traceability Rule would not completely eliminate the worldwide problems of seafood fraud and illegal fishing, there can be no question that the rule will help to alleviate those harms. The United States is the world's second-highest importer of seafood, importing up to 90 percent of what is consumed. *See* https://www.fishwatch.gov/sustainable-seafood/the-global-picture (visited Mar. 3, 2017). At least one study shows that of those imports, up to 32% are illegal or unreported. *See* Pramod, *supra*, note 2. *See also* Steiner Decl. ¶16 (noting United States is the world's second largest seafood importer). The availability of partial redress to Applicants' members is sufficient to show standing. When an environmental problem has multiple contributors, it is enough if "an injunction will redress [the] injury at least in part." *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 73 (3rd Cir. 1990); *see also Mass. v. EPA*, 549 U.S. 497, 525-26 (2007).

interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). The D.C. Circuit takes "a liberal approach to intervention." *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000). Applicants satisfy each of these elements.

A. Applicants' Motion to Intervene Is Timely.

In determining whether an intervention motion is timely, courts consider "all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1295)). Applicants' motion to intervene is timely because the present case is still in its very early stages, and Applicants' participation will not prejudice the existing parties.

This motion is filed just two months after Plaintiffs filed their complaint. *Cf. Cty. of San Miguel v. MacDonald*, 244 F.R.D. 36, 38, 46 (D.D.C. 2007) (granting motion to intervene filed more than 90 days after the complaint); *Appleton v. FDA*, 310 F. Supp. 2d 194, 195, 197 (D.D.C. 2004) (finding intervention timely when sought after the answer and within two months of notification of suit). Although the Court has set an expedited schedule for summary judgment briefing, no substantive or merits issue of any kind has yet been briefed or decided and the full administrative record has not yet been filed. Applicants agree to follow the expedited briefing schedule established in this case.[9] To promote the efficient resolution of this case in accordance with the expedited briefing schedule, Applicants request that they be required to file their briefs

[9] Applicants are aware that Federal Defendants have recently moved to modify that schedule to accommodate production of the administrative record, *see* ECF 22, and will comply with any modifications to the current briefing schedule resulting from this motion.

within two business days of Federal Defendants. This adjustment would afford Applicants the ability to eliminate duplication in their arguments and to further focus their merits briefs on the issues and arguments central to their interests. This short interval will not prejudice Plaintiffs' ability to respond to these arguments.

In addition, granting this motion to intervene at the early stage of the proceedings will not prejudice any party. *See Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) ("The prejudice prong of the timeliness inquiry 'measures prejudice caused by the intervenors' delay—not by the intervention itself.'" (citation omitted)). Applicants are promptly seeking intervention, as discussed below and in the attached declarations, to protect their members' interests in the challenged Seafood Traceability Rule and to preserve regulatory protections and rights under the Magnuson-Stevens Act and other applicable laws. They do not raise cross-claims or other issues that would require the parties to revisit the schedule established to resolve this case. Applicants have lodged their answer to the complaint with the motion to intervene (Exh. A). If intervention is granted, Applicants will brief issues jointly, together as Defendant-Intervenors, to serve the interest of efficiency.

B. Applicants and Their Members Have Legally Protected Interests at Stake.

Rule 24(a) requires an applicant for intervention to possess an interest relating to the property or transaction that is the subject matter of the litigation. Fed. R. Civ. P. 24(a)(2). This "interest test" is not a rigid standard; rather, it is "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967); *see also Jones v. Prince George's Cty.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003) ("[I]ntervenors of right need only an 'interest' in the litigation—not a 'cause of action' or 'permission to sue.'").

Applicants have legally cognizable interests in the challenged rule, combating seafood fraud, and protecting marine ecosystems and wildlife, each of which is at stake in this litigation. Indeed, in this Circuit, an applicant that can demonstrate standing "*a fortiori* has an interest relating to the property or transaction which is the subject of the action." *Crossroads*, 788 F.3d at 320 (citation omitted). *See supra* at section I (explaining that Applicants have standing). Applicants have long worked to develop a national seafood traceability program to reduce seafood fraud and combat illegal, unreported, and unregulated fishing, including specifically participating in and supporting the challenged rule. *See, e.g.*, Steiner Decl. ¶ 6; Chasis Decl. ¶¶ 7–9; Lowell Decl. ¶¶ 3–5, 12–18. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) ("A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported."). Applicants' interests are more than sufficient.

C. If Successful, Plaintiffs' Action Would Impair Applicants' Interests.

An applicant for intervention as of right must be "so situated that the disposition of the action *may* as a practical matter impair or impede the applicant's ability to protect that interest." Fed. R. Civ. P. 24(a)(2) (emphasis added). Applying this impairment requirement, the Court should "'look[] to the 'practical consequences' of denying intervention." *Fund for Animals*, 322 F.3d at 735. Such an inquiry "is not limited to consequences of a strictly legal nature." *Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978). A "possibility" of impairment of Applicants' interests as a practical matter is sufficient. *Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981).

If Plaintiffs prevail in this case, the protections to worldwide fisheries and consumers that the Seafood Traceability Rule provides would be lost. Plaintiffs ask this Court to declare the rule invalid and vacate the rule. Compl. at 42 (Prayer for Relief). Vacatur would eliminate the

benefits of the rule to Applicants and their members, including the accountability and transparency necessary to prevent seafood fraud in imported seafood, the reduction of IUU fishing of numerous at-risk species, the mechanism necessary to enable seafood retailers and purveyors to voluntarily inform or assure their consumers of the origins of their products. If successful, Plaintiffs' action also would undermine the Applicant organizations' missions to protect marine ecosystems from IUU fishing. *See* Steiner Decl. ¶ 17; Chasis Decl. ¶¶ 9–10; Lowell Decl. ¶¶ 18–19. *See, e.g.*, *Nat. Res. Def. Council v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (granting intervention as of right to industry groups in a case that could "nullify" the groups' efforts).

Courts have found such impairment sufficient to sustain intervention for conservation groups in other industry challenges to environmental protection rules. *See, e.g.*, *Idaho Farm Bureau Fed'n*, 58 F.3d at 1398 (concluding decision to remove species from endangered species list would impair conservation groups' interest in preservation); *Sagebrush Rebellion v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) ("An adverse decision in this suit would impair the [intervenor's] interest in the preservation of birds and their habitats."). Because Applicants are so situated that the disposition of this action may, as a practical matter, impair their ability to protect their interests in sustainable fisheries and intact marine ecosystems, Applicants plainly satisfy Rule 24(a)'s impairment-of-interest requirement.

D. Applicants' Interests May Not Be Adequately Represented by Federal Defendants.

Finally, an applicant for intervention as a matter of right must show that its interests may not be adequately represented by the existing parties to the litigation. This requirement is "not onerous" and "'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.'" *Fund for*

Animals, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *Crossroads*, 788 F.3d at 317-18 (explaining that the existence of different governmental and private interests supports intervention) (citation omitted); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Indeed, a petitioner "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee[.]'" *Fund for Animals*, 322 F.3d at 735 (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1293). None of the current parties adequately represents Applicants' interests in this matter.[10]

Federal Defendants may not adequately represent Applicants' interests. The D.C. Circuit has "often concluded that governmental entities do not adequately represent the interest of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736 (citing *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912–13 (D.C. Cir. 1977); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969)); *see also WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010) ("[I]t is 'on its face impossible' for a government agency to carry the task of protecting the public's interests and the private interests of a prospective intervenor." (citation omitted)). The federal government represents a more general interest, which differs in important respects from the particular conservation interests pursued by Applicants. *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 70 (D.D.C. 2006).

NMFS adopted the Seafood Traceability Rule to establish a general incremental regulatory program to enforce legal prohibitions on the importation of seafood caught in violation of foreign laws taking into account a number of competing interests. Applicants' interests in stopping seafood fraud and the damage from IUU fishing are more particularized and

[10] Plaintiffs' interests are directly adverse to those of Applicants. They seek to vacate and enjoin the Seafood Traceability Rule, while Applicants have advocated for the rule and similar programs to increase transparency and reduce IUU fishing. Plaintiffs simply do not represent Applicants' interests.

go beyond the first steps NMFS has taken in adopting this regulatory scheme. *See People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6 (D.D.C. 1993) (concluding government's mandate to design and enforce an entire regulatory system precludes it from adequately representing one party's particular interest in it). Indeed, as NMFS made clear when it declined to expand the program immediately as Applicants advocated, the incremental approach reflected in its rule results from addressing more than the narrow conservation interests of Applicants. *See* 81 Fed. Reg. at 88,982 (stating that the staged approach in the rule is designed to "allow[] time for the Program to be implemented smoothly and without disruption to trade,"); *id*. at 88,983 (declining to expand the program or even to project a schedule for doing so pending further study and assessment). As a regulator balancing other competing demands, NMFS cannot adequately represent Applicants' narrow conservation interests. *Cf. Am. Forest Res. Council v. Hall*, No. 07-0484-JDB, 2007 WL 1576328, at *1 (D.D.C. May 29, 2007) (agreeing that applicants' "interests are not adequately represented by defendants because the Fish and Wildlife Service has been, from Applicants' perspective, insufficiently protective of the [species] and its critical habitat in the course of past litigation and in its proposed rule changes"); *see also Crossroads*, 788 F.3d at 317–18, 321 (explaining that the existence of different governmental and private interests supports intervention); *Dimond*, 792 F.2d at 192–93. This Court regularly grants motions to intervene by nonprofit conservation organizations in similar suits against the federal government brought to remove or weaken procedural or substantive protections for the environment. *See, e.g.*, *Fed. Forest Res. Coal. v. Vilsack*, 100 F. Supp. 3d 21, 33 (D.D.C. 2015); *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 185 (D.D.C. 2014).

Further, the interests of a governmental party and a seemingly aligned prospective intervenor "might diverge during the course of litigation." *Fund for Animals*, 322 F.3d at 736.

Because of that, even where "there may be a partial congruence of interests, that does not guarantee the adequacy of representation." *Id.* at 736–37 (granting intervention and noting that the D.C. Circuit "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors."); *see also Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998) (finding inadequacy of representation in part because "it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts"). This is particularly true in this case, which comes at a time of a presidential administration transition and where the chances of a shift in agency policy are higher. *See, e.g.*, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107 (9th Cir. 2002) (in granting intervention of right to conservation groups, noting George W. Bush administration stopped defending challenge to Roadless Rule promulgated by Clinton administration), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Accordingly, given the minimal showing necessary to find inadequate representation, the Court should grant Applicants' motion to intervene as of right.

III. ALTERNATIVELY, APPLICANTS MERIT PERMISSIVE INTERVENTION

If this Court denies intervention as of right, Applicants request leave to intervene under Rule 24(b). Permissive intervention is appropriate when an applicant presents "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (citing Fed. R. Civ. P. 24(b)).

Applicants merit, at minimum, permissive intervention. First, as demonstrated above, Applicants' motion is timely: the case is at a preliminary stage, and no merits briefing has yet occurred. Applicants do not bring new claims. Instead, they intend to oppose the claim and

requests for relief made by Plaintiffs in this action and to offer defensive arguments, all of which necessarily share questions of law and fact in common with the central issues in this case. Applicants' intention to follow the expedited briefing schedule further demonstrates that they will cause no prejudice or undue delay to the parties. If intervention is granted, Applicants intend to support the efficient adjudication of the case.

This Court also would have subject matter jurisdiction over Applicants' defenses, as they seek to defend against any of Plaintiffs' claims over which this Court has subject matter jurisdiction. *See Butte Cty. v. Hogen*, No. CIV.A.08-519 HHK AK, 2008 WL 2410407, at *2 (D.D.C. June 16, 2008) (finding intervenor-defendant's "claims are sufficiently related to the main claims in this litigation such that an independent ground for subject matter jurisdiction exists" where intervenor-defendant sought to intervene to defend against plaintiff's claims); *see also Nat'l Children's Ctr.*, 146 F.3d at 1046 ("[W]e have eschewed strict readings of the phrase 'claim or defense,' allowing intervention even in 'situations where the existence of any nominate "claim" or "defense" is difficult to find.'" (quoting *Nuesse*, 385 F.2d at 704)). Applicants do not ask this Court to adjudicate any additional claims on the merits, so there is no need to establish additional subject matter jurisdiction over such claims. *Cf. id.* (explaining purpose of independent subject matter jurisdiction requirement is to ensure court has jurisdiction when a "movant asks the district court to adjudicate an additional claim on the merits").

Applicants seek intervention to ensure that this Court is presented with a key perspective on the issues involved in this case that may aid the Court's review. Applicants have gained particular knowledge and expertise about IUU fishing and seafood traceability programs from their years-long engagement with these issues and from their more recent advocacy that has been central to development of the challenged rule. These organizations also seek to participate in this

litigation in part because they have made organizational commitments to combating seafood fraud and IUU fishing. Applicants also have deep experience with the Magnuson-Stevens Act, perspective and experience that would ground their targeted briefing, and that would complement Federal Defendants' defense. *Cf. Costle*, 561 F.2d at 912–13 (granting intervention for movant to protect its own interests and where it "may also be likely to serve as a vigorous and helpful supplement to EPA's defense").

Applicants have a significant interest in maintaining sustainable fisheries, preventing seafood fraud, and using and enjoying affected marine ecosystems. Applicants also have an interest in a valid interpretation of the requirements and limits of the Magnuson-Stevens Act. Given the importance of the issues involved in this case, the stake Applicants have in upholding the Seafood Traceability Rule, and the early stage of the litigation, the Court should at a minimum allow permissive intervention.

CONCLUSION

For the reasons set forth above, Oceana, Natural Resources Defense Council, and Center for Biological Diversity request that the Court grant them intervention as of right or, in the alternative, permissive intervention. Applicants have lodged their proposed answer with the motion to intervene.

Dated: March 7, 2017

Respectfully submitted,

/s/ Aaron Colangelo

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2017, I electronically filed the foregoing Defendant-Intervenor-Applicants' Memorandum in Support of Motion to Intervene with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

March 7, 2017

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