IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION; et al.,	)	No. 1:17-cv-00406-JEB
Plaintiffs,	)	
v.	)	
WILBUR J. ROSS, JR., in his official capacity as Secretary of Department of Commerce; et al.,	)	
Defendants,	)	
NATURAL RESOURCES DEFENSE COUNCIL; et al.,	)	
Defendant-Intervenor Applicants.	)	

PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE

In this case, Plaintiffs Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association, Long Island Commercial Fishing Association, Garden State Seafood Association, and Rhode Island Fishermen's Alliance (collectively, "Fishermen") challenge the designation of 5,000-square miles of ocean as a monument under the Antiquities Act, which limits monuments to "*land* owned or controlled by the Federal Government." *See* Compl., ECF No. 1, ¶ 2; 54 U.S.C. § 320301 (emphasis added).

On March 19, 2016, the Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and R. Zack Klyver (collectively, "Applicant-Intervenors") moved to intervene in the case to defend the monument

designation, arguing that they have unidentified members with general interests related to the environment and the area. *See* Mot. To Intervene, ECF No. 7.

As explained below, the Applicant-Intervenors have failed to carry their burden of providing "specific facts" establishing their standing to intervene and supporting those facts with affidavits or other evidence. If the Court concludes otherwise, the Fishermen ask it not to decide the motion until the Defendants have an opportunity to weigh in. Alternatively, the Fishermen ask that the Court limit the intervention to prevent Applicant-Intervenors from duplicating Defendants' arguments, which will unnecessarily tax party and judicial resources.

Argument

I

Applicant-Intervenors Have Not Carried Their Burden of Establishing Standing

To intervene, a party must first establish standing to participate in the litigation. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003); *see also Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013) (requirement to show standing also applies to would-be defendant-intervenors).[1] The

[1] Applicant-Intervenors assert a right to intervene under Federal Rule of Civil Procedure 24(a) and, in the alternative, request permission to intervene under Rule 24(b). The D.C. Circuit has repeatedly held that the standing requirement applies to intervention as of right. *See Fund for Animals*, 322 F.3d at 731-32; *see also Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013); *Military Toxics Project v. EPA*, 146 F.3d 948, 953 (D.C. Cir. 1998); *City of Cleveland v. NRC*, 17 F.3d 1515, 1517 (D.C. Cir. 1994). It has also held that the obligation to prove a basis for jurisdiction is even higher for permissive intervention. *See EEOC v. Nat'l Children's Ctr., Inc.*,

purpose of this standing requirement is to weed out would-be intervenors who have only a philosophical or policy objection to an issue in a case. *See Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015).

To make this showing, the party must put forth "specific facts" demonstrating that it will (1) suffer a legally cognizable injury (2) caused by the suit in which it seeks to participate and (3) the Court can redress that injury with a favorable ruling. *See Fund for Animals*, 322 F.3d at 731-32; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Applicant-Intervenors have not made the required showing. To establish standing, Applicant-Intervenors cannot rest on "mere allegations, but must set forth by affidavit or other evidence specific facts." *See Fund for Animals*, 322 F.3d at 733 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)). This burden should apply unless the party is "an object of" a challenged regulation or owns property regulated by it. *See Fund for Animals*, 322 F.3d at 733-34; *see also Lujan*, 504 U.S. at 561-62 (explaining that "there is ordinarily little question" of standing for the object of a regulation but where a party's alleged injury is based on regulation "of *someone else*, much more is needed"). The D.C. Circuit has upheld the denial of intervention based on the inadequacy of supporting affidavits. *See, e.g.*, *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1324 (D.C. Cir. 2013); *Agric. Retailers Ass'n v.*

146 F.3d 1042, 1046-47 (D.C. Cir. 1998). Therefore, the failure to establish standing should lead the Court to deny Applicant-Intervenors' motion under both.

United States Dep't of Labor, 837 F.3d 60, 66 (D.C. Cir. 2016). It would make little sense to deny intervention where a party's affidavits are inadequate but to grant intervention when a party submits no affidavits at all.

None of the Applicant-Intervenors have submitted any affidavits or other evidence of specific facts showing they have standing to participate in this case. They are not the objects of the monument's regulations, the Fishermen are. *See* Pres. Proc. No. 9496, 81 Fed. Reg. 65,161, 65,164-65 (Sept. 15, 2016) ("The Secretar[y] shall prohibit . . . [f]ishing commercially or possessing commercial fishing gear . . . except for the red crab fishery and the American lobster fishery as regulated below."); *see also Sierra Club v. EPA*, 292 F.3d at 900 (noting that standing is "self-evident" when a complainant is the object of a regulation). For that reason, Applicant-Intervenors have failed to carry their burden. *See Fund for Animals*, 322 F.3d at 733-34 (movant bears the burden of establishing the right to intervene).

Applicant-Intervenors cite two cases in support of their argument for a lower standard. The first, *United States v. American Telephone & Telegraph Company*, involved the intervention of a party that owned the property at issue and was therefore within *Fund for Animals*' exception. *See Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980); *Fund for Animals*, 322 F.3d at 733-34. The second case, *Defenders of Wildlife v. Perciasepe*, cuts against Applicant-Intervenors' argument, as it refused to credit speculative general allegations as "specific facts" establishing standing. 714 F.3d at 1327.

Setting aside Applicant-Intervenors' failure to support their standing with affidavits or other evidence, the allegations in their proposed answer are also insufficient because they do not provide the "specific facts" required. Rather, Applicant-Intervenors rest solely on vague, general, and conclusory allegations.

Natural Resources Defense Council, Conservation Law Foundation, and Center for Biological Diversity assert only one basis for standing: associational standing based on at least one member who has individual standing. *See* Mot. To Intervene at 13-17; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Despite relying on a theory that requires Applicant-Intervenors to identify at least one member who has individual standing, their allegations fail to identify any particular individual at all, much less show that member has standing.

Natural Resources Defense Council alleges that it has members who are "scientists, recreational fishermen, and bird- and wildlife-watchers" who use the area within the monument or near it. Proposed Answer ¶ 95. This generic allegation falls far short of the specific facts required to show standing. *Lujan* expressly rejects generic claims that someone has previously visited an area as a basis for standing, requiring instead "concrete plans" describing when a particular individual will visit the area again. 504 U.S. at 564.

The Conservation Law Foundation alleges that it has members who enjoy the marine resources off the New England coasts (though it does not allege that this includes the area within the monument). Proposed Answer ¶ 100. Using the general

vicinity is not enough to satisfy standing. *See Lujan*, 504 U.S. at 565-66 ("[A] plaintiff claiming injury from environmental damage must use the area affected . . . and not an area roughly 'in the vicinity' of it.").

Conservation Law Foundation also vaguely alleges that some of its members are scientists who have studied the resources within the area or nearby. Proposed Answer ¶ 102. Allegedly, one member "has a professional interest" in perhaps someday using the area to study climate change, though that person is not identified and Conservation Law Foundation does not state that the unidentified person has any current concrete plans to begin this study in the immediate future. *Id*. ¶ 103. These generic claims that scientists have a professional interest in the species that occupy the area are insufficient, but must have a concrete plan to work in the specific area or with the specific animals that occupy it. *See Lujan*, 504 U.S. at 566-67.

Conservation Law Foundation also asserts that it has members who, because of the monument designation, may someday visit it to watch birds, though it does not identify any such member or indicate that any trips are imminent. Proposed Answer ¶ 104. This allegation falls short of the specific facts required for the same reason as the other allegations above—it does not show that any member has any concrete plans to visit the area at any particular time in the near future. *See Lujan*, 504 U.S. at 564.

The Center for Biological Diversity's claim to standing rests solely on a generic allegation that its "members and staff regularly use the northwest Atlantic Ocean, including areas within and near the Monument, to view and study marine wildlife[.]"

Proposed Answer ¶ 108. This generic allegation also falls short of the specific facts required for the same reason. *See Lujan*, 504 U.S. at 564.

The only individual identified by Applicant-Intervenors is Mr. Klyver, who moves to intervene in his individual capacity. He, too, does not provide an affidavit or other evidence to show standing. His allegations in the proposed answer, rather than establishing standing, affirmatively disprove it.

Mr. Klyver's allegations acknowledge that he has never been to the area included within the monument nor used it for his whale-watching business. Proposed Answer ¶ 113. He also implicitly acknowledges that he has no concrete plan to visit the area in the future. Instead, he merely alleges that he "is considering" making a trip to the area at some unknown time in the future. *Id.*; *see Lujan*, 504 U.S. at 564. ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

II

The Court Should Allow Defendants an Opportunity To Weigh In Before Granting the Motion

Applicant-Intervenors were admirably prompt in filing their motion, dispelling any question whether they satisfied one of the factors for intervention—that the motion be timely. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998); Fed. R. Civ. P. 24(a)(2). Their race to the courthouse was so quick that they even beat the Defendants, who have not yet made an appearance and are not required to do so until May 22, 2017.

Although the Fishermen argue that the motion should be denied because Applicant-Intervenors have failed to establish standing, in the alternative, they ask the Court to withhold judgment on the motion until Defendants can be given an opportunity to weigh in. Because Applicant-Intervenors wish to intervene on the side of Defendants, this motion affects them as much as it does the Fishermen. Defendants' participation may prove useful to the Court in determining whether to grant the motion and, if so, what limitations to put on intervenors' participation in this case, without having to rely on Applicant-Intervenors' speculation. *See* Mot. To Intervene at 22-24.

III

Interventions Should Be Limited To Prevent Duplication of Arguments

If the Court grants Applicant-Intervenors' motion, the Fishermen ask that it include in its order a direction that Applicant-Intervenors avoid duplicating Defendants' arguments. As their motion acknowledges, they do not intend to raise any unique claims or issues. *See* Mot. To Intervene at 25. Redundant briefing would unnecessarily tax both party and judicial resources.

Conclusion

Applicant-Intervenors have not carried their burden of demonstrating their standing through "specific facts" supported by affidavits or other evidence. Their generic allegations each fall short of this standard and are inadequate under *Lujan*. For that reason, the motion to intervene should be denied. In the alternative, the Court should give Defendants an opportunity to weigh in on the motion before

deciding it and, if intervention is granted, limit the intervention to prevent unnecessary duplication of arguments.

DATED: April 12, 2017.

Respectfully submitted:

/s Jonathan Wood

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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NATURAL RESOURCES DEFENSE COUNCIL, et al.,	)	
Defendant-Intervenor Applicants.	)	

[PROPOSED] ORDER DISMISSING DEFENDANT-INTERVENOR APPLICANTS' MOTION TO INTERVENE

Before this Court is a Motion to Intervene by the Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and R. Zack Klyver (Applicant-Intervenors), filed on March 30, 2017. Plaintiffs Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association, Long Island Commercial Fishing Association, Garden State Seafood Association, and Rhode Island Fishermen's Alliance filed a response opposing the Motion to Intervene on April 12, 2017.

DISCUSSION

In addition to satisfying the requirements for intervention under Federal Rule of Civil Procedure 24, any prospective intervenor must establish Article III standing. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003); *see also Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013). To make this showing, the party must put forth "specific facts" demonstrating that it will (1) suffer a legally cognizable injury (2) caused by the suit in which it seeks to participate and (3) the Court can redress that injury with a favorable ruling. *See Fund for Animals*, 322 F.3d at 731-32; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). This burden is lessened only when a party is the object of the regulation at issue. *See Fund for Animals*, 322 F.3d at 731-32; *see also Lujan*, 504 U.S. at 561-62 (explaining that "there is ordinarily little question" of standing for the object of a regulation but where a party's alleged injury is based on regulation "of *someone else*, much more is needed").

Applicant-Intervenors are not the object of the regulation at issue. *See Sierra Club v. EPA*, 292 F.3d 895, 900. Despite bearing the burden of putting forth "specific facts" to demonstrate standing, they did not submit affidavits or any other evidence demonstrating their standing to participate in this case. *See Fund for Animals*, 322 F.3d at 731-32. The Applicant-Intervenor organizations also do not identify any members with individual standing, as is required to establish associational standing. *See Lujan*, 504 U.S. 555, 562-63. Moreover, the Applicant-Intervenors' allegations in their proposed answer are insufficient because they are vague, general, and

conclusory. *See Lujan*, 504 U.S. at 566-67. Applicant-Intervenors' allege that some unidentified member hopes to someday visit the monument for bird or whale watching or scientific research, but no concrete plan for doing any of those things is even alleged.

For the foregoing reasons, the Court holds that Applicant-Intervenors have failed to meet their burdens in establishing standing. It is ORDERED that the Motion to Intervene is DENIED.

DATED: _____.

_____
JAMES E. BOASBERG
United State District Court Judge

List of counsel and parties to be notified of entry of order:

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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