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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EARTH ISLAND INSTITUTE, et al.,
Plaintiffs,
v.
ANDREW R. WHEELER, et al.,
Defendants.

Case No. [20-cv-00670-WHO](#)

ORDER RE MOTION TO DISMISS

Re: Dkt. No. 16

Defendants Andrew Wheeler and the U.S. Environmental Protection Agency (collectively, “EPA”) bring this motion to dismiss plaintiffs’ (collectively, “Earth Island”) cause of action for violation of the Clean Water Act (“CWA”). At issue is whether, as a matter of law, the CWA imposes a nondiscretionary duty on the EPA to update or amend the National Contingency Plan (“NCP”), a plan for responding to oil and hazardous substance contamination that is mandated by the CWA; if so, Earth Island is allowed to bring a cause of action pursuant to the CWA’s citizen-suit provision. I find that the EPA has such a duty and its motion is DENIED. In addition, I DENY the American Petroleum Institute’s motion to intervene because this lawsuit addresses the agency’s procedure, not its substantive decision.

BACKGROUND

Earth Island filed this action on January 30, 2020, alleging causes of action under the CWA and the Administrative Procedure Act (“APA”). Dkt. No. 1. In brief, Earth Island alleges that the current NCP is “obsolete and dangerous” because, among other reasons, it continues to permit the use of chemical dispersants that are now known to be harmful to humans and the environment. *Id.* ¶¶ 1-2. It contends that in failing to update the NCP in over a quarter-century, the EPA is in violation of its obligations under the CWA. *Id.* ¶¶ 2-3. It asserts that I have jurisdiction over this case pursuant to the citizen-suit provision of the CWA, 33 U.S.C. §

1 1365(a)(2). *Id.* ¶ 8. It states that for the same reasons, the EPA violated its duties under the APA
 2 to conclude a matter presented to it within a reasonable time. *Id.* ¶ 4.

3 The EPA filed a motion to dismiss the CWA claim (but not the APA claim) on March 31,
 4 2020. Dkt. No. 16. In addition, the American Petroleum Institute (“API”) filed a motion to
 5 intervene, to which the EPA filed a notice of non-opposition. Dkt. Nos. 23, 27. Earth Island
 6 opposes both motions. Dkt. Nos. 26, 29.

7 LEGAL STANDARD

8 I. MOTION TO INTERVENE

9 Federal Rule of Civil Procedure 24 provides for both intervention as a matter of right and
 10 permissive intervention. Under Rule 24(a), a party may intervene as a matter of right if (i) a
 11 federal statute gives it an unconditional right to intervene, or (ii) the party “claims an interest
 12 relating to the property or transaction that is the subject of the action, and is so situated that
 13 disposing of the action may as a practical matter impair or impede the movant’s ability to protect
 14 its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a).

15 Permissive intervention is governed by Rule 24(b) and provides that the court may permit
 16 a party to intervene if (i) there is a conditional right to intervene provided in a federal statute, (ii)
 17 the party’s claim or defense shares a “common question of law or fact” with the main action, and
 18 (ii) the intervention will not unduly “delay or prejudice the adjudication of the original parties’
 19 rights.” Fed. R. Civ. P. 24(b). “In ruling on a motion to intervene, a district court is required to
 20 accept as true the non-conclusory allegations made in support of [the] intervention motion.” *Koike*
 21 *v. Starbucks Corp.*, 602 F.Supp.2d 1158, 1160 (N.D. Cal. 2009) (internal quotations omitted).

22 II. RULE 12(B)(1)

23 A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure is a
 24 challenge to the court’s subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). “Federal courts are
 25 courts of limited jurisdiction,” and it is “presumed that a cause lies outside this limited
 26 jurisdiction.” *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). The party
 27 invoking the jurisdiction of the federal court bears the burden of establishing that the court has the
 28 authority to grant the relief requested. *Id.* A challenge pursuant to Rule 12(b)(1) may be facial or

1 factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional
2 challenge is confined to the allegations pled in the complaint. *See Wolfe v. Strankman*, 392 F.3d
3 358, 362 (9th Cir. 2004). The challenger asserts that the allegations in the complaint are
4 insufficient “on their face” to invoke federal jurisdiction. *See Safe Air Safe Air for Everyone v.*
5 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To resolve this challenge, the court assumes that the
6 allegations in the complaint are true and draws all reasonable inferences in favor of the party
7 opposing dismissal. *See Wolfe*, 392 F.3d at 362.

8 **III. RULE 12(B)(6)**

9 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
10 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
11 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
12 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when
13 the plaintiff pleads facts that “allow[] the court to draw the reasonable inference that the defendant
14 is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). There must be
15 “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* While courts do not
16 require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a
17 right to relief above the speculative level.” *Twombly*, 550 U.S. at 555, 570.

18 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
19 Court accepts the plaintiff’s allegations as true and draws all reasonable inferences in favor of the
20 plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is
21 not required to accept as true “allegations that are merely conclusory, unwarranted deductions of
22 fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
23 2008) (citation omitted). If the court dismisses the complaint, it “should grant leave to amend
24 even if no request to amend the pleading was made, unless it determines that the pleading could
25 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th
26 Cir. 2000) (citation omitted). In making this determination, the court should consider factors such
27 as “the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure
28 deficiencies by previous amendments, undue prejudice to the opposing party and futility of the

1 proposed amendment.” *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

2 DISCUSSION

3 The parties dispute whether this motion is properly resolved pursuant to Rule 12(b)(1) for
4 lack of subject-matter jurisdiction, or pursuant to Rule 12(b)(6) for failure to state a claim. Dkt.
5 No. 16 at 2, 4-6; Dkt. No. 26 at 7-10; Dkt. No. 28 at 3-6. A ruling under either subsection of Rule
6 12 involves the legal question of whether Earth Island may bring a cause of action under the CWA
7 for a violation of 33 U.S.C.A. § 1321(d)(3). Because I find that Earth Island may bring a CWA
8 claim, as discussed below, I find that it has satisfied the requirements of both Rule 12(b)(1) and
9 Rule 12(b)(6).

10 I. LEGAL FRAMEWORK

11 33 U.S.C.A. § 1321, titled “[o]il and hazardous substance liability,” provides the CWA’s
12 provisions related to the NCP. Subsection (d)(1) states that “[t]he President shall prepare and
13 publish a National Contingency Plan for removal of oil and hazardous substances pursuant to this
14 section.” 33 U.S.C.A. § 1321(d)(1). This “shall provide for efficient, coordinated, and effective
15 action to minimize damage from oil and hazardous substance discharges, including containment,
16 dispersal, and removal of oil and hazardous substances, and shall include” various actions not at
17 issue here. *Id.* § 1321(d)(2). Subsection (d)(3)—the provision at issue in this motion— states that
18 “[t]he President may, from time to time, as the President deems advisable, revise or otherwise
19 amend the National Contingency Plan.” *Id.* § 1321(d)(3).¹ Subsection (d)(4) states that “[a]fter
20 publication of the National Contingency Plan, the removal of oil and hazardous substances and
21 actions to minimize damage from oil and hazardous substance discharges shall, to the greatest
22 extent possible, be in accordance with the National Contingency Plan.” *Id.* § 1321(d)(4).

23 The CWA’s citizen suit provision, pursuant to which Earth Island brings this action, states
24 that a citizen may bring a civil action “against the Administrator where there is alleged a failure of
25 the Administrator to perform any act or duty under this chapter which is not discretionary with the
26 Administrator.” 33 U.S.C.A. § 1365(a)(2). To compel agency action under this provision, “a

27 _____
28 ¹ The President delegated this authority to the EPA. Exec. Order No. 12777, 56 Fed. Reg. 54,757
(Oct. 22, 1991).

1 citizen suit must point to a nondiscretionary duty that is ‘readily-ascertainable’ and not ‘only [] the
2 product of a set of inferences based on the overall statutory scheme.’” *Our Children’s Earth*
3 *Found. v. U.S. E.P.A.*, 527 F.3d 842, 851 (9th Cir. 2008) (citation omitted). In other words, courts
4 “must be able to identify a specific, unequivocal command from the text of the statute at issue
5 using traditional tools of statutory interpretation; it’s not enough that such a command could be
6 teased out from an amalgamation of disputed statutory provisions and legislative history coupled
7 with the EPA’s own earlier interpretation.” *WildEarth Guardians v. McCarthy*, 772 F.3d 1179,
8 1182 (9th Cir. 2014) (citations omitted).

9 General canons of statutory interpretation require that courts begin with the language of the
10 statute to determine whether it has a plain meaning. *Satterfield v. Simon & Schuster, Inc.*, 569
11 F.3d 946, 951 (9th Cir. 2009). Unless otherwise defined, words will be interpreted in accordance
12 with their ordinary and contemporary meaning. *The Wilderness Soc’y v. U.S. Fish & Wildlife*
13 *Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003), *amended on reh’g en banc in part sub nom.*
14 *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 360 F.3d 1374 (9th Cir. 2004). “It is also a
15 fundamental canon that the words of a statute must be read in their context and with a view to their
16 place in the overall statutory scheme.” *Id.* (citations omitted); *see also City of Los Angeles v.*
17 *Barr*, 941 F.3d 931, 940 (9th Cir. 2019) (“In construing specific words in a statute, we must also
18 look to the language and design of the statute as a whole . . . and read the specific words with a
19 view to their place in the overall statutory scheme.”) (citations omitted). “In every case, it is the
20 intent of Congress that is the ultimate touchstone.” *Barr*, 941 F.3d at 940 (citations omitted).

21 No court has addressed the question of whether Section 1321(d)(3) creates a non-
22 discretionary duty to revise or amend the NCP. The Ninth Circuit cases cited by the parties are
23 instructive but do not provide clear guidance on the issue at hand because they address different
24 statutes.

25 In *Our Children’s Earth Foundation*, which analyzed a different section of the CWA, the
26 parties did not dispute that the EPA was required to review the relevant guidelines and limitations
27 for possible revision or that any such formal revisions must be in accord with detailed statutory
28 criteria. *Our Children’s Earth Found.*, 527 F.3d at 849. The parties instead disputed whether the

1 EPA was required to consider the criteria as part of its review process. *Id.* The court examined
2 the various provisions of the statute and found that “[t]he legislative and regulatory maze” that
3 resulted did not satisfy the “readily ascertainable” standard for non-discretionary duties. *Id.* at
4 851.

5 In *WildEarth Guardians v. McCarthy*, the court addressed whether the Clean Air Act
6 imposed a nondiscretionary duty upon the EPA in providing that “[i]n the case of pollutants for
7 which national ambient air quality standards are promulgated after August 7, 1977, [the
8 Administrator] shall promulgate such regulations not more than 2 years after the date of
9 promulgation of such standards.” 772 F.3d at 1180–81. There, the court found that the EPA
10 administrator was required to promulgate regulations, but that the precise scope was unclear. *Id.*
11 The court found that both interpretations advanced by the parties were plausible but that ultimately
12 the scope of the nondiscretionary duty was ambiguous and not clear-cut. *Id.* at 1181–82.
13 Therefore, it affirmed dismissal of the complaint.

14 In a more recent case, the Ninth Circuit addressed whether the EPA had a non-
15 discretionary duty to act under the Toxic Substances Control Act (“TSCA”). *In re A Community*
16 *Voice*, 878 F.3d 779 (9th Cir. 2017) (“*Community Voice*”). The court addressed a provision
17 stating that “[t]he regulations of the Administrator under this subchapter shall include such
18 recordkeeping and reporting requirements as may be necessary to insure the effective
19 implementation of this subchapter. The regulations may be amended from time to time as
20 necessary.” 15 U.S.C.A. § 2687. The court found that this was clearly “an ongoing duty” and that
21 the “statutory framework clearly indicates that Congress did not want EPA to set initial standards
22 and then walk away, but to engage in an ongoing process, accounting for new information, and to
23 modify initial standards when necessary to further Congress’s intent.” *Community Voice*, 878
24 F.3d 779, 784. Further, the court found that “because the EPA granted the Petitioners’ rulemaking
25 petition, it came under a duty to conclude the rulemaking proceeding within a reasonable time.”
26 *Id.* at 785. It also noted that “failing to find a duty would create a perverse incentive for the EPA”
27 to grant petitions for rulemaking but take no action in order to avoid judicial review. *Id.* at 785-
28 86.

II. ANALYSIS

1 To begin, it is clear that the EPA had a nondiscretionary duty to promulgate the NCP in the
2 first instance. It is undisputed that the EPA has discharged that duty. Dkt. No. 26 at 3. The
3 question is whether Section 1321(d) requires, and not merely permits, the EPA to revise the NCP
4 through its provision that “[t]he [EPA] may, from time to time, as the [EPA] deems advisable,
5 revise or otherwise amend the National Contingency Plan,” and that 33 U.S.C.A. § 1321(d)(3); *see*
6 *also* Dkt. No. 1 ¶ 129.

7 The EPA focuses on the plain language of this provision, stressing that the use of the word
8 “may” as opposed to “shall” demonstrates that the duty is discretionary, in contrast with the use of
9 the word “shall” in Section 1321(d)(1). Dkt. No. 28 at 4-5. In addition, it argues that the use of
10 the words “from time to time” and “as the [Administrator] deems advisable” also plainly establish
11 that the statute confers discretion. Dkt. No. 16 at 5; Dkt. No. 28 at 4-5.

12 If I were tasked with interpreting this section without context, I would agree that this
13 language suggests discretionary, not mandatory, authority. But the EPA fails to address the
14 authority, cited by Earth Island, that the word “may” does not always indicate discretionary or
15 permissive action. *See* Dkt. No. 26 at 14-15. In *Community Voice*, the Ninth Circuit interpreted
16 an almost identical provision to require action, notwithstanding the use of the terms “may,” “from
17 time to time,” and “as necessary.” While the EPA suggests that the difference between “as
18 necessary” and “as advisable” is significant, it has no authority for that position. Dkt. No. 28 at 6.
19 Although those terms might occasionally be susceptible of different interpretations, in the context
20 of both the statutes in *Community Voice* and Section 1321(d)(3) the terms indicate the same thing:
21 the regulations should be amended as appropriate, but without a specified deadline. They do not
22 determine the underlying question of whether the provision is discretionary in the context of each
23 statute.

24 To inform the meaning of Section 1321(d)(3), well-settled rules of statutory interpretation
25 instruct that I look to the context of the statute. I start with the remainder of Subsection 1321(d).
26 Subsection (d)(1) requires the EPA to “prepare and publish” the NCP. Subsection (d)(2) requires
27 the NCP to provide “efficient, coordinated, and effective action.” Mandatory aspects of the NCP
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1 include the establishment of Coast Guard strike teams and a national center to assist in carrying
 2 out the NCP, “[a] system of surveillance and notice designed to safeguard against as well as
 3 ensure earliest possible notice of discharges of oil and hazardous substances and imminent threats
 4 of such discharges to the appropriate State and Federal agencies,” “[p]rocedures and techniques to
 5 be employed in identifying, containing, dispersing, and removing oil and hazardous substances,”
 6 and a schedule that identifies dispersants that may be used to carry out the NCP and how they may
 7 be used. *Id.* § 1321(d)(2). The final subsection of the provision regarding the NCP states that
 8 after the publication of the NCP, removal of oil and hazardous substances “shall, to the greatest
 9 extent possible, be in accordance with” the NCP. *Id.* § 1321(d)(4).

10 It is true that Subsection (d)(3) separately addresses amendment of the NCP. But Section
 11 1321(d)’s overall intent is to require a number of activities to ensure the efficacy of the NCP and
 12 the ability to safely provide for mitigation of any pollution. The requirement of Subsection (d)(2)
 13 is particularly instructive as it provides for continuing operations and mandates an “effective” and
 14 efficient” response to oil and hazardous substance pollution. Overall, Section 1321(d)
 15 contemplates an ongoing duty that in turn strongly suggests that the duty to update and revise the
 16 NCP “as advisable” is not discretionary, but required.

17 The facts alleged illustrate why a reading of Subsection (d)(3) as discretionary would be
 18 illogical in the context of the statute. The EPA’s interpretation would allow it to fail to review,
 19 update, or amend the NCP for decades, despite scientific advances, the occurrence of incidences
 20 involving discharge of oil and hazardous substances, and an internal report concluding that the
 21 NCP was outdated and inadequate. *See* Dkt. No. 1 ¶¶ 107-121. Such inaction would frustrate the
 22 purpose of the NCP to achieve an effective and efficient response to pollution.

23 The remainder of Section 1321 and the intent of Congress in enacting the CWA reinforces
 24 an interpretation of Subsection 1321(d)(3) as nondiscretionary. Section 1321(b) provides a
 25 “Congressional declaration of policy against discharges of oil or hazardous substances,” which
 26 states that “it is the policy of the United States that there should be no discharges of oil or
 27 hazardous substances into or upon the navigable waters of the United States. . .” The “declaration
 28 of goals and policy” in the CWA provides that “[t]he objective of this chapter is to restore and

1 maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C.A. §
2 1251(a). In addition, “it is the national policy that the discharge of toxic pollutants in toxic
3 amounts be prohibited.” *Id.* § 1251(a)(3).

4 As with the subsection governing the NCP, these policies reflect an ongoing intent to
5 prohibit the discharge of toxic substances and maintain the integrity of the nation’s waters. This is
6 necessarily a continuing task. In this context, Section 1321(d)(3) is properly interpreted to create a
7 nondiscretionary obligation for the Administrator to revise or amend the NCP. While there is no
8 set date or timeline by which the Administrator must do so, the other provisions and purpose of
9 the statute make clear that it must do so in order to achieve the purpose of the CWA and the
10 purpose of the NCP.

11 This case is more analogous to the Ninth Circuit’s decision in *Community Voice* than to the
12 cases in this circuit upon which the EPA relies. In *Community Voice*, as here, the EPA was
13 required to promulgate the regulations in the first instance. 878 F.3d at 784. As discussed, the
14 provision at issue was similar in wording to Section 1321(d)(3). As here, the court found that this
15 wording reflected an ongoing duty, which included amending the initial standard authorized by
16 Congress. *Id.* As the court noted, “Congress set EPA a task, authorized EPA to engage in
17 rulemaking to accomplish that task, and set up a framework for EPA to amend initial rules and
18 standards in light of new information.” *Id.* at 785. Further, although *Community Voice* addressed
19 provisions of a different statute, many of the same concerns are present here: a desire to eliminate
20 hazardous substances that could harm the public.

21 The EPA’s remaining arguments are not persuasive. It first argues that because Subsection
22 (d)(3) lacks a date-certain deadline to amend the NCP, the statute must be read as conferring
23 discretionary authority. Dkt. No. 16 at 5-6. The EPA is correct that the statute intentionally does
24 not provide a date-certain deadline. But the cases that it cites for the position that any provision
25 that does not provide a date-certain deadline is discretionary are not binding on this court, and
26 such a rule has not been adopted by the Ninth Circuit. *See Nat. Res. Def. Council, Inc. v. Perry*,
27 302 F. Supp. 3d 1094, 1100 (N.D. Cal. 2018), *aff’d sub nom. Nat. Res. Def. Council, Inc. v. James*
28 *R. Perry*, 940 F.3d 1072 (9th Cir. 2019) (declining to follow rule in *Sierra Club v. Thomas*, 828

1 F.2d 783 (D.C. Cir. 1987)). More importantly, the EPA’s argument contravenes the Ninth
 2 Circuit’s decision in *Community Voice*, which found a nondiscretionary duty notwithstanding a
 3 lack of a date-certain deadline. 878 F.3d at 784.

4 In addition, the EPA argues that the duty imposed by the statute is at best ambiguous, fails
 5 to satisfy the “readily ascertainable” requirement set forth in *Children’s Earth Foundation*, and
 6 relies upon an impermissible “cobbling together” of disparate provisions of the CWA. Dkt. No.
 7 28 at 5-6. However, the statute here is not a legal and regulatory “maze” in which it is difficult to
 8 identify the underlying duty or the scope of that duty. Rather, the EPA’s duty here is quite clear:
 9 to revise or amend the NCP in light of new information. Because the duty itself is clear-cut, the
 10 only question is whether it is discretionary or not. As discussed, I find that it is not discretionary.

11 **III. MOTION TO INTERVENE**

12 Earth Island challenges whether API has a sufficient interest such that it would be entitled
 13 to intervene in this matter, either permissively or as a matter of right. *See* Dkt. No. 29. It argues
 14 that the allegations in the complaint only attack the procedure used by the EPA (e.g., the lack of
 15 timeliness in updating the regulations) and not the substance of the regulations. It also contends
 16 that it will be prejudiced by API’s intervention due to “irrelevant” briefing. *Id.*

17 As Earth Island points out, courts have denied motions to intervene in cases like this one.
 18 *See Our Children’s Earth Found. v. U.S. E.P.A.*, No. C 05-05184 WHA, 2006 WL 1305223 (N.D.
 19 Cal. May 11, 2006); *Med. Advocates For Healthy Air v. Johnson*, No. C 06-0093 SBA, 2006 WL
 20 1530094 (N.D. Cal. June 2, 2006); *Sierra Club v. United States Env’tl. Prot. Agency*, No. 13-CV-
 21 2809-YGR, 2013 WL 5568253 (N.D. Cal. Oct. 9, 2013). In these cases, the court found that the
 22 intervening parties’ interests would remain the same regardless of the outcome of the litigation,
 23 because the plaintiff challenged the agency’s procedure and not its substantive decision. *See Our*
 24 *Children’s Earth Found.*, 2006 WL 1305223, at *2. Instead, the agency’s rule-making process
 25 would provide the means to adequately protect the intervening parties’ interests. *Id.*²

26
 27
 28 ² API seeks to distinguish these cases because in those cases, the statute at issue provided a set
 deadline. Dkt. No. 33 at 5-6. However, the lack of a deadline does not change the underlying fact
 that this lawsuit challenges the procedure and not the substance of the NCP.

United States District Court
Northern District of California

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This case is analogous. Earth Island seeks only declaratory judgments that the EPA failed to perform a nondiscretionary duty under the CWA and thus violated the APA, an order to the EPA to issue a final rule to update the NCP, and attorneys’ fees and costs. Dkt. No. 1 at 29. API’s argument that this lawsuit involves the substance of the NCP indicates that its participation will confuse the issues and prejudice Earth Island. *See Sierra Club*, 2013 WL 5568253, at *5 (allowing intervention and “opening the door to these additional contentions would only serve to confuse the matters at issue in the complaint and to delay the proceedings unnecessarily.”). Further, API recognizes that it will have the opportunity to comment on any changes during the EPA’s rulemaking process, but claims that this is irrelevant. Dkt. No. 33 at 6. Not so; the API’s ability to comment on substantive changes, as opposed to any procedural challenges, is undoubtedly relevant to the interests it asserts related to the *contents* of the NCP. *See* Dkt. No. 23 at 3. In short, API has not articulated a cognizable interest that would merit permissive intervention or intervention of right in this proceeding. Its motion is DENIED.

CONCLUSION

For the above reasons, the EPA’s motion to dismiss is DENIED and the API’s motion to intervene is DENIED.

IT IS SO ORDERED.

Dated: June 2, 2020



William H. Orrick
United States District Judge