IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Environmental Justice Health Alliance; Center For Community Action And Environmental Justice; East Yard Communities For Environmental Justice; New Jersey Environmental Justice Alliance; Texas Environmental Justice Advocacy Services; Natural Resources Defense Council, Inc.; National Audubon Society; New York Civil Liberties Union; Sierra Club,

Plaintiffs,

v.

Council on Environmental Quality *and* Mary Neumayr, in her official capacity as Chair of the Council on Environmental Quality,

Defendants,

American Farm Bureau Federation, American Forest Resource Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Road & Transportation Builders Association, Chamber of Commerce of the United States of America, Federal Forest Resource Coalition, Interstate Natural Gas Association of America, Laborers' International Union of North America, and National Cattlemen's Beef Association,

Proposed Intervenors.

No. 1:20-cv-06143

Hon. Colleen McMahon

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

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INTRODUCTION

The complaint in this case challenges a final rule of the Council on Environmental Quality (CEQ) titled "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," and published at 85 Fed. Reg. 43,304 (July 16, 2020). The rule became effective on September 14, 2020. *See id.* This rule (the "NEPA Rule") updates and streamlines CEQ's implementing regulations for the National Environmental Policy Act (NEPA), which requires federal agencies to evaluate the environmental impact of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Federal actions covered by NEPA often include federal permitting decisions under separate and distinct laws like the Clean Water Act and Clean Air Act.

Over the years, NEPA reviews have become increasingly burdensome, expensive, and time-consuming to prepare, ultimately impeding business operations and development projects across the nation. The NEPA Rule addresses this problem by clarifying the requirements for NEPA review and the scope of relevant considerations, improving coordination among agencies involved in reviewing a single federal project, and providing for more orderly public input.

The Proposed Intervenors are nine national trade associations and a leading North American labor union: the American Farm Bureau Federation, American Forest Resource Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Road & Transportation Builders Association, Chamber of Commerce of the United States of America, Federal Forest Resource Coalition, Interstate Natural Gas Association of America, Laborers' International Union of North America, and National Cattlemen's Beef Association. The Proposed Intervenors' members include builders, owners, operators, and employees of agricultural, manufacturing, energy, and infrastructure facilities of all kinds. These organizations frequently engage in operations and development projects that require federal permits and thus NEPA reviews.

The Proposed Intervenors have a significant stake in CEQ's decision to update its NEPA regulations. Under the NEPA Rule, the statute will continue to live up to Congress's original purpose of ensuring that federal agencies give "consideration [to] the environmental impact of their

actions in [major] decisionmaking" (*Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976)), while providing much needed clarity and stability regarding the scope of review. If plaintiffs here obtain a vacatur of the Rule, CEQ's reform of the NEPA review framework would be undone, and the Proposed Intervenors' members would once again be subject to an uncertain and overly-burdensome regulatory scheme that invites obstructive litigation and needlessly delays important projects and operations.

All but one of the Proposed Intervenors sought and was granted intervenor status in a closely related lawsuit pending in the Western District of Virginia. (One Proposed Intervenor did not seek intervention in that case.) *See* Order Granting Mot. to Intervene, *Wild Va. v. Council on Envtl. Quality*, No. 3:20-cv-45 (W.D. Va. Aug. 31, 2020), ECF No. 72. This Court should likewise permit the Proposed Intervenors to intervene as defendants in this case. The motion is timely; the Proposed Intervenors have a legal interest in the NEPA Rule, which may be impaired if they are denied intervention; and CEQ, as a government entity charged with protecting the interests of the public at large, cannot be counted upon to represent the private interests of the regulated business community. The Proposed Intervenors thus satisfy all of the requirements for intervention as of right and permissively.

BACKGROUND

NEPA provides that, for any "major Federal action[] significantly affecting the quality of the human environment," the federal agencies with jurisdiction over the action must prepare "a detailed statement" on "the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C). The first step in this process is an environmental assessment, or EA, which determines whether the federal action is "major" and whether it will have a "significant" effect on the environment. *See* 40 C.F.R. § 1508.9. If a proposed action meets these requirements, the agency must prepare an environmental impact statement, or EIS. *See* 40 C.F.R. § 1502.4.

Under CEQ regulations first promulgated in 1978, when an agency determines that an EIS is required, it must publish a notice of intent in the Federal Register giving the public an oppor-

tunity to comment. 40 C.F.R. § 1508.22. The EIS, in turn, must contain information on "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C). Historically, the EIS must identify and discuss "all reasonable alternatives" to the proposed action (including those not within the jurisdiction of the reviewing agency), and explain why the alternatives were not taken. *See* 40 C.F.R. §§ 1502.14–.16, 1502.19. After completing the EIS, which typically takes many years to prepare, the agency must take additional comment. 40 C.F.R. § 1503.1. This is followed by a waiting period and the issuance of a Record of Decision, or ROD. An ROD describes the agency's decision, the alternatives the agency considered, and the agency's plans for mitigation and monitoring of environmental effects, if necessary. 40 C.F.R. § 1505.2.

Due largely to the risk of litigation and inconsistent judicial interpretations of key NEPA terms and requirements, federal agencies have implemented progressively more complex and burdensome requirements under NEPA over the years. When CEQ's regulations were first promulgated more than 40 years ago, they stated that EISs normally should be less than 150 pages, with a maximum length of 300 pages for proposals of "unusual scope or complexity." 40 C.F.R. § 1502.7. Today, compliance with those limits is the exception rather than the norm. The average length for a final EIS now exceeds 650 pages, and a quarter of all final statements exceed 750 pages. *See* 85 Fed. Reg. at 43,305. CEQ previously recommended that completing an EIS should not take longer than one year; in reality, the average time now approaches five years. *Id*.; *accord* GAO, *National Environmental Policy Act*, GAO-14-370, at 14 (April 2014), perma.cc/9UTJ-3C4N.

More fundamentally, agencies undertaking NEPA reviews have gathered and analyzed boundless amounts of data and evidence concerning distantly indirect effects for use in analyses that have often been irrelevant to their decisionmaking processes, all to minimize the risk that a court will later find the record insufficient. Along the way, regulated entities have been required to produce redundant documents to multiple agencies participating in a largely uncoordinated process. Yet this vast over-inclusion and repetition has not, in fact, reduced the risk of litigation, which

has persisted in the face of unclear and inconsistent interpretations of terms. Nor has it enhanced the quality of agency decisions, because agencies' analytical capacity is scattered rather than focused.

To address these problems, CEQ published an advance notice of proposed rulemaking on June 20, 2018 (83 Fed. Reg. 28,591) and a notice of proposed rulemaking on January 10, 2020 (85 Fed. Reg. 1,684) proposing to "modernize and clarify the CEQ regulations" and "to facilitate more efficient, effective, and timely NEPA reviews" by "simplifying regulatory requirements, codifying certain guidance and case law relevant to these proposed regulations, revising the regulations to reflect current technologies and agency practices, [and] eliminating obsolete provisions." *See* 85 Fed. Reg. at 1,685. CEQ received and considered more than 8,000 unique comments on the NPRM, including from each of the Proposed Intervenors. *See* Yates Decl. (Ex. 1) ¶ 6; Imbergamo Decl. (Ex. 2) ¶ 9; Moskowitz Decl. (Ex. 3) ¶ 6; Macchiarola Decl. (Ex. 4) ¶ 6; Goldstein Decl. (Ex. 5) ¶ 6; Mortimer Decl. (Ex. 6) ¶ 6; Dreskin Decl. (Ex. 7) ¶ 6; Farner Decl. (Ex. 8) ¶ 6; Yager Decl. (Ex. 9) ¶ 6.

CEQ published the final NEPA Rule on July 16, 2020, and it became effective September 14, 2020. The NEPA Rule reforms the NEPA process in numerous respects, including by clarifying the proper scope of NEPA reviews, facilitating coordination for reviews involving more than one agency, and identifying presumptive page and time limits for reviews.

Plaintiffs, a group of environmental organizations, filed this lawsuit on August 6, 2020. Dkt. 1. They allege that the NEPA Rule violates the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq. See* Dkt. 1 ¶¶ 245-250. Plaintiffs ask the Court to vacate the NEPA Rule as unlawful and enjoin CEQ from implementing or enforcing it. *Id.* at p. 95.

LEGAL STANDARD

Federal Civil Rule 24 provides for intervention as of right and permissively. "Intervention as of right under Rule 24(a)(2) is granted when all four of the following conditions are met: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of

the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties." *Mastercard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006). "[T]he test is a flexible and discretionary one, and courts generally look at all four factors as a whole rather than focusing narrowly on any one of the criteria." *Grewal v. Cueno*, 2014 WL 2095166, at *3 (S.D.N.Y. May 20, 2014) (quotation marks omitted).

A court may alternatively grant permissive intervention by anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion to grant permissive intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* 24(b)(3). The Court considers a range of factors including "the nature and extent of the intervenors' interests, the degree to which those interests are adequately represented by other parties, and whether [the] parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Grewal*, 2014 WL 2095166, at *3 (quoting *Citizens Against Casino Gambling in Erie Cnty. v. Hogen*, 417 F. App'x 49, 50-51 (2d Cir. 2011)). "Courts in this district have consistently held that Rule 24(b) 'is to be liberally construed.'" *Gallagher v. N.Y. State Bd. of Elections*, 2020 WL 4261172, at *1 (S.D.N.Y. July 23, 2020) (quoting *Olin Corp. v. Lamorak Ins. Co.*, 325 F.R.D. 85, 87 (S.D.N.Y. 2018)).

ARGUMENT

A. The Proposed Intervenors are entitled to intervene as of right.

The Proposed Intervenors meet all four requirements for intervention as of right under Rule 24(a): They have concrete economic interests in the regulatory changes at issue in this litigation, and CEQ, as an executive branch agency, will not adequately represent those interests or align with the Proposed Intervenors' view of the relevant issues. Courts often allow national trade associations to intervene as defendants in APA suits in which the plaintiffs challenge federal regulations with which the associations' members must comply. *See, e.g.*, *Nat. Res. Def. Council v. Nat'l*

Highway Traffic Safety Admin., 894 F.3d 95, 102 (2d Cir. 2018) (noting that trade associations had intervened); *New York v. Scalia*, 2020 WL 3498755, at *5 (S.D.N.Y. June 29, 2020) (granting permissive intervention); *New York v. Abraham*, 204 F.R.D. 62, 67 (S.D.N.Y. 2001) (granting permissive intervention); *see also, e.g.*, *California v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1158 (N.D. Cal. 2019) (granting intervention to national trade associations and conservations associations in an APA case challenging Department of Interior regulations); *S.C. Coastal Conservation League v. Pruitt*, 2018 WL 2184395, at *9 (D.S.C. May 11, 2018) (granting intervention to several of the Proposed Intervenors in an APA challenge to a federal regulation under the Clean Water Act); *California v. Bureau of Land Mgm't*, 2018 WL 3439453, at *8 (N.D. Cal. July 17, 2018) (granting intervention to national trade associations as defendants in an APA case concerning an oil extraction regulation); *Wildearth Guardians v. Jewel*, 2014 WL 7411857, at *3 (D. Ariz. Dec. 31, 2014) (granting intervention in an APA challenge to a final agency action under the Endangered Species Act).

The same outcome is warranted here.

1. The motion is timely. The timeliness of an intervention motion depends on the "totality of the circumstances," taking into account "(1) the length of time the applicant knew or should have known of [its] interest before making the motion; (2) prejudice to existing parties resulting from the applicant's delay; (3) prejudice to the applicant if the motion is denied; and (4) the presence of unusual circumstances militating for or against a finding of timeliness." *Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric. & Markets*, 847 F.2d 1038, 1044 (2d Cir. 1988).

These factors indicate straightforwardly that the motion here is timely. This motion has been filed fewer than two months after the commencement of this lawsuit on August 6, 2020. There is no risk of prejudice because the case is in its earliest stages, and no responsive pleading has yet been filed. *See, e.g.*, *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (noting that "[a]pplicants filed their motion to intervene in a timely manner,

less than three months after the complaint was filed and less than two weeks after the [government] filed its answer to the complaint").[1]

2. The Proposed Intervenors have a "legally protectable" interest implicated by plaintiffs' challenge to the NEPA Rule. *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010). The rule "does not require that the intervenor prove a property right, whether in the constitutional or any other sense." *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 130 (2d Cir. 2001) (quoting *United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989)). Under this standard, a trade association generally has "a sufficient interest to permit it to intervene [when] the validity of a regulation from which its members benefit is challenged," where lifting the regulation "might well lead to significant changes in the profession and in the way [the members] conduct their businesses." *N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (per curiam).

That is the case here. The NEPA Rule improves regulatory certainty—and reduces the regulatory burden and likelihood of litigation—for the Proposed Intervenors' members. It does so by clarifying NEPA's key terms, more appropriately calibrating the regulations' scope to the words that Congress used. In addition, the Rule will make NEPA reviews less time consuming, more efficient, and less costly by encouraging coordination among agencies involved in a single federal project (*see* 85 Fed. Reg. at 43,325) and setting predictable and enforceable rules concerning timelines and page limits (*id.* at 43,362-64). It also will eliminate the need to categorize effects as "direct" or "indirect" and situate the concept of "cumulative" effects within the proximate cause

[1] Consistent with Rule 24(c), the Proposed Intervenors attach a motion to dismiss and memorandum in support. Courts uniformly find that motions to dismiss satisfy Rule 24(c). *See, e.g., Ctr. for Biological Diversity v. Jewell*, 2015 WL 13037049, at *1 (D. Ariz. May 12, 2015) (Rule 24(c) is satisfied with a "motion to dismiss, in lieu of an answer"); *New Century Bank v. Open Sols., Inc.*, 2011 WL 1666926, at *3 (E.D. Pa. May 2, 2011) (a "motion to dismiss . . . satisfies Rule 24(c)"); *Aids Healthcare Found., Inc. v. Orange Cty.*, 2008 WL 5381855, at *1 (M.D. Fla. Dec. 23, 2008) (finding Rule 24(c) satisfied where the proposed intervenor "seeks to join in [the defendant's] motion to dismiss"). In the event the Court grants our motion to intervene, we ask that it deem the attached motion to dismiss filed on the same date that the government defendants file their corresponding motion and memorandum.

framework, focusing appropriately on whether effects are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. *Id*. at 43,343-44.

All of this together will make NEPA reviews significantly more efficient and less burdensome for the Proposed Intervenors' members, who frequently must participate in the NEPA review process in connection with permits for their ongoing operations and development projects. *See* Yates Decl. ¶ 7; Imbergamo Decl. ¶ 10; Moskowitz Decl. ¶ 7; Macchiarola Decl. ¶ 7; Goldstein Decl. ¶ 7; Mortimer Decl. ¶ 7; Dreskin Decl. ¶ 7; Farner Decl. ¶¶ 7-13; Yager Decl. ¶¶ 7-9. The clarified and simplified procedures under the NEPA Rule will save the Proposed Intervenors' members from significant regulatory burdens and obstructive delays that Congress never intended them to bear, allowing them to dedicate more of their resources to their businesses—including projects like efficient mass transit lines and renewable energy facilities. *See* Yates Decl. ¶¶ 8-9; Imbergamo Decl. ¶¶ 11-12; Moskowitz Decl. ¶¶ 8-9; Macchiarola Decl. ¶¶ 8-9; Goldstein Decl. ¶¶ 8-9; Mortimer Decl. ¶¶ 8-9; Dreskin Decl. ¶¶ 8-9; Farner Decl. ¶¶ 14-15; Yager Decl. ¶¶ 10-11.

This sort of direct economic interest in defending a regulation is readily sufficient to support intervention, as the Second Circuit has held. *See N.Y. Pub. Interest Research Grp.*, 516 F.2d at 352; *see also In re Pandora Media, Inc.*, 2013 WL 6569872, at *8 (S.D.N.Y. Dec. 13, 2013) (explaining that "[a] number of cases confirm that a financial interest" is sufficient "for purpose of the Rule 24(a) analysis").

3. The resolution of this case may impair the Proposed Intervenors' ability to protect their interests. "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied. This burden is minimal." *Am. Farm Bureau Fed'n v. EPA*, 278 F.R.D. 98, 108 (M.D. Pa. 2011) (quoting *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001)).

Plaintiffs here seek a complete vacatur of the NEPA Rule. If this Court entered a judgment granting that relief, the Proposed Intervenors' members would remain subject to the prior NEPA

regulatory framework and its many burdens. To protect their interests, it is essential that the Proposed Intervenors be allowed to participate in this case.[2]

4. Finally, the Proposed Intervenors cannot rely on CEQ to adequately represent their interests. Here, again, "the burden to demonstrate inadequacy of representation is generally speaking minimal." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001).

As a general matter, "the government's position is defined by the public interest," not just "the interests of a particular group of citizens." *Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986); *accord Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) ("The government must represent the broad public interest, not just the economic concerns" of private business interests). Courts thus routinely grant intervention in cases like this because "[t]he interests of government and the private sector may diverge," and "[t]he priorities of the defending government agencies are not" the same as the priorities of the private, regulated public. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001). This Court previously has granted intervention on that basis, reasoning that companies are "in a position to address the issues from an industry, as opposed to a governmental, point of view," and "[t]he Court cannot assume that those viewpoints are identical." *New England Petroleum Corp. v. Fed. Energy Admin.*, 71 F.R.D. 454, 459 (S.D.N.Y. 1976).

To be sure, courts sometimes "have demanded a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective" (*Butler*, 250 F.3d at 179), but that requirement is easily satisfied here. CEQ's and the Proposed Intervenors' interests differ in this litigation, principally because CEQ and the Proposed Intervenors often have

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[2] Recent Supreme Court decisions make clear that the Proposed Intervenors, who seek to intervene as defendants and do not seek additional relief beyond that sought by the other parties, are not required to demonstrate independent Article III standing. *See, e.g.*, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) (citing *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017)); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951-1952 (2019). But even if the Proposed Intervenors were required to establish standing, they have readily done so in light of the concrete injuries that they and their members would suffer if the NEPA Rule were invalidated. *See, e.g.*, *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 317 (D.C. Cir. 2015) (finding "a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit").

competing priorities when it comes to NEPA and the federal government's authority and obligations under administrative law. In light of their often conflicting positions, the grounds for relief that CEQ will rely upon in this lawsuit will diverge from the positions that the Proposed Intervenors will take.

The parties' briefing in the *Wild Virginia* case confirms this point. There, CEQ's motion to dismiss argued that private litigants cannot bring facial APA challenges to regulations except in "special circumstances" (Defs.' Mem. in Supp. of Mot. to Dismiss at 16, *Wild Virginia* (W.D. Va. Aug. 25, 2020), ECF No. 53), and counsel for CEQ argued in a recent hearing that regulated parties are precluded from bringing as-applied challenges to regulations once initial limitations periods for facial challenges have lapsed. Those arguments, if accepted by this Court, would be harmful to the interests of the Proposed Intervenors. Having been granted intervention in the *Wild Virginia* case, the Proposed Intervenors were able to protect their interests by presenting different and narrower arguments for why the plaintiffs lacked Article III standing. Brief in Supp. of Business Ass'ns' Mot. to Dismiss at 4-10, *Wild Virginia* (W.D. Va. Aug. 25, 2020), ECF No. 57.

Similarly, the *Wild Virginia* litigation demonstrates that the Proposed Intervenors and CEQ approach *Chevron* deference differently. CEQ has an institutional interest in aggressively protecting deference doctrines. *See* 85 Fed. Reg. at 43,307 (explaining that the NEPA Rule is "intended to embody CEQ's interpretation of NEPA for *Chevron* purposes"). That observation, once again, has been borne out in CEQ's briefs in the *Wild Virginia* case. *See* Defs.' Opp'n to Mot. for Prelim. Inj. at 13, 15, *Wild Virginia* (W.D. Va. Sept. 2, 2020), ECF No. 75. The Proposed Intervenors, by contrast, do not share the government's institutional interest in *Chevron*; indeed, Proposed Intervenors are often opposite federal agencies in litigation where their interests with respect to deference point in opposite directions. Thus, the Proposed Intervenors defended the NEPA Rule primarily without reliance on *Chevron* deference. *See* Business Ass'ns' Brief in Opp'n to Mot. for Prelim. Inj. at 20, *Wild Virginia* (W.D. Va. Sept. 2, 2020), ECF No. 74.

In short, there is no question that the government will rely on arguments that are often inconsistent with the Proposed Intervenors' institutional interests. The Proposed Intervenors will

therefore "bring a point of view to the litigation not presented by either the plaintiffs or the defendants," warranting their participation as intervenors. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 445 (9th Cir. 2006).

That is especially so given the risk that the Proposed Intervenors face in light of the upcoming presidential election. New administrations often reverse policies after taking office. For example, after the administration change in January 2017, the government ceased defending a high profile Clean Water Act regulation promulgated by the prior administration. *See, e.g.*, *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1344 (S.D. Ga. 2019) (noting that EPA had "declined to defend the substantive challenges to" the rule). Such changes are common. *See, e.g.*, Federal Defs.' Mot. to Stay All Proceedings at 1, *Connecticut v. United States*, No. 3:09-cv-54 (D. Conn. Mar. 10, 2009), ECF No. 93 (informing court that government planned to rescind a healthcare moral conscience regulation and requesting that challenge be stayed).

If there is a change in administration during the pendency of this litigation, the government's position on the NEPA Rule is likely to change, and it may cease defending the Rule in litigation. *See* Juliet Eilperin & Felicia Sonmez, *Trump scales back landmark environmental law, saying it will help restart the economy*, Wash. Post., July 15, 2020, perma.cc/FAS8-9YDH (reporting that the Biden campaign has promised to "reverse the new [NEPA] rule if elected"). If that eventuality occurs, the Proposed Intervenors' participation will be essential to continuing a defense of the Rule. Accordingly, CEQ cannot be counted upon to adequately represent the Proposed Intervenors' interest in a consistent and robust defense of the provisions of the Rule from which they will benefit.

B. Alternatively, the Proposed Intervenors should be allowed to intervene permissively

Because the Proposed Intervenors are entitled to intervene as of right, the Court need not decide whether intervention should be granted permissively. But if the Court denies intervention as of right, it should grant the Proposed Intervenors leave to intervene permissively instead.

The Proposed Intervenors meet the permissive intervention standard for the same reasons that justify their intervention as of right. *See In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 n.5 (2d Cir. 2003) ("Substantially the same factors are considered in determining whether to grant an application for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2).").

Permitting the Proposed Intervenors to intervene to defend the NEPA Rule would allow them to vindicate their substantial interests, and given their promptness in seeking intervention, would neither delay this case nor prejudice any of the parties. *See McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970) (permissive intervention should be granted "where no one would be hurt and greater justice would be attained") (quotation omitted). Thus, if the Court holds that the Proposed Intervenors are not entitled to intervene as of right, it should at minimum allow them to intervene permissively.

CONCLUSION

The motion to intervene should be granted.

Dated: September 25, 2020

Respectfully submitted,

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