IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Iowa Citizens for Community Improvement, Animal Legal Defense Fund, Association of Irritated Residents, Institute for Agriculture and Trade Policy, Waterkeeper Alliance, Inc., Waterkeepers Chesapeake,

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-02715

Hon. Timothy J. Kelly

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutes, Rules, and Regulations

Statutes, Rules, and Regulations—continued

Other Authorities

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.

The Proposed Intervenors sought and were granted intervenor status in each of the other pending lawsuits challenging the NEPA Rule. *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 (one Proposed Intervenor did not intervene in this case); Stipulation and Order Regarding Intervention, *Envtl. Justice Health All. v. Council on Envtl. Quality*, No. 1:20-cv-6143 (S.D.N.Y. Oct. 13, 2020), ECF No. 34; Order Granting Mot. to Intervene, *Alaska Cmty. Action on Toxics v. Council on Envtl. Quality*, No. 3:20-cv-5199 (N.D. Cal. Nov. 5, 2020), ECF No. 37; Order Granting Mot. to Intervene, *California v. Council on Envtl. Quality*, No. 3:20-cv-6057 (N.D. Cal. Nov. 16, 2020), ECF No. 68. 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 opportunity 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 the review process 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 September 23, 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 ¶¶ 74-98. Plaintiffs ask the Court to set aside the NEPA Rule as unlawful and enjoin CEQ from implementing or enforcing it. *Id.* at p. 32.

LEGAL STANDARD

Federal Civil Rule 24 provides for intervention as of right and permissively. Under Rule 24(a), "a district court must grant a motion to intervene [as of right] if the motion is timely, and

the prospective intervenor claims a legally protected interest in the action, and the action threatens to impair that interest, unless that interest is adequately represented by existing parties." *Amador Cty., Cal. v. U.S. Dep't of the Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014). Under current D.C. Circuit precedent, an intervenor under Rule 24(a) must also demonstrate that it has Article III standing. *See, e.g.*, *Deutsche Bank Nat. Tr. Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013).[1]

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). Permissive intervention requires "(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." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). The court also "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "The requirements for permissive intervention are to be construed liberally, with all doubts resolved in favor of permitting intervention." *In re Vitamins Antitrust Litig.*, 2001 WL 34088808, at *3 (D.D.C. Mar. 19, 2001) (quotation marks omitted).

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 asso-

[1] Recent Supreme Court decisions make clear that parties like 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, 1951-52 (2019). But the continued viability of circuit precedent is beside the point here because Proposed Intervenors have standing, as explained below.

ciations 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. "[T]imeliness is to be judged in consideration of 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." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980); *accord, e.g., Ute Indian Tribe of Uintah & Ouray Indian Reservation v. U.S. Dep't of the Interior*, 2020 WL 1465886, at *1 (D.D.C. Feb. 5, 2020) (same).

These factors indicate straightforwardly that the motion here is timely. This motion has been filed less than three months after the commencement of this lawsuit on September 23, 2020. There is no risk of prejudice because the case is in its earliest stages, and the government's motion to dismiss remains pending. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 734-35 (D.C. Cir.

2003) (finding it "not difficult at all" to find timely a motion to intervene filed "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer").[2]

2. The Proposed Intervenors have a "legally protected interest" implicated by Plaintiffs' challenge to the NEPA Rule. 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 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'

[2] Consistent with Rule 24(c), the Proposed Intervenors attach a response to the complaint. In the event the Court grants our motion to intervene and denies the government's pending motion to dismiss in whole or in part, we ask that the Court deem the response filed on the same date that the government files its own response to the complaint.

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. *See N.Y. Pub. Interest Research Grp.*, 516 F.2d at 352; *see also, e.g.*, *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 395 F. Supp. 3d 1, 16, 19-20 (D.D.C. 2019) (association had legally protected interest based on potential for "economic harm" to members if program at issue were vacated).

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)).

Although Plaintiffs here focus their arguments on the NEPA Rule's effect on one particular industry (animal feeding operations), the relief they seek is effectively 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.

4. The Proposed Intervenors cannot rely on CEQ to adequately represent their interests. Here, again, "this requirement of the Rule 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, Inc.*, 322 F.3d at 735 (quotation marks omitted); *see also, e.g.*, *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (explaining that the inadequate-representation requirement "is not onerous").

The D.C. Circuit "look[s] skeptically on government entities serving as adequate advocates for private parties." *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015). That is for good reason. 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). Indeed, courts in this circuit have often granted intervention to private parties with "a financial interest in the outcome of th[e] action that the government does not share." *Alphapointe v. Dep't of Veterans Affairs*, 2019 WL 7290853, at *1 (D.D.C. Aug. 26, 2019); *see also, e.g., Washington All. of Tech. Workers*, 395 F. Supp. 3d at 21 ("[I]t is well-established that governmental entities generally cannot represent the more narrow and parochial financial interest of a private party.") (quotation marks omitted); *Eagle Pharm., Inc. v. Price*, 322 F.R.D. 48, 50 (D.D.C. 2017) (private party could intervene because its "specific financial interest in the [action] is not an interest shared by the general public" and thus would not be adequately represented by FDA).

Under this framework, Proposed Intervenors easily clear the low bar needed to show inadequate representation. As discussed above, Proposed Intervenors' members have an economic interest in the outcome of this case that the government does not. Moreover, CEQ's and the Proposed Intervenors' legal interests differ in this litigation, principally because CEQ and the Proposed Intervenors often have 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 Va.* (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. 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. 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 recent 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).

After the coming change in administration, 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 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.

5. Finally, the Proposed Intervenors have Article III standing. As the D.C. Circuit has explained, standing exists in these circumstances "where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *See, e.g.*, *Crossroads Grassroots Policy Strategies*, 788 F.3d at 317. That is the case here: As explained above, the NEPA Rule benefits Proposed Intervenors' members by making the NEPA process less cumbersome and more efficient, and the vacatur of the Rule would cause the same members economic injury. Proposed Intervenors accordingly have standing to intervene as of right, assuming that standing is required.

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. Permitting the Proposed Intervenors to intervene to defend the NEPA Rule would allow them to vindicate the substantial economic interests they have at stake, 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 marks 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.

C. Conditions for Plaintiffs' non-opposition

Counsel for the Proposed Intervenors has conferred with counsel for Plaintiffs, who state that they do not oppose intervention upon the following conditions:

1. Intervenors' principal briefs shall be limited to two-thirds the length of Plaintiffs' corresponding principal brief. Their replies, if any, shall be limited to two-thirds the length of the Defendants' corresponding reply.
2. The Intervenors shall endeavor in good faith to avoid duplicative briefing of matters already covered in Defendants' briefs.
3. If Plaintiffs respond to a brief filed by Intervenors, Plaintiffs may submit a consolidated brief with a page limit equal to the sum of the same page limits for separate responses to Intervenors' and Defendants' briefs.
4. The Intervenors shall not initiate discovery, but if discovery is initiated by Plaintiffs or Defendants, the Intervenors may participate in such discovery, subject to any limits agreed upon by the parties or ordered by the Court.

Defendants take no position on the motion.

CONCLUSION

The motion to intervene should be granted.

Dated: December 10, 2020

Respectfully submitted,

/s/ *Michael B. Kimberly*

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