No. 09-35200

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Wilderness Society and Prairie Falcon Audubon, Inc.,

Plaintiffs-Appellees,

v.

United States Forest Service; Jane P. Kollmeyer, Supervisor, Sawtooth National Forest; Scott C. Nannenga, District Ranger, Minidoka Ranger District,

Defendants,

and

Magic Valley Trail Machine Association, Idaho Recreation Council, and The BlueRibbon Coalition, Inc.,

Intervenor-Applicants-Appellants.

On Appeal from the United States District Court for the District of Idaho,
Case No. CV 08-363-EJL; Hon. Edward J. Lodge

BRIEF FOR *AMICI CURIAE* AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CROPLIFE AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION IN SUPPORT OF INTERVENOR-APPELLANTS

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RULE 26.1 STATEMENT[1]

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* make the following Disclosures:

The American Petroleum Institute has no parent company, and no publicly held company owns 10 percent or more of its stock.

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/s/ Peter R. Steenland, Jr.
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[1] *Amici curiae* contacted counsel for the parties in this case and obtained their consent to file this brief supporting Intervenor-Appellants.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Petroleum Institute ("API") is a national trade association that represents all aspects of America's oil and natural gas industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies. API has approximately 400 members, from the largest major oil company to the smallest of independents. Among API's mandates is advocacy and representing its members' interests in legal proceedings.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents more than 300,000 direct members and indirectly represents more than three million businesses and organizations of every size, in every industry sector and from every region of the country. An important function of the Chamber to represent the interests of its members in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

CropLife America ("CLA") is a nationwide trade organization representing manufacturers, formulators, and distributors of crop protection and pest control products. Its member companies produce and sell virtually all the active compounds used in crop protection products registered for use in the United States.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Petrochemical and Refiners Association ("NPRA") is a national trade association of more than 450 companies, including virtually all U.S. refiners and petrochemical manufacturers. NPRA members supply consumers with a wide variety of products and services used daily, such as gasoline, diesel fuel, home heating oil, jet fuel, lubricants, and the chemicals that serve as "building blocks" in making diverse products like plastics, clothing, medicine and computers. Among NPRA's core objectives are to serve as a strong advocacy voice for our members with government officials, the media, and the public to promote policies that balance energy supply needs with environmental goals.

Amici's member companies have a vital interest in this case because they frequently pursue important, capital-intensive projects that depend upon federal permits, licenses, and other authorizations required by a host of statutes. In most cases, this federal review also triggers the National Environmental Policy Act

("NEPA"), requiring either an Environmental Impact Statement or an Environmental Assessment with a Finding of No Significant Impact. Agencies' NEPA analyses are frequently challenged in court. Because a NEPA challenge can delay and even jeopardize a project entirely, *amici*'s members often seek to intervene to defend the integrity and adequacy of the NEPA analysis. Although a NEPA challenge is directed to the procedure followed by the federal agency, the goal of the challenge is often to modify the substantive nature of the project itself. Yet, the Ninth Circuit's "federal defendant rule" prevents *amici*'s members from intervening as of right in such cases. *Amici* submit this brief to urge the Court to abandon that rule.

INTRODUCTION

In a broad array of circumstances, NEPA requires federal agencies to follow certain procedures to evaluate the environmental impact of their actions. 42 U.S.C. § 4332(2)(C)(i). Agency actions that require compliance with NEPA procedures include approvals for myriad business operations and projects pursed by private parties. These private enterprises run the gamut from a solar energy transmission line across federal lands and a multi-billion dollar natural gas pipeline, to an artist's display on federal lands.[2] In each example, the private party seeking

[2] *See infra* note 4 (Alaskan Natural Gas Pipeline Project); Notice of Availability of Draft Environmental Impact Statement for the NextLight Renewable Power, LLC,

federal approval has an obvious, substantial interest in defending the agency's NEPA analysis against a court challenge. If a court deems the analysis inadequate, the project cannot proceed. Even though a NEPA plaintiff can only challenge the agency's NEPA procedures, the practical effect of the challenge centrally implicates the interests of the project sponsor.

The plain terms of Federal Rule of Civil Procedure 24(a) allows a party with such critical interests to intervene in defense of the agency's decision. But this Court alone has reached the opposite conclusion, reasoning that because only the federal government can violate NEPA, only the federal government can defend the NEPA analysis. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989). *Amici curiae* support Appellant-Intervenors' arguments urging the Court to abandon this unique Ninth Circuit "federal defendant rule," and will not belabor them. Instead, *amici curiae* submit this brief to demonstrate that, given NEPA's broad application, this Circuit's federal defendant rule has far-reaching, manifestly unfair and untoward consequences, which compels its abandonment.

Silver State Solar Project, Primm, NV, 75 Fed. Reg. 19,990 (Apr. 16, 2010); Notice of Availability of the Draft Environmental Impact Statement for the Proposed Over the River™ Art Project, Colorado, 75 Fed. Reg. 41,517 (July 16, 2010)

ARGUMENT

I. NEPA EXTENDS BROADLY TO PROJECTS IMPACTING PRIVATE PARTIES AND STATE AND LOCAL GOVERNMENTS

In reconsidering the federal defendant rule, this Court must take account of NEPA's vast scope. NEPA is not limited to federal land and resource management actions, such as the Forest Management Plan at issue in this case. Nor is NEPA triggered only by federal project decisions, such as the construction of federal buildings. NEPA applies to a broad array of federal agency decisions that determine the fate of projects pursued by private parties as well as state and local governments. Yet, the Ninth Circuit federal defendant rule deprives these parties of the right to intervene to NEPA cases challenging any of those decisions.

NEPA's reach cannot be overstated. The Act "is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dept. of Interior*, 608 F.3d 592, 599 (9th Cir. 2010) (quoting 40 C.F.R. § 1500.1(c)). To that end, NEPA requires federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i); *see* 40 C.F.R. part 1502. NEPA regulations define "major Federal actions" broadly to include "projects and programs entirely or partly financed, assisted, conducted, *regulated*, or *approved*

by federal agencies," as well as "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a) (emphasis added). Under governing NEPA regulations, an agency may conclude that an action falls within a categorical exclusion from the EIS requirement, or prepare a less comprehensive Environmental Assessment ("EA") and issue a finding that the action would not have significant environmental impacts (known as a Finding of No Significant Impact ("FONSI")). 40 C.F.R. §§ 1508.9, 1508.13. Each of those NEPA procedures, however, is subject to challenge. Thus, a plaintiff may invoke NEPA to challenge a broad array of agency actions, including actions that "regulate" or "approve" private projects, *id.* § 1508.18(a)—even when the agency finds the private project will not have significant environmental impacts.

Federal decisions concerning management of federal lands are merely one subset of agency actions subject to NEPA. Undoubtedly, such land management decisions and the accompanying NEPA analysis have significant ramifications for private parties. For example, before constructing a pipeline or electric transmission line across federal lands, a party must obtain a right of way under the Mineral Leasing Act, 30 U.S.C. §§ 181–287, from the Bureau of Land Management. That decision triggers NEPA review. *E.g.*, *Hammond v. Norton*, 370 F. Supp. 2d 226, 233 (D.D.C. 2005).

Yet, beyond land management decisions, NEPA also reaches countless federal licensing, permitting, and registration schemes in which federal agencies ultimately decide whether a private party may pursue some project. *See* 40 C.F.R. § 1508.18(b). For example, a mixed-use development project that involves work in wetlands requires a permit from the Army Corps of Engineers, the issuance of which triggers NEPA. *E.g.*, *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1111-12 (9th Cir. 2000). Private parties cannot construct a natural gas pipeline, even across non-federal lands, without approval from the Federal Energy Regulatory Commission and an accompanying EIS or EA and finding no significant environmental impacts. *See, e.g.*, *Moreau v. FERC*, 982 F.2d 556, 560 (D.C. Cir. 1993). And, a seed company that develops a new strain of genetically engineered crops must obtain approval from the U.S. Department of Agriculture, which must undertake NEPA analysis.[3] In these instances, the developer, the natural gas company, and the seed company typically would wish to intervene to defend the NEPA analysis and represent their significant interests in the federal decision.

[3] *E.g.*, *Ctr. for Food Safety v. Vilsack*, No. C 08-00484 JSW, 2009 U.S. Dist. LEXIS 86343, at *5, 30 (N.D. Cal. Sept. 21, 2009); *see also Ctr. for Food Safety v. Vilsack*, No. C 10-04038 JSW, Dkt. No. 92, at 3-4 (N.D. Cal. Sept. 28, 2010) (holding that seed company was not entitled to intervene as of right).

Moreover, private parties frequently invest substantial resources in pursuing projects that are contingent upon the federal agency's approval surviving a NEPA challenge. An especially dramatic example involves two competing proposals to build and operate an Alaskan natural gas pipeline, which would traverse nearly 2,000 miles and cost between $26 and $42 billion to construct.[4] Congress has expressly found such a project to be in the national interest. 15 U.S.C. § 720a(b)(2)(A). It would be inconceivable that an entity spending those sums of money would be excluded from a case challenging the EIS upon which the project may depend.[5] Similarly, a utility requiring a federal license to construct a nuclear power plant, with a price-tag in the billions of dollars, would likely seek to intervene in defense of the accompanying EIS. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) (permit applicant intervened as defendant).

Would-be intervenors are not just private parties. They regularly include state and local governments, as well as tribal authorities, that need federal authorization to complete important projects that have been found to be in the

[4] Alaska Natural Gas Transportation Projects, Alaska Natural Gas Pipeline Project Fact Sheet (Oct. 2010), *available at* http://www.arcticgas.gov/sites/default/files/documents/october-2010-fact-sheet.pdf

[5] With respect to potential Alaskan pipeline sponsors, Congress confined judicial review of the project to the D.C. Circuit, 15 U.S.C. § 720c(a), which has not adopted the Ninth Circuit federal defendant rule.

public interest. For example, the City of Chicago intervened when the Federal Aviation Administration's EIS for the $15 billion expansion of O'Hare International Airport was challenged.[6] *See Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006). Similarly, Massport, a state agency, intervened when an EIS for expansion of Boston's Logan International Airport was challenged. *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 681 (D.C. Cir. 2004). Likewise, the South Florida Water Management District, a state agency, intervened when plaintiffs challenged federal permits to implement state projects that are part of the Federal-State Comprehensive Everglades Improvement Program. *See United States v. South Florida Water Mgmt. Dist.*, No. 88-1886-CIV, 2010 WL 1292275, at *6 (Mar. 31, 2010) (describing District's intervention in *NRDC v. Army Corps of Eng'rs*, No. 07-80444-CIV).

Potential intervenors often collaborate with federal agencies in preparing the NEPA document, in part because the EIS or EA is simply one aspect of the larger process involved in obtaining an array of requisite federal approvals for projects. Because these non-federal entities typically design and execute the project, they usually have information necessary for the agency to conduct the NEPA review. Indeed, many agencies have promulgated regulations or other guidance that

[6] *See* Monique Garcia, *O'Hare Lands More Federal Funds for Expansion*, Chicago Tribune (Apr. 6, 2010) (noting cost of the "the $15 billion O'Hare expansion").

precisely dictate how parties must cooperate with the agency. To take one example, FERC requires natural gas project applicants to submit an "environmental report," as well as "any studies that the Commission staff considers necessary or relevant," and to "[c]onsult with appropriate Federal, regional, State, and local agencies" during preparation of the EIS. 18 C.F.R. § 380.3(b), (c). These "environmental reports" total some 13 volumes that embrace every subject the Commission thereafter addresses in its subsequent EIS. Typically, the applicants for any comprehensive proposal requiring federal environmental review also provide part of the financing necessary to complete the NEPA process, which often totals millions of dollars. *See, e.g.*, FAA Order 1050.1E, Environmental Impacts: Policies and Procedures, at 2-4 (2006). The NEPA process can consume years, as the applicants and the federal agency engage in multiple rounds of project design and development of alternatives, all in fulfillment of NEPA's purposes. *See, e.g.*, *Greater Yellowstone Coalition v. Larson*, 641 F. Supp. 2d 1120, 1128-1129 (D. Idaho 2009) (detailing the Bureau of Land Management's five-year process of working with mine operator to develop EIS).

Just as it would be difficult to overstate NEPA's reach, the same can be said for the complexity and detailed scrutiny provided in today's NEPA review. This was not always so. In 1973, this Court upheld an EIS prepared by the FAA for a

new, 12,000 foot runway at Honolulu International Airport, even though the entire document totaled only 46 pages, and its treatment of air pollution consisted of stating that prevailing breezes pushed all emissions into the South Pacific. *See Life of the Land v. Brinegar*, 485 F.2d 460, 467, 470 (9th Cir. 1973), *cert. denied* 416 U.S. 961. Today, with the need to respond fully to comments on the Draft EIS, and with appendices and other addenda, a final EIS for a controversial project can top out at thousands of pages and millions of dollars.

In sum, the Court must consider NEPA's expansive domain in evaluating the federal defendant rule. NEPA cases today carry serious, practical consequences for would-be intervenors who have invested enormous sums in projects and who were intimately involved in both the NEPA process and the underlying regulatory process that triggered NEPA in the first instance. Whether the proposed federal action involves a permit for a "bet the company" project or something more modest, it defies common sense to exclude the project proponent from participating in the defense of the NEPA analysis. As demonstrated below, Rule 24 compels the opposite result.

II. THE FEDERAL DEFENDANT RULE CONFLICTS WITH RULE 24 AND PRODUCES ILLOGICAL, UNDESIRABLE CONSEQUENCES

Rule 24's text, and the vast majority of case law construing it, call for a flexible intervention determination that is guided primarily by practical, case-specific considerations based on the demonstrated interests of a proposed

intervenor. By contrast, the Ninth Circuit's federal defendant rule draws a bright line that precludes a trial court's ability to address practical realities. As we shall now demonstrate, the federal defendant rule is legally incorrect and yields illogical and undesirable results.

A. The Federal Defendant Rule Is Inconsistent With Rule 24, Supreme Court Precedent, Decisions of Other Circuits, and Non-NEPA Ninth Circuit Decisions

The federal defendant rule cannot be reconciled with the Federal Rule of Civil Procedure 24(a), the Supreme Court's cases, decisions of other circuits, or even non-NEPA decisions of this Court.

1. Rule 24(a) Focuses on the Practical Effects on the Potential Intervenor's Interests, Which Often Suffice for Intervention As of Right in NEPA Cases

By its plain terms, Rule 24(a) directs the court to consider how the case may practically affect the potential intervenor's interests. It mandates that a court permit intervention by anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). The Supreme Court has construed Rule 24(a) to require a "significantly protectable interest," *Donaldson v. United States*, 400 U.S. 517, 531 (1971), while recognizing that the current version of Rule 24 was intended to inject more

"elasticity" into the intervention inquiry. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133-34 (1967); *see also* 7C Wright, Miller & Kane, Federal Practice and Procedure: Civil § 1908.2 (3d ed. 2010) ("The central purpose of the 1966 amendment was to allow intervention by those who might be practically disadvantaged by the disposition of the action . . . .").

Consistent with that purpose, in every context other than NEPA, the Ninth Circuit has "liberally" construed Rule 24's inquiry to be "guided primarily by practical considerations, not technical distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (internal quotation marks omitted). Critically, a prospective intervenor does not need to "show that the interest he asserts is one that is protected by the statute under which the litigation is brought." *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993) (reviewing cases). Rather, "[i]t is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Id.*

Under these principles, Rule 24(a) clearly allows intervention of right in many NEPA cases. Just as it does in every other context, in the NEPA context, Rule 24(a) requires the court to consider the practical impact the case will have on the potential intervenor's interests. It does not matter whether NEPA create the protectable interest. *Id.* However, it does suffice that the potential intervenor's

legally protectable interests—which may include interests in capital investments and federal authorization to pursue projects—relate to the claims at issue. *Id.*

As demonstrated above, sponsors of a project under NEPA review frequently have substantial interests that are inextricably intertwined with the outcome of a NEPA challenge. They may be the applicant for a federal permit or license that is conditioned upon NEPA compliance. They may have invested significant resources in projects requiring access to federal lands and, as a result, their employees' very future are dependent upon a federal agency's NEPA compliance. Quite likely, they have cooperated in the preparation of the NEPA document, submitting project information and financing the attendant studies. These "practical considerations" of the case affect the potential intervenor's interests and should compel the court to find a right to intervene by the non-federal party under Rule 24. *Berg*, 268 F. 3d at 818.

2. The Ninth Circuit Federal Defendant Rule is Indefensible

This Court's federal defendant rule simply ignores Rule 24(a)'s central consideration of the potential intervenor's interests. Instead, it focuses on whether the potential intervenor may be liable under the statute giving rise to the plaintiff's cause of action—a factor nowhere present in Rule 24.

Moreover, the rationale underlying the federal defendant rule is wholly untenable and lacks any reference to the standards of Rule 24(a). The Circuit's

current rationale is that "because NEPA requires action only by the government, only the government can be liable under NEPA. Because a private party can not violate NEPA, it can not be a defendant in a NEPA compliance action." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002) (internal quotation marks omitted). But that reasoning applies equally to numerous other licensing, permitting, or regulatory regimes that the federal government administers. For example, Section 404 of the Clean Water Act empowers only the Army Corps of Engineers to issue permits for discharge into navigable waters, and only the Corps can be a defendant for an improper permit issuance. Nonetheless, courts allow the permit applicant to intervene as of right to defend against claims that the Corps' permitting decision violated the Clean Water Act. *See, e.g.*, *Wetlands Action Network*, 222 F.3d at 1109. There is no sound reason to treat NEPA claims differently.

Contrary to this Court's precedents, NEPA cannot be distinguished from permitting regimes like the Clean Water Act by claiming that the Clean Water Act "regulates private parties and state and local governments," whereas NEPA "regulates the federal government." *Sierra Club*, 995 F.2d at 1485. That simplistic classification overlooks the practical realities of how the statutes operate. In many contexts, NEPA directly alters the conduct of private parties by affecting an agency's ability to approve their projects. In effect, NEPA encourages private

parties to design their projects in such a manner that the agency's NEPA analysis will withstand scrutiny. Further, as noted, private parties regularly are required to work with the agencies to develop multiple alternative project designs and to revise their projects throughout the NEPA process. *See, e.g.*, *Larson*, 641 F. Supp. 2d at 1128-1129 (describing development of four alternative designs and the two-year process of refining the final project design). In such cases, NEPA effectively regulates private conduct just as an environmental permitting regime like the Clean Water Act does. On the other hand, it would be true to say that permitting or licensing regimes regulate the federal government. They prescribe the terms under which a federal agency may authorize conduct; if the agency issues a permit that violates those terms, the agency action may be reversed by reviewing courts.

Moreover, even accepting the Ninth Circuit's determination that, among the federal environmental statutes, NEPA is somehow different, it does not support the conclusion that private parties can never have significantly protectable interests to justify intervention as of right. NEPA imposes procedural requirements on federal government action much like the Administrative Procedure Act, 5 U.S.C. §§ 701 - 912, regulates federal agency action. Under the logic of the federal defendant rule, private parties *never* have a right to intervene to defend an agency action against an APA procedural claim, because only the federal agency can comply with the APA's requirements. Yet, this Court has not followed that logic in APA cases.

Instead, it has employed the usual, pragmatic Rule 24(a) evaluation of the "practical harm to the applicant." *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (holding that private party had a right to intervene to defend an agency rulemaking against a suit seeking to enjoin the rulemaking).

Given the apparent flaws in the federal defendant rule, it is no surprise that other courts of appeals have declined to adopt it.[7] As the Third Circuit explained, the Ninth Circuit's "wooden standard minimizes the flexibility and spirit of Rule 24." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 971 (3d Cir. 1998). Because the "reality is that NEPA cases frequently pit private, state, and federal interests against each other," the Ninth Circuit's rule "in such cases contravene[s] a major premise of intervention—the protection of third parties affected by pending litigation." *Id.* In all cases, regardless of whether the claim arises under NEPA, the intervention decision should turn on whether the case practically threatens to impair or impede the applicant's significantly protectable interests. *See, e.g.*, *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995-996 (10th Cir. 2009) (reversing denial of mining company's motion to intervene to defend agency's EIS because if challenge succeeded, "operation of the West Elk Mine will be impaired, or even halted," and the "'threat of economic injury from the outcome of litigation

[7] *See* Appellants' Op. Br., Dkt. No. 16-2, at 42-43 (Sept. 10, 2009) (collecting conflicting cases from other circuits); *Amici* Br. of Motorcycle Industry Council & Specialty Vehicle Instit. of Am., Dkt. No. 17-2, at 15-17 (Sept. 10, 2009) (same).

undoubtedly gives a petitioner the requisite interest'") (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002)).[8] The Court should abandon the federal defendant rule and apply the prevailing Rule 24(a) standard to intervention motions in NEPA claims.

B. The Federal Defendant Rule Produces Illogical and Undesirable Consequences

The federal defendant rule should be discontinued also because of the illogical and undesirable circumstances it produces. Plaintiffs often assert multiple statutory claims against federal permitting decisions, invoking not only NEPA but also the substantive permitting statute and other procedural statutes like the Administrative Procedure Act. If the federal defendant rule is limited to NEPA, as this Court's decisions suggest, a permit applicant cannot intervene to defend against NEPA claims but can intervene to defend against other claims—even though all claims relate to a single permitting decision. *See Wetlands Action Network*, 222 F.3d at 1111-12 (affirming district court's decision allowing permit applicant to intervene as of right to defend against CWA claims, but not NEPA

[8] *See also Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) (reversing denial of conservation association's motion to intervene as of right to defend agency's wilderness plan because association's interests were implicated, and "even the Government cannot always adequately represent conflicting interests at the same time"); *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (reversing denial of commercial fishing groups' motion to intervene to defend agency's fishing plan).

claims). This is especially bizarre because the Council on Environmental Quality, in implementing NEPA, has recommended that the federal agencies use the NEPA process as the platform for which all environmental decision-making should be made. *See* 40 C.F.R. § 1502.25.

Precisely because there is no principled basis for limiting the federal defendant rule to NEPA, some district courts have applied it to exclude applicants in cases arising under other environmental statutes. *See, e.g.*, *Ctr. for Food Safety v. Connor*, No. C 08-00484 JSW, 2008 U.S. Dist. LEXIS 65867, at *7-9 (N.D. Cal. Aug. 15, 2008) (applying the federal defendant rule to deny intervention to defend Plant Protection Act decision and collecting cases denying intervention under the National Forest Management Act, the Endangered Species Act, the Federal Property and Administrative Services Act, the Federal Land Policy and Management Act, the Public Rangelands Improvement Act, and the Taylor Grazing Act of 1934); *Southwest Center for Biological Diversity v. U.S. Forest Service*, 82 F. Supp. 2d 1070, 1074 (D. Ariz. 2000) (denying cattle ranchers' motion to intervene to defend the agency's issuance of livestock grazing permits against an Endangered Species Act challenge). As a result, in the district courts, the federal defendant rule threatens to further disable private parties from defending their often-massive investments in projects with environmental impacts.

In addition, unless this Court changes course, its federal defendant rule will continue to invite forum shopping by parties bringing NEPA challenges. NEPA analyses are frequently subject to challenge in multiple courts of appeals. Not surprisingly, plaintiffs may have a choice of courts to challenge a NEPA analysis accompanying federal approval of a pipeline or transportation system that crosses multiple jurisdictions. Likewise, the NEPA document accompanying federal actions that are nationwide in scope may be challenged in different jurisdictions. Given this choice of courts, the federal defendant rule creates an incentive for plaintiffs to bring a NEPA challenge in the district courts of the Ninth Circuit. Those courts are more likely to exclude would-be intervenors from defending the NEPA analysis in the liability phase. This makes the plaintiff's job easier, especially when those would-be intervenors have the expertise and project knowledge to mount an effective defense.

Such forum shopping places an increased burden on this Court's already overloaded docket. Appeals from NEPA cases that would otherwise go to different courts of appeals instead are filed in the Court because plaintiffs prefer the strategic advantage of the federal defendant rule. But this forum shopping is more than inefficient: It also has the potential to undermine public confidence in the judicial branch as "it would be unfair for the character or result of a litigation

materially to differ" merely because of where the suit is filed. *Hanna v. Plumer*, 380 U.S. 460, 467 (1965).

Finally, the federal defendant rule deprives the court of information that is crucial to a full and fair review of a NEPA challenge. As noted, in many NEPA contexts, a private party or state or local government entity pursuing some project has critical information about the project. Those non-federal entities often have technical expertise from which a court would benefit.[9] In certain situations, it is also possible that a project proponent may have a different motivation to defend the NEPA process than the federal agency has, especially because agencies are charged with balancing multiple, competing strands of the overall public interest. *WildEarth Guardians*, 573 F.3d at 996 (noting that the government's "obligation is to represent not only the interest of the intervenor but the public interest generally," and it "may not view that interest as coextensive with the intervenor's particular interest"). Indeed, in deciding whether to allow private party

[9] In fact, when the opponents of an earlier Chicago O'Hare improvement project challenged the FAA's approval of that airport expansion proposal in 1984, the Seventh Circuit's questions to petitioners' counsel altered the traditional federal response. Because it appeared the panel was more interested in matters involving the City than those regarding the FAA's approval of the project, respondents' argument began, not with FAA counsel, but with the attorney for the City of Chicago addressing the panel's concerns and taking the majority of the respondents' time. This flexibility and responsiveness may have been responsible for the somewhat unique conclusion to the court's opinion upholding the FAA action. *See Suburban O'Hare Commission v. Dole*, 787 F.2d 186, 200 (7th Cir. 1986), *cert. denied* 479 U.S. 847.

intervention in other environmental actions, this Court has studiously noted that "[t]he interests of government and the private sector may diverge," even when they have the same "ultimate objective." *Berg*, 268 F.3d at 823. Thus, allowing the applicant to intervene in defense of the NEPA analysis often brings an important additional perspective to the case and thus can improve a court's decision-making.

C. Allowing Intervention in the "Remedial Phase" Does Not Satisfy Rule 24

On occasion, this Court has allowed a private party or state or local government to intervene as a defendant in the "remedial phase" of a NEPA case. *E.g.*, *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995). Allowing this limited intervention does not, however, cure the deficiencies in the Ninth Circuit federal defendant rule. Rule 24(a) focuses on the interests of the proposed intervenor, and as demonstrated above, those interests are often sufficient to permit intervention to defend the merits of the NEPA analysis. Indeed, this Court's recognition that a proposed intervenor's interests can suffice to participate in the remedy phase undermines the federal defendant rule because those same interests are typically implicated in the merits.

Moreover, deciding whether the agency violated NEPA is often the critical juncture in a case. That decision dictates whether the project may proceed or, instead, whether the agency must undertake additional NEPA analysis, further delaying and increasing the costs of the underlying project. Thus, the proposed

intervenor who sponsored the project has a vital interest in defending the NEPA analysis on the merits. It will often have key project expertise and information that bears on the court's analysis at that stage. Permitting intervention only after the court has decided whether the NEPA analysis is sufficient is cold comfort to the entity whose project is ultimately at stake.

CONCLUSION

For the foregoing reasons, and those stated by Intervenor-Appellants, *Amici* respectfully request that this Court discontinue application of the federal defendant rule in actions brought under NEPA and other environmental statutes, and that it reverse the district court's decision denying appellants' motion to intervene under Federal Rule of Civil Procedure 24(a).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and the Ninth Court's Rule 32-1, I certify that the foregoing Brief of *Amici Curiae* in Support of Intervenor-Appellants complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 5,266 words.

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STATEMENT OF PARTIES' CONSENT TO FILING OF BRIEF

Amici Curiae file this brief supporting Intervenor-Appellants with the consent of the parties.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2010, I caused the foregoing brief to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF user. I have caused the foregoing brief to be mailed by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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