

# The Role of the Project Proponent in the NEPA Process

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## I. Introduction

The statutory trigger for preparation of an environmental impact statement (“EIS”) or environmental assessment (“EA”) under the National Environmental Policy Act (“NEPA”)<sup>1</sup> is “major federal action.”<sup>2</sup> Neither the statute nor the implementing regulations promulgated by the Council on Environmental Quality (“CEQ”) distinguish much between federal actions that are initially proposed by a federal agency and federal actions that are proposed by a private non-governmental entity.<sup>3</sup> Of course, many federal actions are initially proposed by private applicants rather than federal agencies. In the natural resources development context, private

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<sup>1</sup> 42 U.S.C. §§ 4321 to 4370f.

<sup>2</sup> *Id.* § 4332(C).

<sup>3</sup> *See id.*; 40 C.F.R. Part 1500; CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 (1983) (“Neither NEPA nor the CEQ regulations make a distinction between actions initiated by a Federal agency and by applicants.”).

entities may require federal permits, decisions, or authorizations that amount to “major federal action” subject to NEPA.

There are numerous examples: federal oil and gas lease sales,<sup>4</sup> Bureau of Land Management (“BLM”) decisions approving applications for permits to drill (“APDs”)<sup>5</sup> or mining plans of operations,<sup>6</sup> ski area expansions on lands managed by the United States Forest Service (“Forest Service”),<sup>7</sup> timber sales on federal lands,<sup>8</sup> and amendments or revisions to BLM or Forest Service land use plans.<sup>9</sup> This list is by no means exhaustive, and additional examples of federal actions commonly proposed by private entities are set forth in the margin.<sup>10</sup>

A number of questions may arise where a private entity – described in this paper as the “proponent” or “applicant” – proposes a federal action subject to NEPA. What exactly is the

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<sup>4</sup> E.g., Wyoming Outdoor Council, 156 IBLA 347, 348 (2002); Southern Utah Wilderness Alliance, 123 IBLA 13, 16 (1992).

<sup>5</sup> E.g., Southern Utah Wilderness Alliance, 159 IBLA 220 (2003).

<sup>6</sup> E.g., Western Shoshone Defense Project, 160 IBLA 32 (2003); Great Basin Mine Watch, 159 IBLA 324 (2003).

<sup>7</sup> E.g., Appeal of the Record of Decision and Final Environmental Impact Statement for the Loon Mountain Ski Resort Development and Expansion, White Mountain National Forest, New Hampshire, Appeal No. 02-09-0038 A215 (June 7, 2002), available at <http://www.fs.fed.us/r9/appeals/White-Mountain/?dir=2002>.

<sup>8</sup> E.g., Appeal of the Fossil Project Timber Sale, Black Hills National Forest, South Dakota, Appeal No. 2002-02-03-0016 A215 (May 13, 2002); Appeal of the Millswitch Timber Sale Project, Grand Mesa, Uncompahgre and Gunnison National Forests, Colorado, Appeal No. 2003-02-04-0035 (Oct. 7, 2003), available at <http://www.fs.fed.us/r2/projects/NEPA/decisions.shtml>.

<sup>9</sup> E.g., Decision on the Protest of the Wyoming Final Environmental Impact Statement and Proposed Plan Amendment for the Powder River Basin Oil and Gas Project, No. PP-WY-POWDRV-03-58, Department of the Interior (April 29, 2003); Decision on Appeal of the Six Rivers National Forest Land and Resource Management Plan, California, Appeal No. 95-13-00-0057-A217, United States Department of Agriculture (April 3, 1997) available at <http://www.fs.fed.us/emc/applit/nhappdec.htm>.

<sup>10</sup> Examples include: (i) a decision by the BLM authorizing the exchange of public lands for private lands under Section 206 of the Federal Land Policy Management Act (“FLPMA”), 43 U.S.C. § 1716; (ii) a special use permit for the use and occupancy of National Forest System lands issued by the Forest Service under 36 C.F.R. Part 251; (iii) a decision by the Department of the Interior under the Mineral Leasing Act, 30 U.S.C. §§ 201, 211, 226, 241, 262, 281, 272, to issue leases authorizing private entities to develop federally owned deposits of coal, oil, gas, phosphate, sodium, sulphur, potash, or oil shale; (iv) a 40-year special use permit for a ski area on National Forest System lands issued by the Forest Service under the Ski Area Permit Act of 1986, 16 U.S.C. § 497b; (v) a decision by the Department of the Interior authorizing the issuance of oil and gas leases for development on outer continental shelf areas under the Outer Continental Shelf Leasing Act, 43 U.S.C. §§ 1331-1343; (vi) right-of-ways issued by the BLM on public lands under FLPMA, 43 U.S.C. §§ 1761 to 1771; (vii) a right-of-way issued by the BLM under the Mineral Leasing Act, 30 U.S.C. § 185; and (viii) a permit to discharge dredge and fill materials into waters of the United States issued by the United States Army Corps of Engineers (“Corps”) under Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

proponent's role? How does the action advanced by the proponent translate into the agency's proposed action? What is the relationship between the proponent's objectives and the agency's purpose and need statement in the NEPA document? What kind of information can the proponent share with the agency? Can it respond to comments from third parties? How can the proponent fund the preparation of the EIS or EA by a consultant for use by the agency? Under what circumstances do conflicts of interest arise?

What if the EIS or EA is challenged in court by a third party? What options does the proponent have? The proponent has a unique and concrete interest in such litigation that is not shared by the agency or the public. The proponent's development objectives may even be the real target of NEPA litigation even though the proponent is neither named as a defendant nor itself capable of preparing additional NEPA analysis.<sup>11</sup>

This paper identifies the role of the project proponent in the NEPA process. It assumes a basic familiarity with NEPA and provides an overview of issues that arise when the federal action analyzed is proposed in whole or in part by a private entity. The objective is to identify the "rules of the road" (to the extent that they exist) based on NEPA, CEQ regulations or policies, agency practice, and judicial opinions. Part II addresses the proponent's place in the NEPA process. Part III examines issues that arise when a consultant funded by the proponent prepares a NEPA document for the agency, and Part IV identifies the proponent's options in litigation challenging an EIS or EA.

## II. Role of the Proponent in the NEPA Process

### A. Overview

No single provision of NEPA or the CEQ regulations comprehensively addresses the proponent's role. The proponent's place in the process is referenced in numerous CEQ regulations which together demonstrate that the proponent has all the participation rights of the public, and more. For example, as discussed in Parts II and III of this paper, the proponent is allowed to take part in early planning with the agency,<sup>12</sup> draft its proposal for submission to the agency,<sup>13</sup> recommend that the agency select a specific contractor to prepare the environmental analysis and then fund the work by the contractor chosen by the agency,<sup>14</sup> suggest time limits for

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<sup>11</sup> Cf. Conservation Law Foundation of New England, Inc. v. Mosbacher, 966 F.2d 39, 43-44 (1<sup>st</sup> Cir. 1992) (ruling that commercial fisherman were entitled to intervene to defend suit against a federal agency regulating their fishing because "[t]he fishing groups seeking intervention are the real targets of the suit and are the subjects of the regulatory plan. Changes in the rules will affect the proposed intervenors' business, both immediately and in the future.") (citing cases).

<sup>12</sup> 40 C.F.R. § 1501.2(d).

<sup>13</sup> See infra Part II.B.

<sup>14</sup> CEQ Forty Most Asked Questions, Question 16, 46 Fed. Reg. 18,026, 18,031 (1981) (authorizing "the preparation of EISs by contractors paid by the applicant" and where "the applicant ... contracts directly with a consulting firm for its preparation"); Associations Working for Aurora's Residential Environ. v. CDOT, 153 F.3d 1122, 1127 (10<sup>th</sup> Cir. 1998) (upholding EIS prepared by contractor); BLM NEPA Handbook H-1790-1, Appendix 7 (1988) (authorizing

the agency's analysis,<sup>15</sup> work with the agency to prepare project proposals and other information,<sup>16</sup> provide comments to the agency,<sup>17</sup> and generally share information with the agency in an open fashion<sup>18</sup> so as to further NEPA's goal of "excellent action" based on "high quality" "scientific analysis, expert agency comments, and public scrutiny."<sup>19</sup>

## B. Proposed Action

Together with the no action alternative and any other alternatives, the proposed action is "the heart of the environmental impact statement."<sup>20</sup> The CEQ definition of "proposal"<sup>21</sup> and regulatory references to the "proposed action"<sup>22</sup> do not distinguish between proposals initiated by a private entity and proposals initiated by a federal agency. Where a private entity proposes federal action, however, the proposed action is usually the proposal submitted by that applicant.<sup>23</sup>

The proponent of a major federal action has the advantage of drafting its proposal. It should do so carefully. The proponent should: fully describe the action in detail; include pictures, charts, and technical information; identify foreseeable direct and indirect environmental effects; and explain whether environmental effects will be minimized or avoided through permitting, mitigation, and reclamation.<sup>24</sup> The proponent may want to incorporate voluntary mitigation into its proposal, so as to minimize or avoid adverse environmental effects or controversy.

The proponent should identify its objectives and goals, and the degree to which they are congruent with the agency's statutory and regulatory mission, policies, and objectives identified in other applicable materials, such as federal land use plans. By submitting a robust proposal, the proponent can help the agency spot significant issues and minimize insignificant ones,

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proponent of federal action to recommend contractor for BLM to select), *available at* <http://www.blm.gov/nhp/efoia/wo/handbook/h1790-1.pdf>.

<sup>15</sup> 40 C.F.R. § 1501.8(d).

<sup>16</sup> *Id.* §§ 1506.1(b), 1501.2(d), 1501.7(a)(1).

<sup>17</sup> *Id.* § 1503.1(a)(3).

<sup>18</sup> *Id.* § 1506.5(a).

<sup>19</sup> *Id.* § 1500.1.

<sup>20</sup> *Id.* § 1502.14.

<sup>21</sup> *Id.* § 1508.23.

<sup>22</sup> *Id.* § 1502.14.

<sup>23</sup> *E.g.*, Department of the Interior NEPA Manual, 516 DM 4.10(A)(3) (stating that for proposals by a private entity, proposed action "means a non-Federal entity's planned activity which falls under a Federal agency's authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments."), *available at* [http://elips.doi.gov/app\\_DM/index.cfm?fuseaction=home](http://elips.doi.gov/app_DM/index.cfm?fuseaction=home).

<sup>24</sup> *See* 40 C.F.R. § 1506.5.

certainly one of NEPA's aims.<sup>25</sup> Further, as explained below, goals identified by the proponent may help the agency draft its purpose and need statement and identify reasonable alternatives to the proposed action.

### C. Purpose & Need

The purpose and need section in an EIS or EA is a brief statement of “the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”<sup>26</sup> It is simply the agency's goals or objectives in conducting the NEPA process.<sup>27</sup>

The purpose and need statement is a critical – and often overlooked – section of an EIS or EA. Although the statement may be short, it defines the range of reasonable alternatives.<sup>28</sup> Alternatives that would accomplish the objectives in the agency's purpose and need statement are deemed reasonable.<sup>29</sup> “Alternatives that do not accomplish the purpose of an action are not reasonable and need not be studied in detail.”<sup>30</sup> And an agency is not required to analyze alternatives that are remote, speculative, impractical, or ineffective at achieving the stated goals.<sup>31</sup> In this manner, the purpose and need statement shapes the scope and structure of the environmental analysis.

The purpose and need statement sets forth the *agency's* objectives. How does it relate to the proponent's goals in requesting the underlying federal action? Several Courts of Appeals have ruled that, subject to a reasonableness test, the agency may take the proponent's goals into

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<sup>25</sup> Id. § 1500.1(b) (“Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.”).

<sup>26</sup> Id. § 1502.13.

<sup>27</sup> See Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1174 (10<sup>th</sup> Cir. 1999).

<sup>28</sup> Id.; Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991) (“The goals of an action delimit the universe of the action's reasonable alternatives.”); Native Ecosystem Council v. United States Forest Serv., 428 F.3d 1233, 1247 (9<sup>th</sup> Cir. 2005) (“Alternatives that do not advance the purpose of the ... [p]roject will not be considered reasonable or appropriate.”).

<sup>29</sup> E.g., Citizens Against Burlington, Inc., 938 F.2d at 195; Laguna Greenbelt, Inc. v. United States Dept. of Transp., 42 F.3d 517, 524 (9<sup>th</sup> Cir. 1994) (“The range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project.”).

<sup>30</sup> Citizens' Committee to Save our Canyons v. United States Forest Serv., 297 F.3d 1012, 1030 (10<sup>th</sup> Cir. 2002) (quotation omitted); accord AWARE, 153 F.3d at 1130 (“[I]t is clear an agency need not independently evaluate alternatives it determines in good faith to be ineffective as a means to achieving the desired ends.”) (quotation omitted); Laguna Greenbelt, Inc., 42 F.3d at 525 (upholding agency's decision not to analyze alternative that was “not reasonably related to the purposes of the project”); North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1543 (11<sup>th</sup> Cir. 1990) (ruling that agency properly eliminated mass transit alternative from highway EIS because it would not solve the congestion problem targeted by the agency).

<sup>31</sup> E.g., Airport Neighbors Alliance, Inc. v. United States, 90 F.3d 426, 432 (10<sup>th</sup> Cir. 1996) (citing cases); Laguna Greenbelt, Inc., 42 F.3d at 525.

account in identifying the agency's objectives.<sup>32</sup> Of course, an agency's purpose and need statement cannot be defined so narrowly as to preclude consideration of reasonable alternatives to the proposed action.<sup>33</sup> However, so long as it is reasonable, the agency may incorporate the proponent's objectives into its purpose and need statement, thereby using the proponent's goals to help define the range of alternatives. The Tenth Circuit has ruled, for example, that where "the action subject to NEPA review is triggered by a proposal or application from a private party, it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor."<sup>34</sup> The D.C. Circuit has observed that "Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action."<sup>35</sup>

At least one court – the Seventh Circuit – has ruled that the proponent's objectives play a far more limited role in preparing the agency's purpose and need statement and in defining reasonable alternatives. It has ruled that "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals."<sup>36</sup> The Seventh Circuit has set aside an EIS that defined its purpose and need as the proponent's objectives.<sup>37</sup> And despite the rulings by the courts set forth in the preceding paragraph, CEQ guidance states that "[r]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."<sup>38</sup>

#### D. Alternatives

NEPA requires federal agencies to consider reasonable alternatives to the proposed action, including the alternative of no action.<sup>39</sup> Although the proponent prepares the proposal that may become the proposed action in a NEPA document, it is the agency's obligation to identify the full range of alternatives. A proponent, however, may prepare written materials that explain whether it believes particular alternatives are reasonable, technically feasible,

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<sup>32</sup> Citizens Against Burlington, Inc., 938 F.2d at 196 ("When an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application.") (citation omitted); Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1046-47 (1<sup>st</sup> Cir. 1982); City of Grapevine v. Dep't of Transp., 17 F.3d 1502, 1506 (D.C. Cir. 1994); Louisiana Wildlife Fed'n, Inc. v. York, 761 F.2d 1044, 1048 (5<sup>th</sup> Cir. 1985).

<sup>33</sup> E.g., Davis v. Mineta, 302 F.3d 1104, 1120 (10<sup>th</sup> Cir. 2002).

<sup>34</sup> Citizens' Committee to Save Our Canyons, 297 F.3d at 1030.

<sup>35</sup> Citizens Against Burlington, Inc., 938 F.2d at 199.

<sup>36</sup> Van Abbema v. Fornell, 807 F.2d 633, 638 (7<sup>th</sup> Cir. 1986) (emphasis in original); accord Simmons v. United States Army Corps of Engineers, 120 F.3d 664, 669 (7<sup>th</sup> Cir. 1997) ("An agency cannot restrict its analysis to those alternative means by which a particular applicant can reach *his* goals.") (quotation omitted & emphasis in original).

<sup>37</sup> Simmons, 120 F.3d at 670.

<sup>38</sup> CEQ Forty Most Asked Questions, Question 2a, 46 Fed. Reg. at 18,029.

<sup>39</sup> 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1502.14; Native Ecosystems Council, 428 F.3d at 1245.

economically practical, consistent with the purpose and need statement, etc. Such statements should be added to the administrative record.

It is easy to identify the no action alternative when the proposed action is submitted by a private proponent. “No action’ in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.”<sup>40</sup>

The agency may identify a preferred alternative in the draft EIS.<sup>41</sup> The Department of the Interior defines “preferred alternative” as “the alternative which the agency believes would fulfill its statutory mission and responsibilities, while giving consideration to economic, environmental, technical, and other factors.”<sup>42</sup> The preferred alternative identified by the agency in the draft EIS may – or may not – be the same as the action submitted by the proponent.<sup>43</sup>

#### E. Comments

The preparation of an EIS is subject to notice and an opportunity for comment.<sup>44</sup> The CEQ regulations on commenting are one of the few places in the regulations where the proponent is directly referenced – agencies are directed to “request comments from the applicant, if any.”<sup>45</sup>

Comments on NEPA documents are public documents.<sup>46</sup> In the author’s experience, upon request, agencies will freely provide copies of comment to the proponent. The proponent is entitled to review those comments. The comments may provide valuable information: other agencies and third parties may express information that may help the proponent avoid future controversies or conflicts.

#### F. Responses to Comments

The proponent is entitled to respond to comments received from third parties or other agencies. Nothing prohibits the proponent from doing so, even after the close of the comment period.<sup>47</sup> The proponent responds to comments by drafting a letter to the agency that states that

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<sup>40</sup> CEQ Forty Most Asked Questions, Question 3, 46 Fed. Reg. at 18,029.

<sup>41</sup> 40 C.F.R. § 1502.14(e).

<sup>42</sup> Department of the Interior NEPA Manual, 516 DM 4.10(A)(4), *available at* [http://elips.doi.gov/app\\_DM/index.cfm?fuseaction=home](http://elips.doi.gov/app_DM/index.cfm?fuseaction=home).

<sup>43</sup> Id.

<sup>44</sup> For an EIS, the agency will request public comment at the initial “scoping” stage, on the draft EIS, and, under certain circumstances, on the Final EIS prior to reaching a decision. 40 C.F.R. §§ 1501.7, 1503.1.

<sup>45</sup> 40 C.F.R. § 1503.1(3).

<sup>46</sup> Id. § 1506.6(f) (providing that “comments received” on an EIS “shall” be made “available to the public pursuant to the provisions of the Freedom of Information Act”).

<sup>47</sup> For example, the Corps’ regulation for processing applications for discharge permits under Section 404 of the Clean Water Act provides:

it is responding to specific comments and requesting that the document be added to the administrative record. The response may set forth factual, technical, scientific, environmental, or other information.

Of course, it is the agency's decision whether it will affirmatively rely upon or incorporate information submitted by the proponent in response to comments. The CEQ regulations require the agency to "independently evaluate" information submitted by the proponent if it chooses to use that information,<sup>48</sup> consistent with its obligation to "insure the professional integrity" of its work product.<sup>49</sup>

#### G. Role of the Project Proponent in Providing Information to the Agency and Building the Administrative Record

Once final agency action occurs, an agency's compliance with NEPA is subject to judicial review in United States District Court under the APA.<sup>50</sup> Under the APA, the reviewing court determines whether final agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"<sup>51</sup> based upon "the full administrative record that was before the [agency] at the time [it] made [its] decision."<sup>52</sup>

It is far easier to build a favorable record during agency proceedings than it is to supplement it later.<sup>53</sup> From a NEPA litigation point of view, an over inclusive record is better than an under inclusive one.

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If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer. At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer. A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant.

33 C.F.R. § 325.2(a)(3).

<sup>48</sup> 40 C.F.R. § 1506.5(a).

<sup>49</sup> Id. § 1502.24.

<sup>50</sup> See 5 U.S.C. § 706(2)(A); Edwardsen v. United States Dep't of the Interior, 268 F.3d 781, 791 (9<sup>th</sup> Cir. 2001) (reviewing Department of the Interior's NEPA compliance in authorizing off shore oil and gas development under APA); Dubois v. United States Dep't of Agriculture, 102 F.3d 1273, 1287 (1<sup>st</sup> Cir. 1996) (reviewing Forest Service's compliance with NEPA in issuing ski area special use permit under APA).

<sup>51</sup> 5 U.S.C. § 706(2)(A).

<sup>52</sup> Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

<sup>53</sup> E.g., Southwest Center for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1450 (9<sup>th</sup> Cir. 1996) ("Judicial review of an agency decision typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court.").



The agency is the steward of the administrative record. The agency can request the proponent to contribute “environmental information” to the record to aid the preparation of the NEPA document.<sup>54</sup> The proponent may also, on its own initiative, request the agency to add material to the record, including studies, technical information, factual material, correspondence, etc. This may be accomplished by the proponent providing the information to the agency with a letter requesting that it be added to the administrative record.

The weak response to a sharp comment – especially one which undercuts the agency’s position – is to ignore it or not directly respond to it. That approach may invite a reviewing court to set aside the NEPA document.<sup>55</sup> The better tactic is to address the comment directly and explain the agency’s rationale, even if the agency simply disagrees with the comment.<sup>56</sup> The proponent may, in responding to comments, articulate the proponent’s response, and provide technical analyses or other responsive information. If the agency independently evaluates information provided by the proponent,<sup>57</sup> it may incorporate that information into the NEPA document and even make it a basis for its decision.

#### H. The Federal Advisory Committee Act

The question sometimes arises whether the Federal Advisory Committee Act<sup>58</sup> (“FACA”), applies to meetings between a federal agency and a proponent. The statute resolves that question in the negative. The act applies to any “advisory committee” “established or utilized” by an agency for the purpose of obtaining advice or recommendations for the agency.<sup>59</sup> Those statutory triggers do not exist where a permit applicant or proponent meets with agency staff concerning a proposal. The proponent does not amount to an “advisory committee” “established or utilized” by the agency.<sup>60</sup> Nor does a contractor or consultant hired by a federal agency amount to an “advisory committee” subject to FACA.<sup>61</sup>

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<sup>54</sup> 40 C.F.R. § 1506.5(a); see also Department of the Interior NEPA Manual, 516 DM 1.4(C) (stating that the responsible official “shall require applicants, to the extent necessary and practicable, to provide environmental information, analyses, and reports as an integral part of their applications.”), *available at* [http://elips.doi.gov/app\\_DM/index.cfm?fuseaction=home](http://elips.doi.gov/app_DM/index.cfm?fuseaction=home).

<sup>55</sup> E.g., Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 814 (9<sup>th</sup> Cir. 1999) (reversing Forest Service land exchange decision where agency did not respond to comment suggesting the agency consider purchasing inholdings rather than undertake land exchange).

<sup>56</sup> E.g., Custer County Action Assoc. v. Garvey, 256 F.3d 1024, 1036 (10<sup>th</sup> Cir. 2001) (rejecting argument that a federal agency’s analysis in an EIS of a technical issue violated NEPA because the agency “considered these comments and incorporated them into the final analysis”).

<sup>57</sup> 40 C.F.R. § 1506.5(a).

<sup>58</sup> 5 U.S.C. App. II §§ 1-15.

<sup>59</sup> 5 U.S.C. App. II § 3(2).

<sup>60</sup> See Food Chemical News. v. Young, 900 F.2d 328, 331-33 (D.C. Cir. 1990); Steven P. Croley, Practical Guidance on the Applicability of the Federal Advisory Committee Act, 10 Admin. L.J. Am. U. 111 (1996).

<sup>61</sup> Food Chemical News, 900 F.2d at 331 (noting that the “FACA term ‘advisory committee’ does not include a contractor or consultant hired by an officer or agency of the Federal

### III. Third Party NEPA Contracts

#### A. Overview

Proponents of federal actions may fund the preparation of an EIS by a contractor or consultant chosen by the federal agency.<sup>62</sup> The agency – not the proponent – “must select the consulting firm, even though the applicant pays for the cost of preparing the EIS.”<sup>63</sup> The agency is required to guide the consultant’s work, independently evaluate the consultant’s work product, and ultimately be responsible for the contents of the EIS.<sup>64</sup>

The CEQ describes this arrangement as a “third party contract” because the agency is the “third party” to the contract between the contractor and the proponent.<sup>65</sup> Similarly, in its NEPA Handbook, the BLM states that under a “third party contract . . . the applicant for the proposal awards the contract, through proper procedures, for the preparation of the NEPA document for the BLM.”<sup>66</sup> Where a contractor will prepare an EIS for the BLM under a third party contract, BLM must enter into a “memorandum of understanding” with the private applicant to “establish roles” and to provide for BLM “to work directly with the contractor on NEPA-related matters and provide technical direction in preparing the EIS.”<sup>67</sup>

Third party contracts are purely “voluntary”<sup>68</sup> but their benefits to the proponent, agency, and contractor are obvious. The contract is between the project proponent and the contractor, and spells out how the former will fund work by the latter.<sup>69</sup> The agency should be given a copy of the contract for the administrative record, but it is not usually a signatory (although, as is the BLM’s practice, stated in the previous paragraph, it may choose to enter into a side agreement with the proponent). In drafting a third party contract, it is advisable to incorporate the critical elements from the pertinent CEQ regulations.<sup>70</sup> That is, the contract should state that the

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Government.”) (quoting H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4, *reprinted in* 1972 U.S. Code. Cong. & Admin. News 3491 3494).

<sup>62</sup> See 40 C.F.R. § 1506.5(c) (authorizing the use of an EIS prepared “by a contractor selected by the lead agency”); CEQ Forty Most Asked Questions, Question 16, 46 Fed. Reg. 18,026, 18,031 (1981) (authorizing “the preparation of EISs by contractors paid by the applicant” in which “the applicant . . . contracts directly with a consulting firm for its preparation”); Associations Working for Aurora’s Residential Environ. v. Colorado Dep’t of Transp., 153 F.3d 1122, 1127 (10<sup>th</sup> Cir 1998) (“AWARE”) (upholding EIS prepared by contractor).

<sup>63</sup> CEQ Forty Most Asked Questions, Question 16, 46 Fed. Reg. at 18,031.

<sup>64</sup> 40 C.F.R. § 1506.5(c).

<sup>65</sup> CEQ Forty Most Asked Questions, Question 16, 46 Fed. Reg. at 18,031.

<sup>66</sup> BLM NEPA Handbook H-1790-1 (1988), *available at* <http://www.blm.gov/nhp/efoia/wo/handbook/h1790-1.pdf>.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> CEQ Forty Most Asked Questions, Question 16, 46 Fed. Reg. at 18,031.

<sup>70</sup> See 40 C.F.R. § 1506.5.

proponent is funding the contractor's preparation of a NEPA document for the agency, the consultant is working under the direction and control of the agency, and the agency will independently evaluate the consultant's work.

## B. Selection of the Contractor

Where a consultant prepares an EIS, the agency – and not the proponent – must select the consultant.<sup>71</sup> A different rule applies where an agency permits an applicant to prepare an EA.<sup>72</sup> The applicant may contract directly with a consultant for the preparation of an EA for submission to the agency,<sup>73</sup> but the agency must “make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.”<sup>74</sup>

Even where a consultant prepares an EIS, the proponent may participate in the process by which the agency selects the consultant. The CEQ has stated that the proponent may, under the agency's direction, solicit candidates for the agency's consideration.<sup>75</sup> So long as the agency ultimately makes the decision, nothing prohibits the proponent from recommending that the agency select a particular consultant for a particular reason.

Some agency policies spell out the proponent's role in the selection process. For example, the Bureau of Indian Affairs' NEPA Handbook authorizes the applicant to “solicit proposals from consulting firms” and pass them along to the BIA.<sup>76</sup> The BLM's NEPA Handbook states that “[t]he applicant develops contract cost criteria and obtains contract proposals. The applicant may also perform an initial screening of proposals” and “the applicant recommends their preferred contractor for the project to BLM.”<sup>77</sup>

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<sup>71</sup> CEQ Forty Most Asked Questions, Question 16, 46 Fed. Reg. at 18,031; 40 C.F.R. § 1506.5(c) (“It is the intent of these regulations that the contractor be chosen solely by the lead agency ... to avoid any conflict of interest.”).

<sup>72</sup> 40 C.F.R. § 1506.5(b).

<sup>73</sup> E.g., Bureau of Indian Affairs NEPA Handbook at 15 (May, 2005) (providing that for “externally initiated proposals” by a “tribe or third party” the “applicant normally prepares the EA” for submission to the BIA which “shall ... make its own evaluation of the environmental issues and take responsibility for the scope and content of the EA.”).

<sup>74</sup> 40 C.F.R. § 1506.5(b).

<sup>75</sup> See CEQ Forty Most Asked Questions, Question 16, 46 Fed. Reg. at 18,031 (“If a federal agency uses ‘third party contracting,’ the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction”).

<sup>76</sup> Bureau of Indian Affairs NEPA Handbook at 34 (May, 2005).

<sup>77</sup> BLM NEPA Handbook H-1790-1, Appendix 7 (1988), *available at* <http://www.blm.gov/nhp/efoia/wo/handbook/h1790-1.pdf>; see also Forest Service NEPA Handbook, Chapter 26, *available at* [http://www.fs.fed.us/cgi-bin/Directives/get\\_directives/fsh?1909.15](http://www.fs.fed.us/cgi-bin/Directives/get_directives/fsh?1909.15).

### C. Conflicts Of Interest

CEQ regulations require the avoidance of conflicts of interests where consultants prepare NEPA documents.<sup>78</sup> For an EIS, the consultant must “execute a disclosure statement . . . specifying that [it has] no financial or other interest in the outcome of the project.”<sup>79</sup> The intent of the disclosure statement is to avoid situations in which the consultant has an interest in the outcome of the NEPA process.<sup>80</sup>

CEQ regulations do not affirmatively require a consultant preparing an EA to execute a disclosure statement, perhaps because under certain circumstances, the proponent of the action may prepare an EA for consideration by the agency.<sup>81</sup> Nonetheless, where a consultant prepares an EA it may be advisable for it to execute a statement affirming that it does not have a financial or other interest in the outcome of the project. The disclosure statement should be added to the administrative record.

The CEQ regulations do not define conflict of interest, or identify the circumstances under which a consultant has a “financial or other interest” sufficient to disqualify it from preparing a NEPA document.<sup>82</sup> In guidance materials the CEQ has stated that it interprets conflict of interest “broadly to cover any known benefits other than general enhancement of professional reputation.”<sup>83</sup> A “promise of future construction or design work on the project” would amount to a conflict of issue, as would certain “indirect benefits.”<sup>84</sup>

A consulting firm is not disqualified from preparing a NEPA document for an agency where the proponent previously retained the consultant to develop initial data or information for the project so long as that prior involvement between the proponent and the consultant is disclosed to the agency.<sup>85</sup> And a consultant that prepares a NEPA document may later bid for future work on the project if, at the time it prepares the EIS or EA, it does not have a “promise” that it will receive that future work.<sup>86</sup>

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<sup>78</sup> 40 C.F.R. § 1506.5(c).

<sup>79</sup> Id. The disclosure statement form in the Bureau of Indian Affairs NEPA Handbook is illustrative. It states: “[p]ursuant to the requirements of 40 CFR Part 1506.5, the Consultant declares under oath that it has no interest, financial or otherwise, in the outcome of this project.” BIA NEPA Handbook, Appendix 14 (May, 2005).

<sup>80</sup> CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 (1983).

<sup>81</sup> 40 C.F.R. § 1506.5(b).

<sup>82</sup> See id. § 1506.5(c).

<sup>83</sup> CEQ Forty Most Asked Questions, Question 17a, 46 Fed. Reg. at 18,031.

<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> CEQ Forty Most Asked Questions, Question 17b, 46 Fed. Reg. at 18,031; see also CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 (1983) (“[A] firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site. However, if there are no such separate interests or arrangements, and if the contract for the EIS

There are numerous judicial opinions addressing claims that NEPA documents were prepared by consultants with conflicts of interest. An influential Tenth Circuit case involved highway construction.<sup>87</sup> The lead agency apparently had a practice of awarding contracts related to the construction phase to the consultant that prepared the underlying NEPA document for the project. When the EIS for the highway project was completed, the plaintiff contended that it was tainted by bias because the consultant “had an incentive to promote a build alternative over a non-build alternative at the time it aided the preparation of the EIS.”<sup>88</sup>

The Tenth Circuit rejected the argument that the consultant’s expectation of future work created a per se conflict of interest. It ruled “that a contractor with an agreement, enforceable promise or guarantee of future work has a conflict of interest.”<sup>89</sup> Applying that test, the appellate panel determined that no conflict of interest existed because “at the time its services were employed to develop the EIS, the Contractor had no contractual guarantee of future work on the project.”<sup>90</sup> Further, the court ruled that the contractor’s “heightened expectation” that its NEPA work would lead to future work did not create a conflict of interest because “the degree of oversight exercised by [the agency] is sufficient to cure any defect arising from that expectation.” As the Tenth Circuit explained, “the ultimate question for the court is . . . whether the alleged breach compromised the objectivity and integrity of the NEPA process.”<sup>91</sup> After reviewing the record, the court concluded that the agency’s “substantial supervision over the preparation of the EIS . . . protected the integrity and objectivity of the EIS in this case.”<sup>92</sup>

Like the Tenth Circuit, many courts have resolved conflict of interest claims by examining whether the alleged conflicts compromised the integrity of the NEPA process.<sup>93</sup> That has proven to be a difficult test for NEPA plaintiffs to satisfy.<sup>94</sup> Even where the consultant

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preparation does not contain any incentive clauses or guarantees of any future work on the project, it is doubtful that an inherent conflict of interest will exist.”).

<sup>87</sup> AWARE, 153 F.3d at 1128.

<sup>88</sup> Id. at 1127.

<sup>89</sup> Id. at 1128. It should be pointed out that past work as a NEPA contractor for the proponent does not demonstrate that the contractor has “an agreement, enforceable promise or guarantee of future work.” Id. (emphasis added).

<sup>90</sup> Id.

<sup>91</sup> Id. at 1129 (quotations omitted) (citing cases).

<sup>92</sup> Id.

<sup>93</sup> See Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 202 (D.C. Cir. 1991) (refusing to set aside EIS where the agency allowed the proponent to select the consultant that prepared the EIS because “this particular error did not compromise the objectivity and integrity of the NEPA process”).

<sup>94</sup> See Center for Biological Diversity v. Federal Hwy. Admin., 290 F. Supp.2d 1175, 1186-87 (S.D. Cal. 2003) (ruling that although entity that prepared part of an EIS for a highway project “had a financial interest in the project,” there was no conflict of interest given the agency’s substantial review of the consultant’s work); Valley Community Preservation Comm’n v. Mineta, 231 F. Supp.2d 23, 42-43 (D. D.C. 2002) (ruling that plaintiff did not establish likelihood of success for claim that consultant had financial interest in the outcome of the project

arguably has a stake in the outcome of the project, the alleged conflict of interest may be overcome if the agency's oversight is substantial.<sup>95</sup> Agency oversight may be demonstrated in the process conducted by the agency, changes it requests to the draft NEPA document, preparation of the record of decision, mitigation measures selected by the agency, agency resource specialists involved in the decision, agency decisions to alter environmental analyses in response to comments, etc.<sup>96</sup>

One court has found a conflict of interest, and required remedial measures, where the consultant was contractually obligated to prepare a finding of no significant impact before it prepared the underlying environmental assessment.<sup>97</sup> And a court has ordered an agency to require its consultant to execute the mandatory disclosure form where the consultant failed to do so.<sup>98</sup>

#### IV. Role of the Project Proponent in NEPA Litigation

Final agency action reached after a NEPA process is subject to judicial review in United States District Court under the APA.<sup>99</sup> Plaintiffs alleging that an agency violated NEPA may institute a civil action for judicial review by filing a complaint against the agency in federal court. Such civil actions do not name the private proponent of the NEPA process as a defendant. Although it may not be named as a defendant, from the proponent's view point, it has a direct stake in NEPA litigation that seeks to set aside (or delay) an agency decision favorable to the proponent.

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given "uncontroverted evidence" that the agency "provided the requisite oversight of the contractor's preparation of the reports involved in this matter"); Northern Crawfish Frog v. Federal Hwy. Admin., 858 F. Supp. 1503, 1529 (D. Kan. 1994) (rejecting allegation that consultant's interest in future work tainted the NEPA process because "the court is persuaded that the integrity of the environmental process was not compromised by any conflict of interest").

<sup>95</sup> AWARE, 153 F.3d at 1129; Center for Biological Diversity, 290 F. Supp.2d at 1186-87 (rejecting conflict of interest claim because the agency "independently evaluated the record, participated in project meetings, assisted in coordinating comments from other agencies, provided oversight to the process, and required changes to the EIS."); Burkholder v. Wykle, 268 F. Supp.2d 835, 844 (N.D. Ohio 2002) (ruling that "*de minimus*" violation of conflict of interest rules was "cured by the federal agency's independent oversight").

<sup>96</sup> E.g., AWARE, 153 F.3d at 1129.

<sup>97</sup> Davis v. Mineta, 302 F.3d 1104, 1112 (10<sup>th</sup> Cir. 2002) (enjoining agency's reliance on EA for highway construction project where consultant was "contractually obligated to prepare a FONSI" because the consultant "had an inherent, contractually-created bias in favor of issuance of a FONSI rather than preparation of an EIS").

<sup>98</sup> Citizens Against Burlington, 938 F.2d at 202.

<sup>99</sup> See 5 U.S.C. § 706(2)(A); Edwardsen v. United States Dep't of the Interior, 268 F.3d 781, 791 (9<sup>th</sup> Cir. 2001) (reviewing Department of the Interior's NEPA compliance in authorizing off shore oil and gas development under APA); Dubois v. United States Dep't of Agriculture, 102 F.3d 1273, 1287 (1<sup>st</sup> Cir. 1996) (reviewing Forest Service's compliance with NEPA in issuing ski area special use permit under APA).

Proponents may participate in NEPA litigation in three ways. First, attorneys from the United States Department of Justice (“DOJ”) represent federal agencies in suits challenging their NEPA compliance. The proponent may “participate” in NEPA litigation by relying on the DOJ to defend the agency and, by extension, the proponent’s interest in the challenged permit or decision.

Second, the proponent may seek to participate as an amicus curiae by filing a brief addressing the merits of the dispute, but without participating as a party to the litigation.

Third, the proponent can retain separate counsel and intervene as a full party defendant Fed. R. Civ. P. 24. Each option is addressed below.

#### A. The Department of Justice Defends the Agency

The DOJ represents the federal agency, not the proponent. Although the interest of the agency and the proponent should be generally aligned in NEPA litigation, differences may arise. The DOJ and its client agency may not share the proponent’s opinions about the appropriate timetable for resolving the litigation, the relative importance of the case, how best to present the issues to the court, whether and on what terms to settle, whether to prepare a supplemental NEPA document, and whether to appeal.

#### B. Participation in NEPA Litigation as Amicus Curiae

The proponent may participate in NEPA litigation by requesting the court’s leave to appear as an amicus curiae. This gives the proponent a voice in the proceeding, and allows it to present the issues to the court in written briefs. Costs are limited to preparing a motion to participate as an amicus curiae and briefs on the merits.

There are limitations to participating as an amicus curiae. Authority exists for the proposition that an amicus curiae should provide impartial information to the court, not assert a partisan interest.<sup>100</sup> And participating as an amicus may provide inadequate procedural protections where the proponent has a direct interest in the permit, project, or decision under review.<sup>101</sup> As compared to a full party, an amicus: cannot control the pace of the litigation; has no right to be heard at hearings; cannot introduce evidence; cannot appeal an adverse decision; and does not have a seat at the table in settlement negotiations.<sup>102</sup> Participating as an amicus

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<sup>100</sup> E.g., Miller-Wohl Co. v. Commissioner of Labor & Indus., State of Montana, 694 F.2d 203, 204 (9<sup>th</sup> Cir. 1982); New England Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196, 1198 n.3 (1<sup>st</sup> Cir. 1979).

<sup>101</sup> See Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Department of the Interior, 100 F.3d 837, 844 (10<sup>th</sup> Cir. 1996) (“the right to file a brief as amicus curiae is no substitute for the right to intervene as a party in the action under Rule 24(a)(2).”); International Union v. Scofield, 382 U.S. 205, 214-17 (1965) (ruling that employees were entitled to intervene in labor dispute because participation as amicus curiae did not provide adequate procedural protections); Feller v. Brock, 802 F.2d 722, 730 (4<sup>th</sup> Cir. 1986) (same).

<sup>102</sup> United States v. State of Michigan, 940 F.2d 143, 165-66 (6<sup>th</sup> Cir. 1991) (listing limitations on the rights of amici) (citing cases).

may be sufficient where the proponent's interests are minor, or it has little need to control the litigation.

### C. Intervention in NEPA Litigation Under Fed. R. Civ. P. 24

Rule 24 of the Federal Rules of Civil Procedure allows entities to intervene as plaintiffs or defendants in litigation between third parties. Once intervention is granted, the intervenor has the procedural rights of a full party to the litigation.<sup>103</sup>

Private proponents of NEPA processes have intervened in numerous suits against federal agencies to protect their interests in the permit or decision at issue.<sup>104</sup> Intervention in a NEPA case maximizes the proponent's participation rights and control over the litigation. It can: protect its interests in scheduling the case for disposition by the court; file pleadings, motions,<sup>105</sup> and other documents without leave of the court; brief the merits of the case; oppose actions by the plaintiffs with all the tools of civil litigation; present argument at any hearings; and protect its interests in settlement negotiations. As a full party, the proponent can give the case the attention it deserves without relying on the DOJ to do so. And an intervenor defendant has the right to appeal, even where the federal agency defendant chooses not to appeal so long as the intervenor can demonstrate standing under Art. III of the U.S. Constitution.<sup>106</sup>

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<sup>103</sup> E.g., Diamond v. Charles, 476 U.S. 54, 68 (1986); Comanche Indian Tribe of Oklahoma v. Hovis, 53 F.3d 298, 303 (10<sup>th</sup> Cir. 1995) (observing that "once a party intervenes, it becomes a full participant in the suit and is treated just as if it were an original party").

<sup>104</sup> See *infra* Part IV.C.2. (citing cases).

<sup>105</sup> There is authority for the proposition that an intervenor defendant cannot move to dismiss the case for lack of venue under Fed. R. Civ. P. 12(b)(3) or request transfer under 28 U.S.C. § 1404. E.g., 7C Wright, Miller, Kane, Federal Practice & Procedure 2d § 1918 (1986) ("The intervenor cannot question venue. By voluntarily bringing himself into the action he has waived his privilege not to be required to engage in litigation in that forum.") (citing cases); Trans World Airlines, Inc. v. Civil Aeronautics Bd., 339 F.2d 56, 63-64 (2<sup>nd</sup> Cir. 1964). That authority is not always followed, however, because courts have dismissed or transferred cases on motions raised by intervenor defendants. E.g., American Civil Liberties Union v. Federal Communications Comm'n, 774 F.2d 24, 27 (1<sup>st</sup> Cir. 1985) (granting motion to transfer filed by defendant-intervenor); Farah Manufacturing Co. v. National Labor Relations Bd., 481 F.2d 1143, 1145 (8<sup>th</sup> Cir. 1973) (dismissing case for lack of venue on defendant-intervenor's motion). If an intervenor defendant wishes to move to dismiss on venue grounds or request a transfer of the case, it should persuade the federal defendant to do so as well, thereby deflating any argument that such a motion is not properly before the court.

<sup>106</sup> Diamond v. Charles, 476 U.S. 54, 68 (1986) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the [standing] requirements of Art. III."); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1110-11 (9<sup>th</sup> Cir. 2002) (intervenor defendants permitted to appeal district court decision that the Forest Service's Roadless Rule violated NEPA although Forest Service chose not to appeal); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1399 (9<sup>th</sup> Cir. 1995) (ruling that intervenor defendants had standing to appeal order setting aside listing of species under the Endangered Species Act although the United States Fish and Wildlife Service did not appeal); Didrickson v. United States Dep't of the Interior, 982 F.2d 1332, 1340-41 (9<sup>th</sup> Cir. 1992) (ruling that intervenor defendants had standing to appeal district court order invalidating federal regulations concerning sea otters although the federal agency that



If a proponent decides to intervene in NEPA litigation against the agency, it should do so at the outset of the case. This eliminates any argument that intervention should be denied because it is not timely. More importantly, the proponent will likely be more familiar with the administrative record and the facts than will the government counsel who will receive the case after the complaint is filed. The federal agency's attorney will know the least about the case at the early stages when a request for preliminary injunction is most likely.

By intervening early, the proponent can actively defend a request for injunctive relief and ensure that the facts and public interest issues are fairly presented to the court. This will allow the proponent to ensure that the court takes its interests into account in considering or fashioning injunctive relief. Intervening early also gives the proponent a voice in negotiating scheduling orders and case management orders.

1. Intervention Standard Under Fed. R. Civ. P. 24

Rule 24 provides for intervention as of right and permissive intervention. Intervention as of right "shall be permitted" if:

- a. The motion is timely;<sup>107</sup>
- b. The applicant has a significantly protectable interest that is related to the property or transaction which is the subject of the action;<sup>108</sup>
- c. Disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest;<sup>109</sup> and

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promulgated the regulations did not appeal); Yniguez v. State of Arizona, 939 F.2d 727, 731-32 (9<sup>th</sup> Cir. 1991) (ruling that intervenor defendants who sponsored state legislation had standing to appeal order ruling legislation unconstitutional although the state acquiesced in the order and did not appeal); NL Industries, Inc. v. Secretary of the Interior, 777 F.2d 433, 437 (9<sup>th</sup> Cir. 1985) (ruling that intervenor defendant had standing to appeal order setting aside mining claim decision of Secretary of the Interior although the Secretary of the Interior did not appeal).

<sup>107</sup> See Tocher v. City of Santa Ana, 219 F.3d 1040, 1044 (9<sup>th</sup> Cir. 2000) (in determining whether a motion to intervene is timely, the court should consider the "stage of proceeding," the "prejudice to the other parties," and "the reasons for and length for the delay"); Sanguine, Ltd. v. United States Dep't of the Interior, 736 F.2d 1416, 1418 (10<sup>th</sup> Cir. 1984) (timeliness of motion to intervene is determined "in light of all of the circumstances").

<sup>108</sup> This requirement is "satisfied when the interest is protectable under some law and ... there is a relationship between the legally protected interest and claim at issue." Arakai v. Cayetano, 324 F.3d 1078, 1084 (9<sup>th</sup> Cir. 2003) (quotation omitted); see also City of Stillwell, Oklahoma v. Ozarks Rural Elec. Coop. Corp., 79 F.3d 1038, 1042 (10<sup>th</sup> Cir. 1996); Kleisser v. United States Forest Serv., 157 F.3d 964, 972 (3<sup>rd</sup> Cir. 1998) (timber company's interests in Forest Service timber sales justified intervention as of right in action seeking to enjoin agency from making such timber sales).

<sup>109</sup> Sierra Club v. United States Env'tl. Prot. Agency, 995 F.2d 1478, 1486 (9<sup>th</sup> Cir. 1993) (where relief sought against federal agency could result in modification of permit held by applicant, the

- d. The applicant's interests are inadequately represented by the existing parties.<sup>110</sup>

Fed. R. Civ. P. 24(a)(2). Case law has fleshed out each element, and intervention is to be liberally granted.<sup>111</sup> Permissive intervention “may be permitted” at the court’s discretion if:

- a. The motion is timely;
- b. There are common questions of law and fact between the applicant’s defense and the principal action;<sup>112</sup> and
- c. Intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.<sup>113</sup>

Fed. R. Civ. P. 24(b)(2). A substantial number of federal decisions address each component of permissive intervention.

## 2. Obstacles to Intervention in NEPA Litigation

There is a split among the Federal Circuit Courts of Appeals concerning intervention as of right in NEPA cases. In the Tenth Circuit, an economic interest in a federal permit, decision, or approval provides grounds to intervene as of right to defend an action that may impair that economic interest, including actions challenging an agency’s NEPA compliance.<sup>114</sup> Some

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litigation would “necessarily result in practical impairment” of the applicant’s interests sufficient to intervene).

<sup>110</sup> The inadequate representation requirement “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.” Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972). Individual commercial interests are not subsumed within the public interest represented by the government, Southwest Center for Biological Diversity, 268 F.3d at 823, in part because a federal agency “is required to represent a broader view than the more narrow, parochial interests of” a permit applicant, Californians for Safe and Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1190 (9<sup>th</sup> Cir. 1998); accord Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior, 100 F.3d 837, 845 (10<sup>th</sup> Cir. 1996).

<sup>111</sup> 7C Charles A. Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure § 1904 (1986).

<sup>112</sup> An applicant for permissive intervention satisfies the common question requirement where it will “assert defenses of the government [decision] that squarely respond to the challenges made by plaintiffs in the main action.” Kootenai Tribe of Idaho, 313 F.3d at 1111.

<sup>113</sup> Intervention will not delay or prejudice the rights of the original parties where the intervenor is prepared to participate in the litigation on the same schedule as the original parties. Kootenai Tribe of Idaho, 313 F.3d at 1111 n.10.

<sup>114</sup> E.g., Utahns for Better Transportation v. United States Dep’t of Transp., 295 F.3d 1111, 1116-17 (10<sup>th</sup> Cir. 2002) (trade association asserting economic interests of contractors permitted to intervene as of right as defendant in action challenging federal agency’s compliance with the

decisions (principally from the Ninth Circuit) have created obstacles for permit applicants and project proponents seeking to intervene as of right to defend government decisions involving NEPA. Ninth and Seventh Circuit precedent holds that private entities cannot intervene as of right as defendants in the liability phase of a NEPA action because only the federal government can “comply” with the procedural requirements of NEPA.<sup>115</sup> NEPA proponents can, however, intervene as of right in the remedies phase of a NEPA case.<sup>116</sup> The Ninth Circuit has not extended its rulings limiting intervention as of right to the Clean Water Act or Federal Land Policy Management Act.<sup>117</sup> The Ninth Circuit precedent restricting intervention as of right in NEPA cases rests on the procedural nature of NEPA.<sup>118</sup> Those rulings are arguably inconsistent with decisions by Ninth Circuit panels which have allowed private entities to intervene as of right to defend the government’s compliance with an array of procedural laws.<sup>119</sup>

The Third, Fifth, and Tenth Circuits have rejected the Ninth Circuit’s view, and ruled that private entities may intervene as of right as defendants in NEPA actions.<sup>120</sup>

Although Ninth Circuit precedent restricts intervention as of right in NEPA cases, courts in the Ninth Circuit routinely permit NEPA proponents to intervene to defend NEPA claims.<sup>121</sup>

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Clean Air Act); Friends of the Bow v. Thompson, Civ. Action No. 94-D-1370 (D. Colo. Dec. 21, 1995) (private entity permitted to intervene as of right as defendant in NEPA litigation), aff’d, 124 F.3d 1210 (10<sup>th</sup> Cir. 1997); Natural Resources Defense Council v. United States Nuclear Regulatory Comm’n, 578 F.2d 1341, 1344 (10<sup>th</sup> Cir. 1978) (allowing private entity to intervene as of right as defendant in NEPA litigation).

<sup>115</sup> E.g., Wetlands Action Network v. United States Army Corps of Eng’rs., 222 F.3d 1105, 1113-14 (9<sup>th</sup> Cir. 2000) (citing cases); Wade v. Goldschmidt, 673 F.2d 182 (7<sup>th</sup> Cir. 1982) (citing cases).

<sup>116</sup> Wetlands Action Network, 222 F.3d at 1113-14.

<sup>117</sup> E.g., Sierra Club v United States Env’t Prot. Agency, 995 F.2d at 1483 (allowing the holder of Clean Water Act discharge permit to intervene as of right as a defendant in suit against the EPA challenging the agency’s regulation of the permitted discharges); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527-28 (9<sup>th</sup> Cir. 1983) (private entities were entitled to intervene as of right to defend the Secretary of the Interior’s procedural compliance with FLPMA in creating a national conservation area).

<sup>118</sup> E.g., Wetlands Action Network, 222 F.3d at 1113-14.

<sup>119</sup> Yorkshire v. United States Internal Rev. Serv., 26 F.3d 942, 944-45 (9<sup>th</sup> Cir. 1994) (corporation entitled to intervene as of right to defend the IRS’ refusal to disclose tax information under the Freedom of Information Act); Yniguez v. Arizona, 939 F.2d 727, 735-38 (9<sup>th</sup> Cir. 1991) (sponsors of ballot initiative allowed to intervene as of right in suit challenging the initiative); National Wildlife Fed. v. Burford, 871 F.2d 849, 851 (9<sup>th</sup> Cir. 1989) (private entities allowed to intervene to defend claim that federal agencies did not adhere to procedural requirements of Mineral Leasing Act in issuing federal coal leases); Idaho v. Freeman, 625 F.2d 886, 887 (9<sup>th</sup> Cir. 1980) (National Organization for Women allowed to intervene as of right in suit challenging the procedures for ratification of the proposed Equal Rights Amendment).

<sup>120</sup> Kleissler v. United States Forest Serv., 157 F.3d 964, 971 (3d Cir. 1998); Friends of the Bow v. Thompson, Civ. Action No. 94-D-1370 (D. Colo. Dec. 21, 1995), aff’d, 124 F.3d 1210 (10<sup>th</sup> Cir. 1997); Sierra Club v. Espy, 18 F.3d 1202, 1207 (5<sup>th</sup> Cir. 1994); Natural Res. Defense Council v. United States Nuclear Regulatory Comm’n, 578 F.2d 1341, 1344 (10<sup>th</sup> Cir. 1978).

In December 2002, the Ninth Circuit clarified the issue by ruling that although private entities cannot intervene as of right as defendants in NEPA actions, they can intervene as defendants on a permissive basis under Rule 24(b)(2).<sup>122</sup>

As a result, a proponent of a federal action that wishes to defend an agency's NEPA compliance in the Ninth or Seventh Circuits may request permissive intervention rather than intervention as of right, even where its interest is based on real property, contractual, or other concrete interests that would appear to provide grounds for intervention as of right. This strategy has been successful in NEPA litigation within the Ninth Circuit.

## V. Conclusion

Agencies, proponents, consultants, and the interested public should consider the proponent's unique role. The proponent stands apart from the agency, yet its stake in the outcome gives it an interest that is not shared by the public. Despite that unique interest, the proponent must, like the public, rely on the agency to comply with the statute. The proponent can assist the agency by participating meaningfully in the process. In that manner it helps improve the agency's decisionmaking which is, of course, the "fundamental purpose of the NEPA process, the end to which the EIS is the means."<sup>123</sup>

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<sup>121</sup> Kern v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9<sup>th</sup> Cir. 2002) (private timber companies permitted to intervene to defend BLM's analysis of environmental effects under NEPA in EIS for land management plan); Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 804 (9<sup>th</sup> Cir. 1999) (land exchange proponent permitted to intervene to defend action challenging exchange under FLPMA and NEPA); Kettle Range Conservation Group v. Bureau of Land Mgmt., 150 F.3d 1083, 1084 (9<sup>th</sup> Cir. 1998) (same); ONRC Action v. Bureau of Land Mgmt., 150 F.3d 1132, 1135 (9<sup>th</sup> Cir. 1998) (private entities permitted to intervene to defend BLM's procedural compliance with NEPA and FLPMA in authorizing timber sales); Oregon Natural Resources Council v. United States Forest Serv., 59 F. Supp.2d 1085, 1088 (W.D. Wa. 1999) (same).

<sup>122</sup> Kootenai Tribe of Idaho, 313 F.3d 1094, 1110-11 (9<sup>th</sup> Cir. 2002).

<sup>123</sup> Council on Environmental Quality, Preamble to Final NEPA Regulations, 43 Fed. Reg. 55,978, 55,979 (1978).