Client Alert.

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A Seat at the Table: Ninth Circuit Announces New Rules for Defending NEPA Actions

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The Ninth Circuit has removed a long-standing obstacle that prevented private parties and local governments from intervening in National Environmental Policy Act ("NEPA") cases. In *Wilderness Society v. U.S. Forest Service*, an en banc panel of the Ninth Circuit jettisoned the "federal defendant" rule, which allowed only the lead federal agency to defend a NEPA case and precluded other parties, who often had significant interests at stake, from intervening as of right in the lawsuit. The decision sets the stage for increased participation in NEPA litigation by a wide variety of businesses, trade associations, state and local governments, and other third parties with a significantly protectable interest in the outcome.

THE "FEDERAL DEFENDANT RULE" IN NEPA CASES

In determining whether to allow a third party to intervene in litigation, federal courts apply Federal Rule of Civil Procedure 24(a)(2). The rule provides for intervention when a party (1) timely files a motion to intervene; (2) claims a "significantly protectable" interest relating to the property or transaction at issue; and (3) claims an interest that is inadequately represented by the parties to the action. Courts have looked to practical and equitable considerations to construe the rule broadly in favor of proposed intervenors.

Over the past 20 years, however, the Ninth Circuit had adopted a categorical prohibition of intervention as of right in NEPA actions. The Ninth Circuit held that private parties could not claim a direct, significantly protectable interest under NEPA because the statute imposes a procedural obligation only on the federal agencies to evaluate significant environmental impacts prior to undertaking major actions. Moreover, Ninth Circuit courts held that a party's significant economic stake in a case was not a protectable interest because NEPA provided no protection for purely economic interests. While some courts allowed permissive intervention at the court's discretion, intervention was unavailable as a matter of right.

THE *WILDERNESS SOCIETY V. U.S. FOREST SERVICE* DECISION

In *Wilderness Society*, two environmental conservation groups challenged a federal plan for the off-road use of recreational motorized vehicles in Idaho, alleging that the Forest Service violated NEPA by failing to prepare an Environmental Impact Statement and to consider reasonable alternatives to its travel plan. Three groups representing recreation interests moved for intervention as of right and for permissive intervention. Applying the "federal defendant" rule, the district court categorically denied intervention as of right and also denied permissive intervention on the grounds that the recreation groups had not adequately participated in the administrative process and would not add any further clarity or insight to the litigation.

The Court of Appeals en banc reversed and remanded by abandoning the categorical prohibition against third party intervention as of right. Citing Ninth Circuit precedent in non-NEPA intervention cases, the court declared that a "significantly protectable" interest did not require a party to allege an interest protected by statute. Rather, the court asserted that the standard for intervention as of right required only that a third party's interest be protectable under law and related to the claims at issue. The court ruled that a party would generally demonstrate a sufficient interest for intervention as of right in a NEPA action, as in all cases, if its interest would suffer as a result of the pending litigation. The court further found that the federal defendant rule was "out of step" with all other intervention of right cases, including those under environmental laws other than NEPA, and with all but one of the sister circuits that had addressed whether private parties may intervene as of right in NEPA cases.

THE RULING WILL INCREASE PARTICIPATION FROM REAL PARTIES IN INTEREST

The *Wilderness Society* decision clears the way for increased participation by interested parties in NEPA litigation. This may serve to improve courts' decisionmaking in factually complex environmental cases. A private party or state or local government entity pursuing a federal project often has important and unique information, commonly in the form of technical expertise, from which a court would benefit. A nonfederal party may also have a unique motivation to vigorously defend a federal agency's performance of NEPA procedures, whether that motivation be economic, aesthetic, political, or philosophical. Facilitating such uniquely equipped real parties in interest to litigate complex environmental issues may serve to expand a court's consideration of other perspectives and promote the efficient resolution of those cases.

The ruling also squares the rule for NEPA intervention with other types of environmental cases. Other, similar statutes have long recognized the need of real parties in interest to participate as parties in the case. For example, NEPA's sister statute in California, the California Environmental Quality Act ("CEQA"), not only allows but requires the participation of the real party in interest in the litigation.

Third-party intervenors from diverse environmental perspectives will likely benefit from the lower bar to intervention. There may be concerns that a federal agency may not vigorously defend its own actions undertaken during the previous administration. Accordingly, a plaintiff in one NEPA action against a federal agency may quickly find itself as a potential intervenor in another NEPA action against that same federal agency. *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002), and *Wilderness Society* illustrate this point. In the former case, the environmental group Wilderness Society moved to intervene in a NEPA action brought against the Forest Service. *Kootenai Tribe*, 313 F.3d at 1108–1111. The environmental group sought to defend the Forest Service's NEPA process that occurred during the Clinton administration and resulted in a rule promoting roadless lands because the group suspected that the Bush administration would not vigorously defend the NEPA lawsuit. *Id.* Wilderness Society now plays the opposite role in the current litigation by challenging the NEPA process that the Forest Service undertook during the Bush administration.

Morrison & Foerster LLP is widely recognized as a leader among law firms on environmental issues, including NEPA and CEQA litigation and compliance counseling. If you would like assistance, please contact Peter Hsiao or Joshua Simon in our Los Angeles office at (213) 892-5200 or David Gold, Zane Gresham, or Edgar Washburn in our San Francisco office at (415) 268-7000.

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