UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, Plaintiff, v. U.S. DEPARTMENT OF THE INTERIOR AND KENNETH SALAZAR, in his official capacity as Secretary of the Interior, U.S. Department of the Interior et al., Defendants, SAFARI CLUB INTERNATIONAL, Amicus Movant.	Case No. 10-cv-01274(ESH) **REPLY IN SUPPORT OF MOTION BY SAFARI CLUB INTERNATIONAL FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE***

I. INTRODUCTION

Safari Club International ("Safari Club") submits this Reply in Support of its Motion for Leave to Participate as *Amicus Curiae* and in answer to the Response in Opposition filed by Federal Defendants

("Opposition").[1] Safari Club and its members will be directly harmed by the ultimate relief that the Plaintiff seeks in this litigation, have a perspective to offer this Court that is different from that of any of the parties in this case, and have an expertise in environmental law and litigation that Safari Club will use to help the Court resolve the issues raised in Plaintiff's Complaint. Safari Club's participation in this case will not delay the proceedings or prejudice any party. Safari Club's motion should be granted because Safari Club and its members are the only individuals and entities involved in this case whose conduct will be directly governed (*i.e.,* eliminated) by the regulations that Plaintiff seeks through this litigation.

A. Argument

1. An Amicus Is A Friend of the *Court,* Not the Parties

The fact that Federal Defendants generally oppose Safari Club's motion is irrelevant to whether this Court should grant Safari Club amicus status. An amicus curiae is a "friend of the court" and not necessarily the friend of any of the parties to the litigation. *See Blackman v. District of*

[1] At the time that Safari Club filed its Motion for Leave to Participate As Amicus Curiae ("Amicus Motion") Plaintiff, Public Employees for Environmental Responsibility, notified Safari Club that it opposed Safari Club's Amicus Motion. Safari Club informed the court of this fact at the time of filing the Amicus Motion. Plaintiff did not file a brief in opposition to Safari Club's motion. Thus, "the Court may treat the motion as conceded," at least as far as Plaintiff is concerned. L. Cv. R. 7(b).

Columbia, 277 F. Supp. 2d 89, 90 n.1 (D.D.C. 2003)(Judge Paul Friedman of this court designated the court's own amicus in a case involving special education in the District of Columbia school system). While often amici do support one party or the other, and here Safari Club supports the actions of the Federal Defendants, the test for amicus status largely centers around the assistance that the prospective amicus curiae can provide the Court in resolving the case.

2. The Allegedly Procedural Nature of This Case Should Not Bar the Participation of Those Interested in the Underlying Substantive Matter

Federal Defendants' opposition to Safari Club's Amicus Motion appears to stem from the fact that the Plaintiff initiated this action as a demand for procedural rulemaking. Federal Defendants suggest that, because the final outcome of that rulemaking process is uncertain, this Court need not allow Safari Club to participate and assist the Court in understanding the law and the facts of the case. However, this challenge to procedural rulemaking bears great similarity to cases involving National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, challenges where federal agencies are sued for failing to comply with their procedural duties to assess the potential environmental consequences of proposed federal actions, before carrying out those actions. In NEPA challenges, the outcome

of a challenge to the agency's procedural compliance with NEPA will not dictate if and how the agency will carry out the underlying federal action (*i.e.*, following compliance with NEPA, the agency could make the exact same decision it made without following NEPA). Nevertheless, courts in this jurisdiction have permitted individuals and entities with a stake in the underlying action to participate at a far more active level than amicus status. Courts have permitted litigants to intervene "as of right" in NEPA litigation in order to protect their interest in the outcome of the underlying agency action. *Humane Society of U.S. v. Johanns*, 520 F. Supp. 2d 8, 14 (D.D.C. 2007)(Horse slaughter facility operators were permitted to intervene to defend the Department of Agriculture's NEPA compliance in creating a fee for service ante-mortem horse slaughter inspection system). Even the Ninth Circuit, a jurisdiction that applies the "none but federal defendants rule" to bar intervention as of right in defense of NEPA compliance, permits interested parties to participate as amici to assist the courts in these procedural cases. *Center for Food Safety v. Connor*, 2008 WL 3842889, *3 (N.D. Cal. 2008) (Court denied motions to intervene filed by beetgrowers and others, but granted amicus status in merits phase of NEPA and Plant Protection Act challenge to the deregulation of genetically regulated sugarbeets).

Courts have broad authority to permit amicus participation even when the impact to the amicus from the outcome of the litigation is speculative at best. *National Ass'n. of Home Builders v. U.S. Corp. of Engineers*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007) (Court granted environmental group amicus status in case challenging authority to regulate upland ditches, based upon hypothetical concern that if ditches are not regulated, they could be polluted and that would harm members of the group.)

3. Safari Club Should Participate Because It Is the Only Party In This Litigation That Will Be Directly Affected By The Ultimate Outcome

Federal Defendant's Opposition tries to silence the only party that has a direct stake in the ultimate outcome of this litigation. This case concerns a petition for a rule that will terminate and/or restrict hunting opportunities that are currently authorized and are statutorily mandated on the Mojave National Preserve. Without question, those who will be most profoundly affected and unquestionable harmed by the promulgation of any such rule are the people who hunt in the Preserve. As evidenced by Safari Club's Amicus Motion and the declarations attached to that motion, Safari Club's members are those hunters. Federal Defendants' Opposition fails to acknowledge the fact that there cannot be a more unique or essential perspective to offer the Court than that of the party whose conduct will be

regulated by the ultimate outcome of the dispute.[2] In some ways, Safari Club has a more direct stake in this litigation than does the Plaintiff. Although it was Plaintiff who filed this lawsuit with the ultimate pursuit of a regulation, that regulation will not directly regulate Plaintiff's conduct in any way. And yet, Federal Defendants wish to completely exclude from this case the only parties whose conduct will be curtailed by the regulations that Plaintiff seeks in filing this suit.

4. Plaintiff's Request to Have This Court Maintain Jurisdiction Over This Case Supports Safari Club's Amicus Participation

In their Opposition, Federal Defendants' assert that Plaintiff seeks nothing more than a "strictly procedural" remedy in the form of an agency response "within a reasonable amount of time." (Opposition at 4.) Federal Defendants do correctly note that the only regulatory provisions that the Plaintiff identifies by number in their Complaint are National Park Service procedural regulations, 43 C.F.R. §§14.3 and 14.4, relating to timing and publication in the Federal Register. Federal Defendants appear to have

[2] *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) ("one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, ….").

missed the more substantive regulatory challenges included by Plaintiff in the wording of its Complaint, such as

> Mr. Tutchon pointed out that federal hunting regulations were legally required regardless of the existence or content of state hunting regulations.

Complaint, at 6, ¶ 26. The wording of the Complaint demonstrates that Plaintiff does not merely seek a prompt response to its petition for regulations that will prohibit and/or limit forms of hunting on the Mojave National Preserve. Instead, the Complaint asserts that the proposed regulations are "legally required." Consequently, Plaintiff's requested relief, including the request that this Court "[m]aintain jurisdiction over this action until DOI and NPS are in compliance with the Administrative Procedure Act, *Department of the Interior regulations,* and every order of this Court" ((Complaint at 9)(emphasis added)), creates the distinct impression that Plaintiff has a broader agenda than just a timely response and hope to retain the Court's jurisdiction to achieve that agenda. The allegations of the Complaint, considered in their entirety, demonstrate that Plaintiff will not be satisfied with ***any*** timely response to its rulemaking petition. Instead, the Complaint establishes that Plaintiff's goal is a prompt result that will terminate and/or limit hunting on the preserve.

5. Federal Defendants' Agreement With Safari Club Does Not Stand in the Way of Amicus Participation

The Federal Defendants properly agree with Safari Club at least on the point that this Court has no reason to retain jurisdiction over this case beyond its initial consideration of Plaintiff's procedural claims. (Opposition at 5.) Nonetheless, the fact that the amicus agrees with one of the parties to the litigation is no reason to bar that amicus from participating in the case. Judge and now U.S. Supreme Court Justice Alito explained that the concept of an "impartial" amicus has become "outdated." *Neonatology Associates P.A. v. C.I.R.*, 293 F.3rd 128, 131 (3rd Cir. 2002)(court allowed participants in employee benefit plans to join as amici in case involving legality of income tax deductions for contributions to plans).

6. Safari Club's Amicus Participation Will Cause No Harm and the Court Can Rely On Safari Club's Assistance to the Extent That It is Helpful

Contrary to Federal Defendants' unsubstantiated assertions, Safari Club's amicus participation will not cause any unnecessary delay in this litigation. As an example of this fact, Safari Club filed their amicus motion for leave to participate early in the case, rather than waiting until the briefing was underway. In addition, Safari Club will follow any scheduling and other requirements imposed by the Court to prevent unnecessary delays.

Safari Club does not believe that this Court will be confused or hindered in its ability to discern if and how Safari Club's amicus

participation, if granted, can assist the Court. Upon granting amicus status, this Court has full discretion to disregard any or all parts of Safari Club's amicus submission that prove unhelpful to the court's resolution of the case. *Neonatology Associates*, 293 F.3d at 133.

II. CONCLUSION

As the only party that would be directly affected by the regulations that are the subject of Plaintiff's Complaint, Safari Club belongs in this case. Even if Plaintiff's challenges are of strictly procedural nature, Safari Club's interest in the underlying substantive matter is sufficient to allow this Court to grant amicus status. Plaintiff's Complaint suggests that Plaintiff seeks more from this Court than a simple procedural remedy and the foreshadowing of that phase of the litigation lends additional support to Safari Club's amicus request. As amicus, Safari Club will not cause any delay or harm to any other party to this litigation, and this Court has the discretion to rely on Safari Club's amicus submissions to the extent that they prove helpful. For these reasons, Safari Club asks this Court to grant its motion for leave to participate as amicus curiae.

Dated: October 22, 2010.

Respectfully Submitted,

/s/ Anna M. Seidman_____
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