IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*,	)	
Plaintiffs,	)	Case No. 2:15-cv-79
v.	)	
SCOTT PRUITT, *et al.*,	)	
Defendants.	)	

PROPOSED BUSINESS INTERVENORS' MOTION TO INTERVENE AS PLAINTIFFS AND INCORPORATED MEMORANDUM OF LAW

June 29, 2018

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INTRODUCTION & SUMMARY OF THE NATURE OF THE CASE

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Proposed Intervenors-Plaintiffs the American Farm Bureau Federation, American Forest & Paper Association, American Petroleum Institute, American Road and Transportation Builders Association, Georgia Association of Manufacturers, Georgia Farm Bureau Federation, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand, and Gravel Association, Public Lands Council, and U.S. Poultry & Egg Association (collectively, the "proposed Business Intervenors") respectfully move for leave to intervene in this action as Plaintiffs.

The complaint challenges a final agency action passed in 2015 by the Environmental Protection Agency and the U.S. Army Corps of Engineers (together, the "Agencies") defining the Waters of the United States. We refer to the rule challenged in this case as the "2015 Rule."

Since its promulgation, the 2015 Rule has been the subject of sustained litigation, including in lawsuits filed by many of the proposed Business Intervenors in the U.S. Court of Appeals for the Sixth Circuit and the U.S. District Court for the Southern District of Texas. And related litigation has not been limited to the 2015 Rule. While this and other lawsuits have been pending, and while the Agencies consider a repeal and replacement of the 2015 Rule, the Agencies amended the 2015 Rule "to maintain the status quo." *Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule*, 82 Fed. Reg. 55,542 (Nov. 22, 2017) ("Applicability Date Rule"). More specifically, the Agencies amended the 2015 Rule with "an applicability date" in 2020 to provide "continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the public while the agencies continue to work to consider possible revisions." *Id.*; see 83 Fed. Reg. 5,200 (Feb. 6, 2018) (final rule). The Applicability Date Rule too has been the subject of challenges by number of states and environmental organizations. Many of the proposed

Business Intervenors have intervened to defend the Applicability Date Rule in litigation pending before the U.S. District Courts for the Southern District of New York and the District of South Carolina.

These cases are closely interconnected. Each court has been asked to consider the legality of administrative actions regarding the same regulatory framework under the Clean Water Act. The outcome here will have a significant impact on the challenge to the 2015 Rule filed by many of the proposed Business Intervenors in the Southern District of Texas, and on their defense of the Applicability Date Rule litigation in New York and South Carolina district courts.[1]

On the one hand, a ruling in favor of the Defendants here could ultimately subject the proposed Business Intervenors and their members to increased (and possibly inconsistent) regulatory burdens, inhibiting their productive use and enjoyment of their lands and imposing significant costs for compliance. Indeed, the proposed Business Intervenors and their members have already incurred substantial costs in anticipation that the 2015 Rule may take effect. On the other hand, a favorable outcome vacating the 2015 Rule would directly impact the Business Intervenor's actions pending before the U.S. District Courts for the Southern District of New York and South Carolina, given that the Applicability Date Rule amends the 2015 Rule.

Against this background, the Court should grant the proposed Business Intervenors leave to intervene to protect their interests in this litigation. Their motion is timely; they have a clear interest in the States' action that will be impaired if they cannot defend it; and the States, as sovereigns protecting the general public interest within their respective territories, will not adequately represent the interests of private businesses.

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[1] The proposed Business Intervenors here include entities that were not parties to the Texas, New York, or South Carolina suits—specifically the Georgia Farm Bureau Federation and Georgia Association of Manufacturers. In addition, proposed intervenors American Forest & Paper Association; National Stone, Sand, and Gravel Association; and U.S. Poultry & Egg Association were not plaintiffs in the Texas suit. Finally, the Texas, New York, and South Carolina suits included parties who are not proposed intervenors here—specifically the Matagorda County Farm Bureau and Texas Farm Bureau.

STATEMENT OF FACTS

1. On June 29, 2015, the Agencies published the 2015 Rule, which purports to "clarify" the definition of "waters of the United States" within the meaning of the Clean Water Act ("CWA"). *Clean Water Rule: Definition of "Waters of the United States"*, 80 Fed. Reg. 37,054 (June 29, 2015). Because the Agencies' regulatory jurisdiction extends to "waters of the United States" and no more, the 2015 Rule establishes the scope of the Agencies' regulatory jurisdiction under the CWA. On July 2, 2015, most of the proposed Business Intervenors here filed a complaint for declaratory and injunctive relief in the U.S. District Court for the Southern District of Texas, alleging that the Agencies' promulgation of the 2015 Rule violated the Administrative Procedure Act; exceeded their authority under Article I, Section 8 of the Constitution; and offended the Due Process Clause of the Fifth Amendment. *See generally* Complaint, *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165 (S.D. Tex. July 2, 2015) (Dkt. No. 1). Those intervenors sought a declaration that the 2015 Rule is unlawful and an injunction against its implementation or application.

2. From the outset, the intervenors' complaint presented the threshold question of whether jurisdiction fell to the district courts under 28 U.S.C. § 1331 or instead to the courts of appeals under 33 U.S.C. § 1369(b). Section 1369(b) confers original jurisdiction on the courts of appeals to review challenges to seven categories of final agency actions—including, the Agencies argued, the 2015 Rule. At the same time, the Administrative Procedure Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704.

In light of the Agencies' assertion that review of the 2015 Rule belonged in the courts of appeals under Section 1369(b), numerous parties (including most of the proposed Business Intervenors) either filed protective petitions for review in various courts of appeal under Section 1369(b)

or intervened in the petitions. These petitions were consolidated in the U.S. Court of Appeals for the Sixth Circuit.

3. Shortly after the petitions were consolidated, several petitioners moved for, and the Sixth Circuit granted, a nationwide stay of the 2015 Rule pending the court's consideration of the merits. *See In re EPA & Dep't. of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). The court held, in particular, that "petitioners have demonstrated a substantial possibility of success on the merits of their claims," describing the Rule's promulgation as "facially suspect." *Id*. at 807. Indeed, "it is far from clear that the new Rule's distance limitations are harmonious" with even the most generous reading of the prevailing Supreme Court precedents. *Id*.

Acknowledging "the pervasive nationwide impact of the Rule on state and federal regulation of the nation's waters" and the risk of injury "visited nationwide on governmental bodies, state and federal, as well as private parties," the Court concluded that "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being." *Id*. at 806, 808. The Sixth Circuit thus enjoined the Agencies from enforcing the 2015 Rule nationwide. *Id.* at 808-09.

4. Even before the Sixth Circuit entered its stay of the 2015 Rule, a different group of plaintiff States challenging the 2015 Rule in the U.S. District Court for the District of North Dakota moved for, and that court granted, a preliminary injunction. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). Like the Sixth Circuit, the North Dakota court held that the moving States were "likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the [2015] Rule." *Id*. at 1055. The court found that the 2015 Rule suffered from numerous "fatal defect[s]," including that is inconsistent with any plausible reading of Supreme Court precedent; it is arbitrary and capricious; the Agencies failed to seek additional public comment after making major, unforeseeable changes to the proposed version of the 2015 Rule; and the

Agencies failed to prepare an environmental impact statement as required by the National Environmental Policy Act (NEPA). *See id.* at 1055-58.

The North Dakota court further concluded that the moving States had "demonstrated that they will face irreparable harm in the absence of a preliminary injunction." *Id.* at 1059. It held, in particular, that the WOTUS Rule would "irreparably diminish the States' power over their waters" and inflict "irreparable harm in the form of unrecoverable monetary harm." *Id*. Finding that those harms outweighed any asserted injury to the public interest, the Court granted the preliminary injunction, but only within the geographic limits of Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. *Id*. at 1051 n.1, 1059-60.

5. After the Sixth Circuit stayed the 2015 Rule nationwide, the National Association of Manufacturers—which is a member of the proposed Business Intervenors but did not join the petitions for review in the courts of appeals—intervened in the petitions for review and moved to dismiss each for lack of jurisdiction. The Sixth Circuit denied the motions to dismiss, holding in a splintered decision that jurisdiction belongs in the court of appeals, not the district courts. *See In re Dep't of Def. & EPA Final Rule*, 817 F.3d 261 (6th Cir. 2016).

The National Association of Manufacturers then filed a petition for a writ of certiorari. The Supreme Court granted the petition and reversed the Sixth Circuit. The Supreme Court held, in short, that "any challenges to the [2015] Rule … must be filed in federal district courts." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018). Following remand from the Supreme Court the Sixth Circuit dismissed the petitions for review and dissolved its nationwide stay of the 2015 Rule.

6. While the litigation was ongoing, the Agencies published a notice of proposed rule-making in the *Federal Register*, proposing to repeal and replace the 2015 Rule in a "comprehensive, two-step process" process. *Definition of "Waters of the United States"—Recodification of Pre-*

Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017). The first step of this comprehensive process (which we refer to as the "Proposed Repeal Rule") would "rescind" the 2015 Rule, restoring the status quo ante by regulation. *Id.* "In a second step," according to the Agencies, the government "will conduct a substantive reevaluation of the definition of 'waters of the United States.'" *Id.*

The Proposed Repeal Rule was published on July 27, 2017, and the comment period ended two months later, on September 27, 2017. The Agencies received thousands of comments, many of which were lengthy and substantive. Perhaps for that reason, the Agencies have not yet issued a final Repeal Rule.

In light of the delay in issuing a final Repeal Rule, and anticipating that the Supreme Court would reverse the Sixth Circuit's jurisdictional holding and that the stay would soon dissolve, the Agencies set out "to maintain the status quo" while they continued to consider comments on the Proposed Repeal Rule and work on the substance of a replacement rule. *Definition of "Waters of the United States"*, 82 Fed. Reg. 55,542. The Agencies thus proposed to amend the 2015 Rule with "an applicability date" to provide "continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the public while the agencies continue to work to consider possible revisions." *Id.*

Following promulgation of the final Applicability Date Rule on February 6, 2018, a group of states and a group of environmental organizations each filed lawsuits challenging the Applicability Date Rule in the U.S. District Court for the Southern District of New York and the U.S. District Court for the District of South Carolina. Many (but not all) of the proposed Business Intervenors moved for and were permitted to intervene in those suits to defend the Applicability Date Rule. *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165 (S.D. Tex.); *New York v. Pruitt*, No. 1:18-cv-1030 (S.D.N.Y.); *Nat. Resources Def. Council v. EPA*, No. 1:18-cv-1048 (S.D.N.Y.); *South Carolina Coastal Conservation League v. Pruitt*, No. 2:18-cv-330 (D.S.C.).

7. Meanwhile, as with the action before this Court, the suit in the Southern District of Texas was reopened following the Supreme Court's decision on jurisdiction. The plaintiff there (most of whom, but not all, are proposed intervenors here) moved for a nationwide preliminary injunction against the 2015 Rule. Mot. for Prelim. Inj., *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165 (S.D. Tex. Feb. 7, 2018) (Dkt. No. 61). That motion remains pending to date, while the same legal challenges impacting the proposed Business Intervenor's interests progress in this case.

Demonstrating the inter-relatedness of these challenges, a number of environmental groups challenging the Applicability Date Rule in the Southern District of New York, including the National Wildlife Federation, intervened in the Texas litigation and opposed the motion for a preliminary injunction. *See* Def.-Intervenors' Opp. at 1, *Am. Farm Bureau Fed'n*, No. 3:15-cv-165 (S.D. Tex. Feb. 14, 2018) (Dkt. No. 66); *see also Amicus Curiae* Br. of New York et al. at 1, *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex. Feb. 15, 2018) (Dkt. No. 102-1). The National Wildlife Federation has also filed a Motion to Intervene as a Defendant in this case. *Georgia v. McCarthy*, No. 2:15-cv-000079 (S.D. Ga. July 31, 2015) (Dkt. No. 36).

LEGAL STANDARD

Rule 24 provides for intervention as of right and permissively. Pursuant to Rule 24(a)(2), the district court must grant leave to intervene, upon timely application, when the applicant "has an interest relating to the property or transaction which is the subject of the action, [and] he is so situated that the disposition of the action, as a practical matter, may impede or impair his ability to protect that interest, [and] his interest is represented inadequately by the existing parties to the suit." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); *accord Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002).

Even when intervention is unavailable as of right, the Court may permit intervention by anyone who "has a claim or defense that shares with the main action a common question of law or

fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion to grant permissive intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* 24(b)(3).

ARGUMENT

A. The proposed Business Intervenors are entitled to intervene as of right.

The proposed Business Intervenors easily meet all four requirements for intervention as of right under Rule 24(a): They have concrete interests at stake in this litigation, and the Plaintiff States may not adequately represent those interests. More fundamentally, the outcome of this litigation will have a direct and obvious impact on the litigation in the Southern District of Texas as well as the Applicability Date litigation in the Southern District of New York and District of South Carolina. Because resolution of this lawsuit may impair the intervenors' ability to defend their interests in Texas and elsewhere, they are entitled to intervene as of right in this action.[2]

1. Timeliness

The motion is timely. In assessing timeliness, courts consider "the length of time during which [the proposed intervenors] knew or reasonably should have known of their interest in the case before moving to intervene, the extent of prejudice to the existing parties as a result of the [proposed intervenors'] failure to move for intervention as soon as they knew or reasonably should have known of their interest, the extent of prejudice to the [proposed intervenors] if their motion is denied, and the existence of unusual circumstances militating either for or against a determination that their

[2] Because they do not wish "to pursue relief not requested by [the States]," the proposed Business Intervenors need not show independent Article III standing in this case. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017). Nevertheless, in other litigation, they submitted numerous affidavits establishing their standing. *See* Addendum of Declarations to Opening Brief for the Business and Municipal Petitioners, *In Re EPA & Dep't of Def. Final Rule*, No. 15-3751 (6th Cir. Nov. 1, 2016) (Dkt. 129-2); Appendix to Plaintiffs' Mot. for a Nationwide Preliminary Injunction at Tab 1-B, *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165 (S.D. Tex. Feb. 7, 2018) (Dkt. 61-1). We attach those affidavits as exhibits to this motion.

motion was timely." *Chiles*, 865 F.2d at 1213. This is not a rigid analysis: "The requirement of timeliness must have accommodating flexibility . . . if it is to be successfully employed to regulate intervention in the interest of justice." *Id*. (quoting *McDonald v. E.J. Lavino Co*., 430 F.2d 1065, 1074 (5th Cir. 1970)).

The proposed Business Intervenors' motion is timely. Even where an action has been pending for several years, motions to intervene are deemed timely if the action has been stayed "almost the entirety of that time." *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 2017 WL 5476781, at *2 (N.D. Al. 2017). That is the case here. Although the complaint was originally filed in June 2015, this Court ruled just two months later that it lacked jurisdiction over the dispute. The suit was thereafter stayed pending interlocutory appeal and resolution of the jurisdictional and transfer questions. *See* Dkts. 102, 106. Upon resolution of those issues in February 2018, the Court on March 9, 2018 entered an order continuing the stay for an additional thirty days. *See* Dkt. 144. It was not until April of this year that the stay was finally lifted.

The proof of the pudding is in the status of the motion to intervene filed by a number of environmental groups (including the National Wildlife Federation, which has intervened in our Texas litigation) on July 31, 2015, shortly after this lawsuit was initiated. *See* Dkt. 36. That motion—which was undeniably timely—has yet to be acted on in light of the intervening delays in the litigation. The proposed Business Intervenors are therefore on the same practical footing as other proposed intervenors who filed their motion almost three years ago.

In any event, "[t]he most important consideration in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene." *McDonald*, 430 F.2d at 1073. That no responsive pleading has yet been filed, and no discovery conducted, militates in favor of finding this motion timely. *See Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1125 (5th Cir. 1970) (motion to intervene filed more than a year after

commencement of the litigation timely where "[t]here is no showing of any delay in the process of the overall litigation"). Because intervention would cause no delay or prejudice to the existing parties in this litigation, the Business Intervenors' motion is timely.

2. Legally protectable interest & impairment of that interest

The proposed Business Intervenors possess a sufficient, legally protectable interest in the challenge to the Agencies' final action in this case. "[A] party is entitled to intervention as a matter of right if the party's interest in the subject matter of the litigation is direct, substantial and legally protectable." *Georgia*, 302 F.3d at 1249. To determine whether a party has a legally protectable interest, a court's inquiry is "flexible" with a focus "on the particular facts and circumstances" of each case. *Chiles*, 865 F.2d at 1214. And where the outcome of litigation may adversely impact a movant's ability to protect its interests in related litigation, courts find not only that a proposed intervenor has a protectable interest, but that the interest may be impaired absent intervention. *See Georgia*, 302 F.3d at 1258 (finding a sufficient impact on a proposed intervenor's legally protected interest where "a final ruling in this case may adversely impact" a proposed intervenors' ongoing lawsuit against the same party before another federal district court); *Martin v. Travelers Idem. Co.*, 450 F.2d 542, 554 (5th Cir. 1971) (similar).

a. The Business Intervenors are keenly interested in the fate of the 2015 Rule, which they have consistently argued violates the Constitution, the CWA, and the APA and which imposes significant and unjustified costs on their members. Accordingly, as we described at the outset (*see supra* pages 3-7), the proposed Business Intervenors have participated in litigation over the 2015 Rule and related Applicability Date Rule at virtually every stage and in every forum, including as the lead and successful parties in the United States Supreme Court. As we have noted, most of the proposed Business Intervenors are litigating the lawfulness of the 2015 Rule in the U.S. District Court for the Southern District of Texas, and are involved in proceedings before the U.S. District

Courts for the Southern District of New York and the District of South Carolina concerning the Applicability Date Rule. *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165 (S.D. Tex.); *New York v. Pruitt*, No. 1:18-cv-1030 (S.D.N.Y.); *Nat. Resources Def. Council v. EPA*, 1:18-cv-1048 (S.D.N.Y.); *South Carolina Coastal Conservation League v. Pruitt*, No. 2:18-cv-330 (D.S.C.). They also are considering intervening in additional suits in the Western District of Washington and the Northern District of California, both of which involve challenges to the 2015 WOTUS Rule as well as the Applicability Date Rule. *Puget Soundkeeper Alliance v. Pruitt*, No. 2:15-cv-01342 (W.D. Wash.); *Waterkeeper Alliance, Inc. v. Pruitt*, No. 3:18-cv-3521 (N.D. Cal.).

The outcome of this litigation will have an obvious impact on the pending litigation before the Southern District of Texas (and vice versa). A final judgment here will bear on the issues involved in that case, many of which overlap; and the scope of any injunction entered may further complicate the regulatory landscape in ways relevant to the relief being considered in Texas.

A decision in this case also would have an clear and direct impact on the Applicability Date Rule actions pending before the courts in New York and South Carolina. The Applicability Date Rule amends the 2015 Rule to "add[] an applicability date." 83 Fed. Reg. at 5,200. In any event, in the process of considering the Applicability Date Rule the courts in New York and South Carolina will have to address the 2015 Rule. They will, for example, have to evaluate whether the challengers there have been harmed by the suspension of the 2015 Rule, which requires understanding how it operates and how it changed the status quo ante. *Any* decision this Court makes concerning the 2015 Rule will inevitably bear upon the issues presented in that litigation. That is especially so because the Business Intervenors are also asking for vacatur without remand in the Applicability Date litigation, in the event any court finds the Applicability Date Rule unlawful. Intervenors' entitlement to that form of relief will be impacted by a judgment of this Court concerning the legality of the underlying 2015 Rule. And were this Court to hold the 2015 Rule unlawful and strike it down, the Applicability

Date Rule would by necessity cease to be operative, since it amends only the 2015 Rule, and the Applicability Date litigation would become moot.

Courts have frequently held that intervention is warranted where a case would have a direct impact on parallel litigation to which the proposed intervenors are a party. The Fourth Circuit, for example, has "recognized that an interest in preventing conflicting orders may be sufficient for intervention as of right." *Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986). And in *Chiles*, 865 F.2d at 1214, the Eleventh Circuit held that "the potential *stare decisis* effect" of a decision in one case on another "may supply that practical disadvantage which warrants intervention as of right." *See also Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n*, 646 F.2d 117, 121 (4th Cir. 1981)); *Oneida Indian Nation of Wis. v. New York*, 732 F.2d 261, 265-66 (2d Cir. 1984) ("[T]here is a significant likelihood that the ultimate resolution of this litigation will lead to . . . conclusions of law on issues of first impression, or mixed findings of fact and law, . . . which would control any subsequent lawsuit by the intervenors."). Just so here.

b. Apart from the other pending lawsuits, the proposed Business Intervenors have a substantial legally protected interest in challenging the 2015 Rule because the Rule inhibits their productive use and enjoyment of their members' property. The proposed Business Intervenors and their members own and work on real property that includes land areas that are likely to constitute "waters of the United States" under the 2015 Rule. Addendum of Declarations to Opening Brief for the Business and Municipal Petitioners, *In Re EPA & Dep't of Def. Final Rule*, No. 15-3751 (6th Cir. Nov. 1, 2016) (Dkt. 129-2); Appendix to Plaintiffs' Mot. for a Nationwide Preliminary Injunction at Tab 1-B, *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165 (S.D. Tex. Feb. 7, 2018) (Dkt. 61-1). Thus, each member would be required to comply with the CWA's prohibition against unauthorized "discharges" into any such areas. If the Rule is upheld, they would lose their ability to develop and pursue gainful projects on these lands without complying with costly regulations—or

may be forced to forgo such projects altogether. This Circuit has recognized a sufficient interest to intervene where the outcome of a lawsuit could have a "practical effect" on property in which the proposed intervenor has a right. *See, e.g.*, *Georgia*, 302 F.3d 1242 (holding Florida has sufficient legal interest in lawsuit regarding acts within Georgia that have a practical effect upon the quantity and quality of water in which Florida has a right).

Similarly, a sufficient interest exists where a judgment could impair or halt the business activities of regulated parties subject to an agency action. *See, e.g.*, *Black Warrior*, 2017 WL 5476781, at *2. Numerous courts have agreed that regulated parties have a sufficient interest to intervene in litigation where the disposition of the lawsuit would impose costs on and interfere with the movant's business activities.[3] The same principle applies here: if Defendants are successful and the 2015 Rule is implemented, there is no doubt that the Rule would impede the business activities of the members of the proposed Business Intervenors. And if the 2015 Rule goes into effect in some States but not others, the proposed Business Intervenors' injuries will be compounded by having to sort out which regulatory regime applies to which activities under which circumstances—a particularly troubling prospect given that many of plaintiffs' members manage construction, extraction, and farming projects across multiple states.

[3] *See, e.g.*, *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 976 (8th Cir. 2014) (sufficient interest where regulated party would be required to install emission control technology on its property); *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995–96 (10th Cir. 2009) (sufficient interest where regulated party's business activities would be "impaired, or even halted"); *Sierra Club v. Glickman*, 82 F.3d 106, 109 (5th Cir. 1996) (per curiam) (sufficient interest where suit would directly impact ability of farmers to pump irrigation water from aquifer); *N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (a trade association has "a sufficient interest to permit it to intervene" when "the validity of a regulation from which its members benefit is challenged," where lifting the regulation "might well lead to significant changes in the profession and in the way the [members] conduct their businesses."); *see also* 7C Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1908.1 (3d ed. 2018) ("[I]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention").

Unless the proposed Business Intervenors are permitted to intervene in this action, their interests—both practical and legal—stand to be impaired. Thus, in order to adequately protect their interests, it is essential that the proposed Business Intervenors be allowed to participate in this case.

3. Adequacy of representation

The proposed Business Intervenors cannot rely on the States to adequately represent their interests. A proposed intervenor's burden of showing that representation of his or her interests may be inadequate is "minimal." *Chiles*, 865 F.2d at 1214 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Intervention "should be allowed" in the absence of a "clear" showing that the States (the *regulators* under the CWA) will adequately represent the interests of the proposed Business Intervenors (the *regulated* under the CWA). *Id.* (quoting 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1909, at 319 (2d ed. 1986)).

No such showing can be made here. For one thing, the Eleventh Circuit has recognized that a governmental regulator with a primary interest in the management of a resource has interests different from those of a regulated entity with "economic interests in the use of that resource." *Georgia*, 302 F.3d at 1259. The same principle supports intervention here. The States' sovereign interests in the management and stewardship of natural and economic resources is not concomitant with the interests of the proposed Business Intervenors' interest in using, harvesting, or extracting those resources. That is because "[t]he government must represent the broad public interest, not just the economic concerns" of an industry. *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994).

This is why the State Petitioners litigated the merits of the 2015 Rule as separate coalition from the Business and Municipal Petitioners before the Sixth Circuit. *See* Case Mgmt. Order No. 1, *In re EPA & Dep't. of Def. Final Rule*, No. 15-3751 (6th Cir. May 9, 2016) (Dkt. 93-1). Although their briefs overlapped in certain respects, they made several different arguments, including those concerning federalism, state sovereignty over local land use, and the agencies' violation of the

National Wildlife Federation Act. *Compare* Opening Brief of State Petitioners, *In re EPA & Dep't. of Def. Final Rule*, No. 15-3751 (6th Cir. Nov. 1, 2016) (Dkt. 128) *with* Opening Brief of Business and Municipal Petitioners, *In re EPA & Dep't. of Def. Final Rule*, No. 15-3751 (6th Cir. Nov. 1, 2016) (Dkt. 129-1).

The differences in interests here are particularly acute because the Business Intervenors are nationwide organizations with nationwide members who manage projects around the country. Yet the individual plaintiff States (understandably) cannot be counted on to protect interests that arise outside their respective borders. The proposed Business Intervenors are concerned with lost productivity, lost use of their property, and other regulatory burdens and costs—not just within Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin, but all across the country. Given the ambiguities inherent in the Rule, moreover, the proposed Business Intervenors face enormous risk associated with liability under the Clean Water Act, including crushing fines and potential criminal liability. The risk of criminal penalties under the CWA is not one that the States, as regulators, face. That by itself is sufficient to satisfy the proposed Business Intervenors' obligation to demonstrate inadequate representation.

Additionally, the proposed Business Intervenors have no guarantee that the States would exhaust their appellate remedies in the event of an unfavorable (or partially unfavorable) decision from this Court. They may not appeal, for example, a decision in favor of the States with respect to certain elements of the 2015 Rule that is coupled with a decision in favor of the federal agencies on other elements. One criterion weighing in favor of finding representation inadequate is the possibility that the parties will focus on different litigation strategies:"[t]he fact that the interests are similar does not mean that approaches to litigation will be the same." *Chiles*, 865 F.2d at 1214. Intervention is therefore separately necessary to ensure that the proposed Business Intervenors are permitted to make their own decision regarding the course of litigation, should the need arise.

B. Alternatively, the proposed Business Intervenors should be allowed to intervene permissively.

Because the proposed Business Intervenors are entitled to intervene as of right, the Court need not decide whether they should be permitted to intervene. *See Georgia*, 302 F.3d at 1256. But if the Court believes otherwise, it should grant discretionary leave to intervene under Rule 24(b). That rule provides that a court may allow a party to intervene if it merely "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "[T]he claim or defense clause of Rule 24(b)(2) is generally given a liberal construction." *Georgia Aquarium, Inc. v. Pritzker*, 309 F.R.D. 680, 690 (N.D. Ga. 2014) (granting motion to intervene where movant's comments during the administrative process were directly referenced in the government's determination to deny permit). Permissive intervention is appropriate where "the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties." *Georgia*, 302 F.3d at 1250.

The proposed Business Intervenors have met this standard for the same reasons that make intervention proper as of right. Because the proposed Business Intervenors also challenge the 2015 Rule in their Texas litigation, they have a claim that shares a common question of law with this case. Permitting the proposed Business Intervenors to intervene to defend the 2015 Rule here would allow them to vindicate their substantial interests and, given their prompt action, would neither delay this case nor prejudice any of the parties. *See McDonald*, 430 F.2d at 1074 ("[I]t has been the traditional attitude of the federal courts" to allow intervention "where no one would be hurt and greater justice would be attained") (quotation omitted). Defendants have not yet filed an Answer to the Complaint, and discovery has not yet commenced. Thus, the proposed Business Intervenors should be permitted to intervene permissively if not mandatorily.

Allowing the proposed Business Intervenors to participate in this litigation would not in any way unduly prejudice or delay the adjudication of the rights of the original parties. The Court has not

yet set a schedule for briefing on summary judgment, and the proposed Business Intervenors will commit to working with the other parties to establish reasonable deadlines without delaying ultimate resolution of the issues presented in the lawsuit.

C. The proposed Business Intervenors' participation as plaintiffs in the Texas litigation is no reason to deny them intervention here

Although the plaintiff States have indicated that they consent to the relief requested in this motion, the defendant agencies have indicated that they are likely to oppose intervention on the ground the proposed Business Intervenors are already plaintiffs in the Texas lawsuit.[4] In the federal agencies' view, a doctrine akin to *Colorado River* abstention counsels against intervention here. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). That is wrong for a range of very basic reasons.

Under *Colorado River*, a federal court will sometimes abstain from adjudicating a claim that is being litigated in parallel in state court or before a foreign tribunal. *Ambrosia Coal & Const. Co. v. Pages Morales*, 368 F.3d 1320, 1331 (11th Cir. 2004). This kind of abstention is "extraordinary and narrow" and highly disfavored. *Id*. The doctrine is also purely discretionary and depends on a "pragmatic, flexible manner" analysis of the circumstances of each case taken individually. *Id*. at 1330. At bottom, abstention under *Colorado River* is intended to encourage "the efficient use of scarce judicial resources" and to avoid the possibility of "conflicting judgments." *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1521-1522 (11th Cir. 1994); *see also TranSouth Fin. Corp. v. Bell*, 149 F.3d 1292, 1295 (11th Cir. 1998) (intended to avoid "piecemeal litigation"). It also promotes "federalism" and respect for state court actions (*TranSouth*, 149 F.3d at 1295), and "international comity" and respect for foreign court actions (*Turner Entm't*, 25 F.3d at 1521).

[4] When asked for its position on this motion, counsel for the United States stated that "the United States plans to file a response after reviewing the motion." Counsel for the plaintiff States stated that they do not object to the relief requested.

None of these concerns has any application in this case. Federalism and comity have no role to play here because the parallel suits are all proceeding in federal district court. And there is no avoiding these parallel challenges of the 2015 Rule, with or without the proposed Business Intervenors' involvement in this case: The States' challenge to the 2015 Rule is moving forward expeditiously in North Dakota, and challenges have recently been reactivated in the Western District of Washington (*Puget Soundkeeper Alliance v. Pruitt*, No. 2:15-cv-01342 (W.D. Wash.)) and the Northern District of California (*Waterkeeper Alliance, Inc. v. Pruitt*, No. 3:18-cv-3521 (N.D. Cal.)). What is more the proposed intervenors' case in Texas is also moving forward. Notably, the federal agencies asked the Judicial Panel on Multidistrict Litigation to transfer and consolidate the cases in a single MDL proceeding, but that request was denied. Order Denying Transfer, *In Re: Clean Water Rule Definition of "Waters of the United States,"* MDL No. 2663, 140 F. Supp. 3d 1340 (J.P.M.L. 2015). Thus it is a foregone conclusion that multiple parallel suits will be proceeding simultaneously, no matter whether intervention is allowed.

Likewise, there is no guarantee that these courts will all reach consistent conclusions. But in that respect, the *Colorado River* factors favor allowing the proposed Business Intervenors to intervene. As we have explained, the proposed Business Intervenors have been involved in lawsuits across the country concerning the 2015 Rule. Their intervention here is in keeping with their nationwide approach to the litigation, and granting them intervention will ensure that this Court has the benefit of the same arguments and strategy decisions that they are making and putting into practice in the other courts across the country, reducing the chance of inconsistent judgments.

CONCLUSION

The motion to intervene should be granted.

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/s/ Mark D. Johnson

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CERTIFICATE OF SERVICE

I hereby certify that, on June 29, 2018, I filed and thereby caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of Georgia on all parties registered for CM/ECF in the above-captioned matter.

/s/ *Mark D. Johnson*