THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE, et al.,

Plaintiffs,

v.

SCOTT PRUITT, et al.,

Defendants,

and

AMERICAN FARM BUREAU FEDERATION; AMERICAN FOREST & PAPER ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION; 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,

Applicants Intervenor-Defendants.

No. 2:15-cv-01342-JCC

PROPOSED BUSINESS INTERVENORS' MOTION TO INTERVENE AS DEFENDANTS

NOTE ON MOTION CALENDAR: July 13, 2018

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

INTRODUCTION

Pursuant to Fed. R. Civ. P. 24, Proposed Intervenor-Defendants the American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; 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, Public Lands Council; and U.S. Poultry & Egg Association (collectively, the "proposed Business Intervenors") respectfully move for leave to intervene in this action as Defendants. A proposed answer is attached as Exhibit A.

The Amended Complaint (Dkt. 33) challenges a 2015 Rule defining the "waters of the United States" within the meaning of the Clean Water Act (CWA). The Amended Complaint also challenges a 2017 amendment adding an applicability date to the 2015 Rule. EPA and the U.S. Army Corps of Engineers (the "Agencies") amended 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." *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.")

Since its promulgation, the 2015 Rule has been the subject of sustained litigation. These challenges include lawsuits filed by 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. In those cases, the proposed Business Intervenors argued that the 2015 Rule is unlawful and inconsistent with the text of the CWA because it covers a staggering amount of land that Congress never intended to reach. In contrast, the Plaintiffs here argue that the 2015 Rule is unlawfully narrow in scope. The Applicability Date Rule, too, has been the subject of challenges by both States and private parties. The proposed Business Intervenors have successfully

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

intervened as defendants in litigation challenging the Applicability Date Rule pending before the U.S. District Courts for the Southern District of New York and the District of South Carolina.

If plaintiffs here obtain a vacatur of the Applicability Date Rule, it would have direct bearing on the proposed Business Intervenors' litigation in the Southern District of Texas, and on their pending motion for a preliminary injunction against enforcement of the 2015 Rule. It would affect the Applicability Date Rule litigation that the Business Intervenors are defending in the Southern District of New York and District of South Carolina. And it would subject the proposed Business Intervenors and their members to increased regulatory burdens and, given that the 2015 Rule has been stayed in half of the Nation, inconsistent burdens, causing a multitude of economic and noneconomic harms.

The Court should therefore grant the proposed Business Intervenors leave to intervene to protect their interests in this and other litigation. The motion is timely; the proposed intervenors have a clear interest in the Agencies' action that will be impaired if they cannot defend it; and the Agencies, as neutral regulatory bodies, cannot represent the interests of the regulated business community with the same perspective and vigor. Demonstrating the link between the cases, other challengers to the Applicability Date Rule have intervened in the proposed Business Intervenors' case in the Southern District of Texas. The motion accordingly should be granted.[1]

STATEMENT OF FACTS

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"

[1] The court having stayed plaintiffs' challenge to the 2015 Rule (Dkt. 32), the proposed Business Intervenors are moving to intervene as defendants to uphold the Applicability Date Rule, just as they have in three other suits in South Carolina and New York. If the Court later lifts the stay of the 2015 Rule claims, a realignment of the proposed Business Intervenors—who are challenging (or supporting challenges) to the 2015 Rule in Texas, Georgia, and North Dakota—would be in order. The Court need not address that possibility at this time. In addition, because they do not wish to "pursue relief not requested by a plaintiff," the proposed Business Intervenors need not show Article III standing at this time. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017).

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

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 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 Clean Water Act and Administrative Procedure Act ("APA"); 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). The proposed Business Intervenors sought a declaration that the 2015 Rule is unlawful and an injunction against its implementation.

From the outset, the proposed Business 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) establishes a scheme of judicial review for certain specified agency actions under the CWA. When judicial review of a final agency action under the Clean Water Act is *not* available in the courts of appeals under Section 1369(b), the APA provides a cause of action in district court under 28 U.S.C. § 1331.

In light of the Agencies' assertion that review of the 2015 Rule belonged in the courts of appeals, numerous parties (including 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.

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).

Even before the Sixth Circuit entered its stay of the 2015 Rule, a group of plaintiff States challenging the 2015 Rule as overly expansive 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). The preliminary injunction applied only within the

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

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.

After the Sixth Circuit stayed the 2015 Rule nationwide, the National Association of Manufacturers (one of the proposed Business Intervenors here) intervened in the petitions for review and moved to dismiss each for lack of jurisdiction. The Sixth Circuit denied the motion 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, supported by the remaining proposed Business Intervenors, then filed a petition for a writ of certiorari. The Supreme Court granted the petition and, on January 22, 2018, reversed the Sixth Circuit. The Supreme Court held 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). On remand, the Sixth Circuit dismissed the petitions for review and dissolved its nationwide stay of the 2015 Rule.

While the litigation was ongoing, the Agencies published a notice of proposed rule-making, proposing to repeal and replace the 2015 Rule in a "comprehensive, two-step process" process. *See 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 (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 and have not yet issued a final Repeal Rule.

In light of the delay in issuing a final Repeal Rule, the Agencies set out "to maintain the status quo" by amending 2015 Rule with "an applicability date" to provide "continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the public

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

while the agencies continue to work to consider possible revisions." *Definition of "Waters of the United States"*, 82 Fed. Reg. 55,542.

The final Applicability Date Rule was published in the *Federal Register* on February 6, 2018. States and environmental organizations have challenged the Applicability Date Rule in lawsuits filed in the U.S. District Court for the Southern District of New York and U.S. District Court for the District of South Carolina.

Meanwhile, as with the action before this Court, the proposed Business Intervenors' suit challenging the 2015 Rule in the Southern District of Texas was reopened following the Supreme Court's decision on jurisdiction. The proposed Business Intervenors filed a motion for a nationwide preliminary injunction against the 2015 Rule in that case. *See* 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.

After similarly re-opening proceedings, the Southern District of Georgia has enjoined the 2015 Rule in the States of Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, and the Commonwealth of Kentucky. *See* Order, *Georgia v. Pruitt*, No. 2:15-cv-79 (S.D. Ga. June 8, 2018) (Dkt. No. 174). As a result of the preliminary injunctions issued by the district courts in North Dakota and Georgia, the 2015 Rule is currently enjoined in 24 States and thus would not go into effect in those States were the Applicability Date Suit enjoined or set aside.

Demonstrating the inter-relatedness of all these challenges, many environmental groups advancing positions similar to the Plaintiffs' here have intervened in the Texas litigation and have opposed the Business Intervenors' motion for a preliminary injunction. *See* Def.-Intervenors' Opp. at 1, *Am. Farm Bureau Fed'n v. EPA*, 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). Environmental groups have also filed a Motion to Intervene as defendants before the Southern District of Georgia. *Georgia v. Pruitt*, No.

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

2:15-cv-000079 (S.D. Ga. July 31, 2015) (Dkt. No. 36). The proposed Business Intervenors are simultaneously moving to intervene as plaintiffs in that case.

LEGAL STANDARD

Fed. R. Civ. P. 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 (1) the applicant claims a "significantly protectable interest relating to the property or transaction which is the subject of the action," (2) the applicant is "so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest" and (3) the applicant's interest is "inadequately represented by the parties to the action." *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993), *abrogated on other grounds by Wilderness Soc. v. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). The Ninth Circuit follows "practical and equitable considerations and construe[s] the Rule broadly in favor of proposed intervenors . . . because [a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Wilderness Soc.*, 630 F.3d at 1179 (quotations omitted) (second alteration in original).

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). "The standard for permissive intervention is a low one." *Sierra Club v. McLerran*, 2012 WL 12846108, at *1 (W.D. Wash. 2012). 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." Fed. R. Civ. P. 24(b)(3).

ARGUMENT

A. Proposed Business Intervenors Are Entitled to Intervene as of Right.

The proposed Business Intervenors meet all four requirements for intervention as Defendants as of right under Rule 24(a).

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

1. Intervention is Timely

In assessing timeliness, courts consider "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) (quoting *County of Orange v. Air California*, 799 F.2d. 535, 537 (9th Cir. 1986)). Under any reasonable application of these criteria, the proposed Business Intervenors' motion is timely.

First, the litigation is "in its infancy": EPA has not filed its answer, and no discovery or dispositive motion practice has occurred. *McLerran*, 2012 WL 12846108, at *1 (granting motion to intervene where "Plaintiffs filed suit less than five months ago; the EPA filed its answer less than two months ago; and no discovery or dispositive motion practice has occurred.").

Second, the Ninth Circuit has recognized a "liberal policy in favor of intervention," *Wilderness Soc.*, 630 F.3d at 1179, that is overcome only by a showing of "serious prejudice," such as when intervention would "seriously disrupt a delicate or complex settlement." *McGough*, 967 F.2d at 1395. Intervention at this early stage would not prejudice any party.

Finally, there has been no improper delay. While Plaintiffs filed the original complaint in August 2015, the case was stayed shortly thereafter pending resolution of jurisdictional and transfer questions. *See* Dkts. 14, 19. It was not until April 27, 2018 that the Court entered an order re-opening the case, permitting Plaintiffs to amend and supplement the case. Dkt. 32. The Court further stayed Plaintiffs' existing claims challenging the 2015 Rule. *Id*. Plaintiffs then filed an Amended Complaint adding a challenge to the Applicability Date Rule on May 1, 2018. Dkt. 33. This motion is filed only a few months following the re-opening of this case and Plaintiffs' broadening of this lawsuit to challenge the Applicability Date Rule. Dkt. 33. Thus, the Business Intervenors are on the same practical footing as if they had filed their motion in 2015. Under all three criteria, the Business Intervenor's motion is timely.

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

2. The Proposed Business Intervenors Have a Legally Protectable Interest that May be Impaired By This Litigation

The proposed Business Intervenors possess a sufficient, legally protectable interest in the challenge to the Agencies' final actions in this case. To determine whether an intervenor demonstrates a significantly protectable interest, courts consider whether "the interest is protectable under some law" and "there is a relationship between the legally protected interest and the claims at issue." *Wilderness Soc.*, 630 F.3d at 1179 (quotations omitted). A movant "has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). Where the outcome of litigation may adversely impact a movant's ability to protect its interests in related litigation, a proposed intervenor plainly has a protectable interest that the interest may be impaired absent intervention.

a. The proposed Business Intervenors have a significant legally protected interest in defending the Applicability Date Rule. The proposed Business Intervenors and their members own and work on real property that includes features that are likely to constitute "waters of the United States" under the 2015 Rule, which vacatur of the Applicability Date Rule would effectively implement. 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). The Ninth Circuit has recognized that parties directly regulated by the CWA have a legally protected interest in suits that would "affect the[ir] use of real property." *Sierra Club*, 995 F.2d at 1483.[2]

[2] Numerous courts have agreed, holding that regulated parties have a sufficient interest to intervene where the disposition of the lawsuit would impose costs on and interfere with their business activities. *See, e.g., Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 976 (8th Cir. 2014); *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995–96 (10th Cir. 2009); *Sierra Club v. Glickman*, 82 F.3d 106, 109 (5th Cir. 1996) (per curiam); *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").

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

That is the case here. The outcome of the litigation will have a clear and direct impact on the proposed Business Intervenors' and their members' use of their real property. Many members may be required to obtain costly permits, and each would be required to comply with the CWA's prohibition against unauthorized "discharges" into any such areas. Indeed, in proposing the Applicability Date Rule, the Agencies observed that it would provide "continuity and regulatory certainty for regulated entities" like the Business Intervenors. Mem. 7 (quoting Definition of "Waters of the United States", 82 Fed. Reg. 55,542, 55,542).

Where, as here, the relief the plaintiff seeks would (if granted) profoundly impact the nature of a proposed intervenor's business activities, "[t]here is no question that the interests of the proposed intervenors would be impaired . . . [and] proposed intervenors presence is necessary to fully and fairly put [such] issue[s] before the court." *Juliana v. United States*, 2016 WL 183903, at *4 (D. Or. 2016) (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003)).

b. The Business Intervenors are keenly interested in the fate of the 2015 Rule and the Applicability Date Rule. They have consistently argued that the 2015 Rule violates the Constitution, the CWA, and the APA and that it imposes significant and unjustified costs on their members. The proposed Business Intervenors have participated in the litigation over the 2015 Rule and related Applicability Date Rule at virtually every stage and in every forum, including the United States Supreme Court.

The outcome of this litigation will have an obvious impact on the suit challenging the 2015 Rule in the Southern District of Texas as soon as the Rule was promulgated—and vice versa. A final judgment here will bear on the issues involved in that case; and the scope of any final judgment in this Court may further complicate the regulatory landscape in ways relevant to the relief being considered in Texas. A decision in this case also would be a relevant factor in the Applicability Date Rule actions pending in New York and South Carolina. Intervention is warranted where a case would have an impact on parallel litigation to which intervenors are a

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

party. *E.g.*, *Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986) ("an interest in preventing conflicting orders may be sufficient for intervention as of right")

3. The Agency Defendants Do Not Adequately Represent the Business Intervenors' Interests

The proposed Business Intervenors cannot rely on the Agencies to represent their interests. A proposed intervenor's burden of showing inadequate representation is "minimal: it is sufficient to show that representation *may* be inadequate." *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498-99 (9th Cir . 1995), *abrogated on other grounds by Wilderness Soc.*, 630 F.3d 1173 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). To determine adequacy of representation, courts consider "whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; whether the present party is capable and willing to make such arguments; and whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect." *Id.* Although courts apply a presumption of adequacy when a proposed intervenor shares the same ultimate objective as an existing party, the parties here possess "distinctly different" interests. *Lockyer*, 450 F.3d at 444.

While the Agencies and the proposed Business Intervenors both will argue, at the most general level, that the challenge to the Applicability Date Rule is meritless, their interests are distinctly different. As the district court in South Carolina observed when it granted intervention under effectively identical circumstances,

> The court is not so persuaded that the business groups share the same ultimate objective as the government. The EPA is, after all, in the business of protecting the environment—not protecting business interests. The EPA's stated motivation in enacting the [Applicability Date] Rule included, certainly, creating regulatory certainty for businesses such as the industries that the business groups represent. But it also involved policy considerations of what waters in the United States deserved protection under the Act. Furthermore, while the government is defending the legality of the [Applicability Date] Rule in this court, aligning itself with the position of the business groups, the government is the adversary of the business groups in the pending WOTUS litigation in district courts across the country it is defending. In that pending litigation, this court assumes, the government will continue to defend the merits of the WOTUS rule against these very same business groups' challenges. In short, in that pending litigation over the

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

> WOTUS rule the government is, as the business groups pointed out during the hearing on this motion, "on the opposite side of the v."

S.C. Coastal Conservation League v. Pruitt, 2018 WL 2184395, *9 (D.S.C. May 11, 2018).

Certainly, the Agencies' interests in the management of natural and economic resources is not concomitant with the interests of the proposed Business Intervenors' interest in using, harvesting, or extracting those resources. The "more narrow, parochial interest[]" of private business is just one among many varied and often competing constituencies represented by the Agencies, which bear statutory obligations on behalf of the "general public" as a whole. *Forest Conservation Council*, 66 F.3d at 1499 (quotation omitted). "The government must represent the broad public interest, not just the economic concerns" of a particular industry or industries. *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994). Courts in the Ninth Circuit have routinely recognized that a governmental regulator with a primary interest in the management of a resource has interests different from those of a regulated entity. *See, e.g.*, *McLerran*, 2012 WL 12846108, at *2 (noting "the County's interest as a governmental entity may cause it to take positions inconsistent with those of a purely private entity).

There is also reason to doubt that the Agency is willing to make the same arguments and rigorously pursue appeal.While the Agencies can be counted on to "stick up for [their] actions in response to [a] petition for review," "if [they] lose[] the Solicitor General may decide that the matter lacks sufficient general importance to justify proceedings before the [appellate] court . . . or the Supreme Court." *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004) ("*Sierra Club II*). In other words, the proposed Business Intervenors have no guarantee that the Agencies would exhaust their appellate remedies in the event of an unfavorable decision from this Court. This was the case when the National Association of Manufacturers filed a certiorari petition on the 6th Circuit denial of its motion to dismiss which the Agencies vigorously opposed. The Agencies continued to oppose the petition in the Supreme Court on the merits, losing in a 9-0 ruling. *See Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 624.

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

Intervention is therefore necessary to ensure that the Business Intervenors are placed "on equal terms" and allowed "to make their own decisions about the wisdom of carrying the battle forward" should the need arise. *Sierra Club II*, 358 F.3d at 518. That is easily enough to satisfy the proposed Business Intervenors' obligation to demonstrate inadequate representation.

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. 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). "The standard for permissive intervention is a low one." *McLerran*, 2012 WL 12846108, at *1.

The proposed Business Intervenors have met this standard for the same reasons that make intervention proper as of right. Permitting the proposed Business Intervenors to intervene to defend the Applicability Date Rule 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 v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970) ("[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.'"). This motion is being filed the same day that Defendants' answer to the complaint is due. Allowing the proposed Business Intervenors to participate in the litigation would not in any way unduly prejudice or delay the adjudication of the rights of the original parties. Thus, the proposed Business Intervenors should be permitted to intervene permissively if not mandatorily.

CONCLUSION

The Court should grant the motion to intervene. Counsel for the proposed Business Intervenors have contacted counsel for the parties concerning this motion. Neither Plaintiffs nor Defendants take a position on the motion at this time.

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

Dated this 28th day of June, 2018.

TUPPER MACK WELLS PLLC

/s/ James A. Tupper, Jr.
James A. Tupper, Jr., WSBA No. 16873
Lynne M. Cohee, WSBA No. 18496
2025 First Avenue, Suite 1100
Seattle, WA 98121
(206) 493-2300
tupper@tmw-law.com
cohee@tmw-law.com

MAYER BROWN LLP

Timothy S. Bishop*
Michael B. Kimberly*
1999 K Street NW
Washington, DC 20006
(202) 263-3000
tbishop@mayerbrown.com
mkimberly@mayerbrown.com

Attorneys for Proposed Intervenors-Defendants
*Pro hac vice motions pending

CERTIFICATE OF SERVICE

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

Dated at Seattle, Washington, this 28th day of June, 2018

s/ James A. Tupper, Jr.
James A. Tupper, Jr., WSBA No. 16873

4831-8947-8508, v. 1

Tupper Mack Wells PLLC
2025 First Avenue
Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310