IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

States of West Virginia, North Dakota, Georgia, Iowa, Alabama, Alaska, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wyoming,

Plaintiffs,

and

American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Associated General Contractors of America, Cass County Farm Bureau, Leading Builders of America, National Apartment Association, National Association of Home Builders of the United States, National Association of Realtors, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Multifamily Housing Council, National Pork Producers Council, National Stone, Sand and Gravel Association, North Dakota Farm Bureau, Public Lands Council, and U.S. Poultry and Egg Association,

Movants/Proposed Intervenor-Plaintiffs,

vs.

U.S. Environmental Protection Agency, Michael S. Regan, In His Official Capacity as Administrator of the U.S. Environmental Protection Agency, Michael L. Connor, In His Official Capacity as Assistant Secretary of the Army for Civil Works, and LTG Scott A. Spellmon, In His Official Capacity as Chief of Engineers and Commanding General, U.S. Army Corps of Engineer,

Defendants.

Case No. 3:23-cv-32

ORDER

Pursuant to the Administrative Procedure Act, twenty-four states challenge two federal agencies' promulgation of a revised definition of "Waters of the United States" (WOTUS) under the Clean Water Act. Eighteen trade groups move to intervene as plaintiffs, alleging they meet requirements both for intervention as of right and for permissive intervention. (Doc. 54). If allowed to intervene, the movants intend to seek a preliminary injunction. Defendants oppose intervention, both as of right and permissively.[1] (Doc. 82).

Background

The administrative rule now challenged is the third revision of the WOTUS definition promulgated since 2015. The two prior revisions—promulgated in 2015 and in 2020—remain the subjects of pending litigation in multiple federal district courts, and a case involving interpretation of WOTUS under the Clean Water Act is pending before the United States Supreme Court. Sackett v. EPA, 8 F.4th 1075 (9th Cir. 2021), cert. granted in part, 142 S. Ct. 896 (2022). Some of the movants were permitted to intervene in various cases challenging the 2015 and 2020 WOTUS Rules.[2] The Rule challenged in this case is the subject of litigation in at least two other federal districts—the Southern District of Texas and the Eastern District of Kentucky. The rule now challenged was effective as of March 20, 2023.

Sixteen of the eighteen trade groups now moving to intervene initiated litigation in the Southern District of Texas. That case—American Farm Bureau Federation v. EPA,

[1] Defendants are the United States Environmental Protection Agency and its Administrator, the United States Army Corps of Engineers and its Chief of Engineers and Commanding General, and the Assistant Secretary of the Army for Civil Works.

[2] (See Doc. 56, pp. 6-8) (citing cases).

No. 3:23-cv-20 (S.D. Tex.), was consolidated with Texas v. EPA, No. 3:23-cv-17 (S.D. Tex.), in which the states of Texas and Idaho challenge the same rule. On March 19, 2023, a judge in the Southern District of Texas preliminarily enjoined implementation or enforcement of the 2023 Rule within the states of Texas and Idaho but denied the plaintiff trade groups' request for a nationwide injunction.

The eighteen trade groups moving to intervene purport to represent parties directly regulated by the 2023 Rule, stating their "members and members' clients consist of countless businesses and individuals that own or use land for a broad variety of purposes including farming, ranching and other livestock production, manufacturing, mining of all types, oil and gas production and refining, power generation, road and other infrastructure construction, and home and commercial building." (Doc. 56, p. 2). Collectively, movants claim to represent "a large portion of the Nation's economic activity." Id.

Movants describe their extensive history of advocacy regarding each iteration of the WOTUS Rule and, because they have been allowed to intervene in previous litigation regarding other versions of the Rule, movants assert their experience will be helpful to the court in resolving this case. Id. at 6-8. Further, they contend their interests are different from the interests of the plaintiff states, asserting the states' focus is "on their sovereign authority to manage the water and land within their boundaries and their role as state regulators," while the movant trade groups represent the interests of members of those trade groups. Id. at 13. Movants view themselves as "best-positioned to explain the legal flaws in the 2023 Rule as it applies to their properties." Id. at 5.

Law and Discussion

Federal Rule of Civil Procedure 24 governs intervention:

> **(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
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> . . .
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> **(2)** claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
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> **(b) Permissive Intervention.**
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> **(1) In General.** On timely motion, the court may permit anyone to intervene who:
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> . . .
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> **(B)** has a claim or defense that shares with the main action a common question of law or fact.
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> . . . .
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> **(c) Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Fed. R. Civ. P. 24. Movants submitted a proposed complaint as required by the rule.

In considering a motion to intervene, the court must accept as true all allegations of the proposed intervenor complaint and construe those allegations in favor of the prospective intervenor. Nat'l Parks Conservation Ass'n v. U.S. EPA, 759 F.3d 969, 973 (8th Cir. 2014); United States v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 834 (8th Cir. 2009). As described by the Eighth Circuit, one seeking to intervene as of right has the burden to show (1) a recognized interest in the subject matter of the litigation that (2) might be impaired by disposition of the case and that (3) will not be adequately

protected by the existing parties. N.D. ex rel. Stenehjem v. United States, 787 F.3d 918, 921 (8th Cir. 2015). The Eighth Circuit has stated doubts about appropriateness of intervention should be resolved in favor of allowing it "because this serves the judicial system's interest in resolving all related controversies in a single action." Sierra Club v. Robertson, 960 F.2d 83, 86 (8th Cir. 1992).

The motion to intervene was filed five days after the states initiated the action and defendants do not challenge timeliness of the motion. Nor do defendants challenge movants having adequately asserted a legally protectable interest. Rather, defendants contend (1) movants are already adequately protecting their interests in the case they initiated in the Southern District of Texas, their intervention in this case would contravene principles against duplicative litigation and claim splitting, and their intervention would therefore be inconsistent with principles of Rule 24; (2) movants have not established standing; and (3) permissive intervention is not warranted. (Doc. 82, pp. 16-27). The court next addresses each of those arguments.

1. Standing

Relying on Town of Chester v. Laroe Estates, Inc., 581 U.S. 433, 435, 439-40 (2017), movants assert they need not show independent Article III standing because they are not requesting relief different from that the plaintiff states are requesting. (Doc. 56, p. 5 n.2). Defendants argue Town of Chester did not address the precise question presented here and held only that Article III standing is required for an intervenor as of right to pursue relief different from that sought by a party that has standing. (Doc. 82, p. 22). In reply, movants argue defendants misinterpret Eighth Circuit case law that followed Town of Chester and alternatively assert their declarations are adequate to establish their Article III standing. (Doc. 86, pp. 5-8).

It is firmly established that a plaintiff must demonstrate Article III standing by showing an injury in fact, fairly traceable to the defendant's challenged conduct, which is likely to be redressed by a favorable judicial decision. Town of Chester, 581 U.S. at 438-39 (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 337-38 (2016)). In Town of Chester, the Supreme Court stated:

> Although the context is different, the rule is the same: For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a co[-]plaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests.

Id. at 439.

The plaintiff in Town of Chester had purchased land for the purpose of developing a housing subdivision. Because of disputes with the town over his development plan, the landowner alleged a regulatory taking. A real estate development company that had an agreement with the landowner moved to intervene, asserting an equitable interest in the property. The district court denied the motion to intervene, but the Second Circuit reversed that decision. The Supreme Court remanded, stating it was not clear the putative intervenor sought damages different from those sought by the plaintiff, in which case it would be required to establish its own Article III standing in order to intervene. Movants argue that if an intervenor seeking the same relief as a plaintiff were required to establish its own standing, the Supreme Court would not have determined remand was necessary. (Doc. 86, p. 5).

Defendants cite Eighth Circuit cases decided after Town of Chester, asserting the Eighth Circuit has firmly held an intervenor must establish standing regardless of the relief sought. (Doc. 82, p. 23). Movants reply that the cases defendants cite are

distinguishable from this case because the cited cases involved putative intervenors seeking relief different from that sought by the plaintiffs. Though Town of Chester does not directly address the question posed here—whether a putative intervenor seeking the same relief as the plaintiff must independently establish its own standing—the court views movants' interpretation as more reasonable than that asserted by defendants. In granting the states' request for a preliminary injunction, the court in the Southern District of Texas endorsed the interpretation advanced by movants. (Doc. 104-1, pp. 10-12); (see also id. at 13) ("Because the court has determined that the States have standing, it need not determine whether the Associations do."). And that interpretation is confirmed in a footnote in Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, where the Supreme Court cited Town of Chester:

> Under our precedents, at least one party must demonstrate Article III standing for each claim for relief. An intervenor of right must independently demonstrate Article III standing if it pursues relief that is broader than or different from the party invoking a court's jurisdiction. Here, the Federal Government clearly had standing to invoke the Third Circuit's appellate jurisdiction, and both the Federal Government and the Little Sisters asked the court to dissolve the injunction against the religious exemption. The Third Circuit accordingly erred by inquiring into the Little Sisters' independent Article III standing.

140 S. Ct. 2367, 2379 n.6 (U.S. 2020) (citation omitted).

Comparison of the states' complaint with the movants' proposed complaint confirms both seek the same declaratory and injunctive relief. (Doc. 1, pp. 59-60; Doc. 56-1, pp. 48-49). Movants are therefore not required to independently demonstrate standing.

2. Adequate Protection of Interests and Alleged Duplication and Claim Splitting

Defendants argue movants have other available and adequate means to protect their asserted interests and are in fact already using those means. Indeed, sixteen of the eighteen trade groups seeking intervention in this case—all but North Dakota Farm Bureau and Cass County Farm Bureau—are plaintiffs in the Southern District of Texas case asserting a similar challenge to the 2023 Rule.

Defendants cite George v. Uponor, Inc., where the court denied intervention to individuals who were putative class members in three other pending putative class actions raising claims "functionally identical" to those in the case in which they moved to intervene. 290 F.R.D. 574 (D. Minn. 2013). In reaching that conclusion, the court described the issue as one of timing and concluded consideration of intervention would be most appropriate after a decision regarding class certification. Id. at 577. Movants assert their claims in this case are not functionally identical to those in the Texas litigation because the Texas court might—as it has recently done—limit the geographic scope of any injunction. (Doc. 86, pp. 4-5).

Defendants cite cases generally finding intervention inappropriate if the movant can protect its interests through some other means. (See Doc. 82, p. 16). Those cases are easily distinguishable from this one. Deus v. Allstate Insurance Co. denied intervention that was requested only to gain access to sealed documents for use in separate litigation. 15 F.3d 506, 525 (5th Cir. 1994). California ex rel. Lockyer v. United States cited the same general principle but determined the proposed intervenors had no other means to protect their significant interests and reversed a decision denying a motion to intervene. 450 F. 3d 436, 442 (9th Cir. 2006). In United States v. Alisal Water Corp., a putative

intervenor sought to oppose a receivership in order to collect a debt from the defendant and intervention was denied because the district court had established a process adequate to protect the putative intervenor's interest as a creditor. 370 F.3d 915, 921 (9th Cir. 2004).

In the Southern District of Texas litigation, as in this case, the defendants asserted no preliminary injunction should issue but, alternatively, asserted any injunctive relief should be geographically limited to the plaintiff states. (Doc. 82, p. 17 n.2; Doc. 92, pp. 41-42). Because defendants oppose nationwide injunctive relief, movants contend the only avenue open to organizations—such as theirs—with nationwide interests is to file separate actions covering the entire nation. And they point to litigation over the 2015 WOTUS Rule—where several courts enjoyed enforcement in only states that were parties to the litigation—as "instructive." (Doc. 86, p. 4). In fact, the injunction recently issued in the Southern District of Texas applies only in the two states that are plaintiffs in that case.

Defendants argue movants are attempting to litigate the same claims against the same defendants in two separate fora. (Doc. 82, p. 19). Since a purpose of Rule 24 is to avoid multiple lawsuits having common questions of law or fact, defendants argue the instant motion should be denied as promoting rather than limiting multiplicity. Id. at 20-21. But, as movants identify, it is defendants' opposition to nationwide injunctive relief that leads to movants' desire for involvement in separate actions covering the entire nation. Allowing intervention would lessen the possibility of movants initiating separate litigation in each of the twenty-four plaintiff states.

Movants describe their extensive history of advocacy regarding each iteration of the WOTUS Rule and assert their previous intervention in other litigation regarding the

Rule will be helpful to the court in resolving this case. (Doc. 56, pp. 6-8). Further, they contend their interests are different from the interests of the plaintiff states, asserting the states' focus is "on their sovereign authority to manage the water and land within their boundaries and their role as state regulators," while the movant trade groups represent the interests of members of those trade groups. Id. at 13. Movants view themselves as "best-positioned to explain the legal flaws in the 2023 Rule as it applies to their properties." Id. at 5.

As to the two movants that are not parties to the Southern District of Texas litigation, defendants point to Cass County Farm Bureau being a member of North Dakota Farm Bureau and North Dakota Farm Bureau being a member of one of the plaintiffs in the Texas litigation—American Farm Bureau Federation. Thus, defendants argue, interests of the three entities are aligned such that interests of Cass County Farm Bureau and North Dakota Farm Bureau are adequately protected by American Farm Bureau Federation's position as a plaintiff in the Texas litigation. Alternatively, defendants argue only Cass County Farm Bureau and North Dakota Farm Bureau should be allowed to intervene, though defendants argue neither entity meets Article III standing requirements. (Doc. 83, p. 18). The court recognizes some likely duplication of interests of the three entities, though each focuses on a different geographic area.

Keeping in mind the premise that any doubts should be resolved in favor of intervention, in this court's view, movants have established that their interests are not adequately protected by the existing parties and have satisfied requirements of Rule 24(a)(2).

3. Permissive Intervention

In opposing permissive intervention under Rule 24(b)(1)(B), in addition to arguing lack of standing and duplication of the Southern District of Texas litigation, defendants argue the intervention would delay this litigation and present immediate scheduling problems. More specifically, defendants point to the need to respond to two separate preliminary injunction motions on separate schedules if intervention is allowed. (Doc. 82, p. 22). Though the court recognizes some duplication will result, the extent of duplication is less than would result if movants were to file separate litigation in district courts in each of the twenty-four plaintiff states. And there is no question movants' claim shares common questions of law and fact with the plaintiff states' claim. Even if movants were not viewed as satisfying Rule 24(a)'s requirements, this court would permit their intervention under Rule 24(b).

Conclusion

The court finds movants meet requirements of Federal Rule of Civil Procedure 24(a) and alternatively meet requirements of Rule 24(b). Their motion to intervene, (Doc. 54), is therefore **GRANTED**. The Clerk is directed to file the proposed intervenor complaint and issue a summons, and movants are directed to serve the intervenor complaint.

IT IS SO ORDERED.

Dated this 22nd day of March, 2023.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge