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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PASCUA YAQUI TRIBE; QUINAULT INDIAN NATION; FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA; MENOMINEE INDIAN TRIBE OF WISCONSIN; TOHONO O'ODHAM NATION; and BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL REGAN, Administrator of the Unites States Environmental Protection Agency; UNITED STATES ARMY CORPS OF ENGINEERS; and TAYLOR N. FERRELL, Acting Assistant Secretary of the Army for Civil Works,

Defendants,

and

ARIZONA ROCK PRODUCTS ASSOCIATION; NATIONAL STONE, SAND, AND GRAVEL ASSOCIATION; ARIZONA CATTLE FEEDERS ASSOCIATION; HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA; ARIZONA FARM AND RANCH GROUP; ARIZONA FARM BUREAU; and ARIZONA CHAPTER ASSOCIATED GENERAL CONTRACTORS,

Proposed Intervenors-Defendants.

CV-20-00266-TUC-RM

Assigned to Judge Rosemary Márquez

UNOPPOSED MOTION TO INTERVENE

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Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, Proposed Intervenors-Defendants Arizona Rock Products Association; National Stone, Sand, and Gravel Association; Arizona Cattle Feeders Association; Home Builders Association of Central Arizona; Arizona Farm and Ranch Group; Arizona Farm Bureau; and Arizona Chapter Associated General Contractors ("Intervenors") respectfully move to intervene as of right in this action, or alternatively, for permissive intervention. Intervenors meet the criteria for intervention as of right because: (1) this Motion is timely; (2) Intervenors' members own land and property that are recognized property rights and will be impacted by the Court's ruling on Plaintiffs' claims; (3) the outcome of this litigation directly affects the interests of Intervenors' members in their property rights; and (4) Intervenors' interests are different from those of the named defendants, and, therefore, their interests will not be adequately represented in this litigation. Alternatively, if the Court denies the request to intervene as of right, Intervenors request that the Court exercise its discretion to grant Intervenors permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1)(B). The property rights and interests of Intervenors' members involve questions of law and fact common with this action. It would conserve judicial resources to permit Intervenors to participate in this proceeding rather than force Intervenors to file a collateral action to protect their interests. For these reasons and as set forth more fully below in their Memorandum in Support of Motion to Intervene, Intervenors respectfully request that the Court grant its Motion to Intervene as of right, or alternatively, for permissive intervention and allow Intervenors to participate in the summary judgment briefing set by the Court's Scheduling Orders (Docs. 20, 24).

The undersigned counsel conferred with counsel for Plaintiffs, who do not oppose this Motion to Intervene provided: (1) intervention does not impact the current summary judgment briefing schedule and (2) Plaintiffs receive an additional 3,000 words for the combined reply/response to the cross motions for summary judgment. Both conditions are acceptable to Intervenors. Counsel for Defendants stated that Defendants take no position regarding this Motion to Intervene or Plaintiffs' request for additional words.

I. MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

A. SUMMARY OF THE CASE

Plaintiffs seek to reinstate an unlawful and already repealed 2015 rulemaking by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Agency Defendants") that attempted to broadly define "waters of the United States" ("WOTUS") for purposes of the Clean Water Act ("CWA"). *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule"). To reinstate the 2015 Rule, Plaintiffs petition this Court to set aside two subsequent final agency actions: one that repealed the 2015 Rule and replaced it with the definition of WOTUS that existed prior to issuance of the 2015 Rule (*see* Definition of "Waters of the United States"–Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) ("2019 Repeal Rule") and a second that promulgated a revised definition of WOTUS (*see* The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("2020 Rule"). Intervenors' members own and/or use land for a broad variety of purposes including aggregate mining; the production and supply of asphalt, asphaltic concrete, ready mix concrete, and Portland cement for road and other infrastructure construction; farming; ranching and other livestock production; home and commercial building; and highway, heavy, industrial, and municipal-utility construction. Conducting these activities often requires determining if property includes surface water features subject to CWA jurisdiction, including CWA permitting requirements and the threat of criminal and civil liability if an activity occurs in WOTUS without a permit. Because its members stand to be significantly harmed if Plaintiffs succeed in reinstating the 2015 Rule and setting aside the 2019 Repeal and 2020 Rule, Intervenors seek to intervene as Defendants. Intervenors represent parties directly regulated by these Rules[1] and are uniquely positioned to explain the harms that Plaintiffs'

[1] Each Intervenor advocates for regulatory standards and policies that enable the success of the industry members that they represent. *See* Arizona Rock Products Association, https://www.azrockproducts.org/ (last visited Apr. 30, 2021); National Stone, Sand, and Gravel Association, https://www.nssga.org/ (last visited Apr. 30, 2021); Arizona Cattle

position would cause to its members, their business industries, and the public to the Court. Intervenors have substantial real-world experience regarding WOTUS jurisdiction that will assist the Court in ruling on Plaintiffs' claims.

The lawsuit before this Court will determine under which regulatory regime the Intervenors' members must operate. Plaintiffs' ultimate objective—and the logical result of enjoining the 2020 Rule—is to return to a broader definition of WOTUS unmoored from the confines of the CWA and to increase federal regulation. Accordingly, a ruling in Plaintiffs' favor would subject private parties, including Intervenors' members, to more burdensome regulatory requirements and would inhibit their productive use and enjoyment of their lands and property rights. Therefore, the Court should grant Intervenors leave to intervene in order to adequately represent and protect the property and interests of its members.

This Motion is timely due to the recent change in the federal administration, the confirmation of the new EPA Administrator responsible for the review of the 2020 Rule, and this Court's recent denial of the Agency Defendants' Motion to Hold Case in Abeyance. Intervenors' members, as owners and/or users of land for a variety of business purposes, possess regulatory and economic interests in the Agency Defendants' actions that will be impaired if they cannot defend the 2020 Rule; and the Agency Defendants, based on the recent change in federal administration and documented opposition to the 2020 Rule, cannot represent and protect the interests of Intervenors and its members with the same perspective and vigor. As "interven[ors] in support of defendants in the trial court," Intervenors "d[o] not need to establish standing." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950-51 (2019). Intervenors' interest in this suit is strong and direct. Intervenors and their members' experience operating under the CWA and various regulatory regimes implementing it will help the Court resolve this case.

Feeders Association; Home Builders Association of Central Arizona, https://www.hbaca.org/ (last visited Apr. 30, 2021); Arizona Farm and Ranch Group, https://www.azfarmranch.org/ (last visited Apr. 30, 2021); and Arizona Farm Bureau, https://www.azfb.org/ (last visited Apr. 30, 2021).

Accordingly, Intervenors request that this Motion to Intervene as of right, or alternatively permissively, be granted.

B. STATEMENT OF FACTS

On June 29, 2015, Agency Defendants published the 2015 Rule, which purported to "clarify" an expanded definition of WOTUS for purposes of the CWA. 2015 Rule, 80 Fed. Reg. at 37,055. Because Agency Defendants' regulatory jurisdiction extends to "waters of the United States" and no more, the definition of WOTUS establishes the scope of Agency Defendants' regulatory jurisdiction under the CWA.

Because the sweeping reach of the 2015 Rule stood to significantly impair their business operations, various coalitions of business trade groups and States challenged the legality of the 2015 Rule through original suits and as intervenors in various forums. As a result of these challenges, various courts issued regional preliminary injunctions guarding against application of the 2015 Rule in more than half of the States, including Arizona. *See* Order, *Am. Farm Bureau Fed'n v. E.P.A.*, No. 3:15-cv-165 (S.D. Tex. Sept. 12, 2018), Dkt. 87; *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364-65 (S.D. Ga. 2018); *North Dakota v. E.P.A.*, 127 F. Supp. 3d 1047, 1060 (D. N.D. 2015).

While the litigation was ongoing, Agency Defendants published a proposal to repeal and replace the 2015 Rule on July 27, 2017 as the first part of a two-step process. *See* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg., 34,899 (July 27, 2017). The second step, according to Agency Defendants, involved a substantial reevaluation and revision of the definition of WOTUS.

During this ongoing rulemaking, challenges to the 2015 Rule continued. The United States District Courts for the Southern District of Texas and Southern District of Georgia both held the 2015 Rule violated the procedural requirements of the Administrative Procedure Act ("APA"). *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *Texas v. E.P.A.*, 389 F. Supp. 3d 497 (S.D. Tex. 2019). The Southern District of Georgia also held that the 2015 Rule is inconsistent with the CWA. *Georgia*, 418 F. Supp. 3d at 1381-82. Both courts remanded the 2015 Rule to Agency Defendants in light

of the ongoing administrative process to repeal and replace the 2015 Rule, keeping their previously issued preliminary injunctions in place. *Id.*; *Texas*, 389 F. Supp. 3d at 506.

Agency Defendants published the final 2019 Repeal Rule in the Federal Register on October 22, 2019. 2019 Repeal Rule, 84 Fed. Reg. at 56,626. Agency Defendants then published the final 2020 Rule, the subject of this action, on April 21, 2020. The 2020 Rule became effective in all states but Colorado on June 22, 2020. The 2020 Rule took effective in Colorado as of March 2, 2021. *See Colorado v. E.P.A.*, 989 F.3d 874 (10th Cir. 2021). Plaintiffs filed this action challenging the 2020 Rule on June 22, 2020. Doc. 1.

On January 20, 2021, Joseph R. Biden Jr. was sworn in as the 46th President of the United States. On January 20, 2021, President Biden signed the "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which "directs all executive departments and agencies [including Agency Defendants] to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives." That Executive Order also authorized the Attorney General to notify "any court with jurisdiction over pending litigation related to those agency actions … and may, in his discretion, request that the court stay or otherwise dispose of litigations, or seek other appropriate relief consistent with this order, until the completion of the process described in this order." Additionally, that Executive Order revoked Executive Order 13778 of February 28, 2017, which required the review and reversal of the 2015 Rule. On January 20, 2021, the 2020 Rule was specifically included on the White House's "non-exclusive list of agency actions that heads of the relevant agencies will review in accordance with the Executive Order."

On January 21, 2021, EPA's Acting General Counsel Melissa Hoffer sent a letter requesting "that the U.S. Department of Justice seek and obtain abeyances or stays of proceedings in pending litigation seeking judicial review of any EPA regulation promulgated between January 20, 2017, and January 2021 … in order to provide an

opportunity for new Agency leadership to review [and decide whether to reconsider, revise or repeal] the underlying rule or matter."

On February 3, 2021, President Biden's nominee for EPA Administrator, Michael Regan, told the Senate Environment and Public Works Committee during his confirmation hearing that the 2019 Repeal Rule and the 2020 Rule were "a rollback that went even further back then presidents of both [] parties" previously supported. Mr. Regan's confirmation hearing statement was consistent with his statement in May 2020 when his North Carolina Department of Environmental Quality filed suit opposing the 2020 Rule and claiming the 2020 Rule is an "historic rollback of protections [that] will result in a significant loss of natural resources and it is not based on science and runs counter to decades of EPA policy." Mr. Regan was confirmed as EPA Administrator on March 10, 2021 and will be responsible for reviewing the 2020 Rule in accordance with the January 20, 2021 Executive Order.

Consistent with EPA's January 21, 2021 letter to the Department of Justice, Agency Defendants filed a Motion to Hold Case in Abeyance on February 18, 2021 to hold the current action in abeyance for 90 days. Doc. 25. Plaintiffs opposed the Motion. Doc. 26. After Agency Defendants replied (Doc. 29), Plaintiffs filed two notices of supplemental information (Docs. 30, 31). On April 12, 2021, the Court denied the Motion.

In light of this factual and procedural history, circumstances have changed since the filing of this lawsuit in June 2020, and Agency Defendants no longer adequately represent parties whose rights may be impaired by this lawsuit or by changes to the 2020 Rule. Therefore, Intervenors now move to intervene to protect against the serious harms that reinstatement of the 2015 Rule would cause Intervenors' members; to advocate against changes to the 2020 Rule; and to protect Intervenors' members' property rights, livelihoods, productive use of their lands, and their ability to conduct business.

C. INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT.

Fed. R. Civ. P. 24 provides for intervention as a matter of right and permissive intervention. A district court must grant leave to intervene as a matter of right under Fed.

R. Civ. P. 24(a) when the party seeking to intervene: (1) timely moves to intervene; (2) has a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) is situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) is not adequately represented by the existing parties. *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). Although an applicant seeking to intervene has the burden to demonstrate the four elements, "the requirements are broadly interpreted in favor of intervention." *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006); *see also Arakaki*, 324 F.3d at 1083. Additionally, courts "stress that intervention of right does not require an absolute certainty that a party's interests will be impaired or that existing parties will not adequately represent its interests." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011). Intervenors satisfy all four requirements of Fed. R. Civ. P. 24(a) to intervene as of right.

1. <u>This intervention is timely</u>.

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 *Cty. of Orange v. Air California*, 799 F.2d. 535, 537 (9th Cir. 1986)). In analyzing these factors, the Ninth Circuit has determined that the "crucial date for assessing the timeliness of a motion to intervene is when the proposed intervenors should have been aware that their interests would not be adequately protected." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (quoting *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)) ("*Smith v. L.A.*"). Intervenors' request to intervene is timely under these criteria.

a. Stage of Proceedings

In analyzing the "stage of proceedings" factor for timeliness, the Ninth Circuit has held that the "[m]ere lapse of time alone is not determinative" because "[w]here a change of circumstances occurs, and that change is the 'major reason' for the motion to intervene,

the stage of proceedings factor should be analyzed by reference to the change in circumstances, and not to the commencement of the litigation." *Id.*

Here, there have been a number of changes in circumstances that support Intervenors' request to intervene. Namely, President Biden was elected and immediately ordered EPA to review the 2020 Rule to determine if it was consistent with the Biden Administration's agenda. As a result, EPA requested DOJ "stay or otherwise dispose" of the litigations related to the 2020 Rule, including the one before this Court. In February 2021, Agency Defendants filed a Motion to Hold Case in Abeyance consistent with President Biden's Executive Order to allow the review to proceed. During EPA Administrator Regan's confirmation hearing, it became known that Mr. Regan, who is obligated to perform the review under the Executive Order, is an opponent to the 2020 Rule; is unlikely to fully defend the 2020 Rule; and will not adequately represent and protect the property rights and interests of Intervenors' members in regard to the 2020 Rule. In light of these changed circumstances and the Court's decision to proceed with this matter, Intervenors timely request the opportunity to intervene to protect its members' property rights and interests.

b. Prejudice to Other Parties

The Ninth Circuit has determined that the "prejudice to existing parties" is the most important consideration for the court in deciding whether a motion to intervene is untimely. *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). However, "the only 'prejudice' that is relevant under the factor is that which flows from a prospective intervenor's failure to intervene after he knew, or reasonably should have known, that his interests were not being adequately represented—and not from the fact that including another party in the case might make resolution more 'difficult.'" *Smith v. L.A.*, 830 F.3d at 857.

Intervenors recently learned that the interests of their members will not be adequately represented and protected by Agency Defendants given the change in the federal administration and the confirmation of a new EPA Administrator, who has

actively opposed the 2020 Rule at issue in this litigation, and that this litigation will move forward to the merits. Like *State of Oregon*, Intervenors' participation will not prejudice any party. Given the new EPA Administrator was confirmed on March 10, 2021 and Agency Defendants' Motion to Hold Case in Abeyance was denied on April 12, 2021, Intervenors have timely sought intervention. Additionally, this litigation is in its early stages and no discovery or dispositive motion practice has occurred. As a result, allowing Intervenors to intervene and participate will not cause any delays or prejudice any parties. Finally, Intervenors anticipate filing and responding to motions for summary judgment in this matter on the same schedule as Agency Defendants and as set forth by the Court in its existing Scheduling Orders (Docs. 20, 24), so there will not be any delays in the disposition of this matter as a result of Intervenors' participation.

c. Reason for and Length of the Delay

The Ninth Circuit has determined that the "reason for and length of delay" factor for timeliness has weighed in favor of intervention even after at least an eight-month delay or even a one-year delay after the change in circumstances. *See, e.g., S.C. Coastal Conservation League v. Pruitt*, 2018 WL 2184395, at *9 (May 11, 2018) ("SCCCL"). As discussed above, it was only recently that EPA Administrator Regan was confirmed, and President Biden assumed office and issued his Executive Order to "stay or otherwise dispose" of litigation related to the 2020 Rule. Based on the confirmation of Mr. Regan and the Biden Administration no longer supporting the 2020 Rule, Agency Defendants will not adequately represent the interests of the Intervenors' members, so they promptly and timely filed this motion to protect those interests. Intervenors also acted reasonably in waiting to file this motion and seek intervention until after the Biden Administration's positions and intentions relating to the 2020 Rule became known.

2. <u>Intervenors have legally protectable interests that may be impaired or impeded by this litigation</u>.

The question of whether a proposed intervenor has a significant protectable interest is a "practical, threshold inquiry," and the party seeking intervention need not establish

any "specific legal or equitable interest." *Citizens for Balanced Use*, 647 F.3d at 987 (quoting *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996)). 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). Once a protectable interest is established, courts then look to whether the proposed intervenor's ability to protect that interest would be "impair[ed] or imped[ed]" by the "disposition of the action." *Citizens for Balanced Use*, 647 F.3d at 897; *see also Los Angeles SMSA Ltd. P'ship v. City of L.A., California*, 2019 WL 4570012, at *6 (C.D. Cal. 2019) (recognizing a protectable interest when the use and enjoyment of land may be impaired by disposition of case). "If an absentee would be substantially affected in a practical sense by the determination made in an action, [it] should, as a general rule, be entitled to intervene…." *Citizens for Balanced* Use, 647 F.3d at 898 (quoting *Fed. R. Civ. P.* 24 advisory committee's note); *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) ("We follow the guidance of Rule 24 advisory committee notes….").

Intervenors have a protectable interest in the action before this Court that may be impaired or impeded by the disposition of this litigation. The governing definition of WOTUS, the issue directly at stake in this litigation, dictates the regulatory scheme under which Intervenors' members must operate their aggregate mining, farming, ranching, construction, and other business activities. An unfavorable ruling in this Court would be controlling over Intervenor's members' Arizona operations and would heighten the regulatory burdens on those operations. It also could cause regulatory chaos and uncertainty that the 2020 Rule was intended to correct.

Intervenors possess significant, legally protected interests in defending the 2020 Rule. 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 v. E.P.A.*, 995 F.2d 1478, 1483 (9th Cir. 1993). Many 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. E.P.A.*, 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* 7 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1908.1 (3d ed. 2020).

Denial of intervention could impede Intervenors ability to protect their members' interests in protecting the 2020 Rule and their property rights given that the outcome of this litigation will directly affect both. Intervenors' members own and/or operate on real property and must comply with the CWA's prohibition against unauthorized "discharges" into any areas that are deemed jurisdictional. The CWA subjects them to criminal penalties and civil suits for failure to comply. Thus, Intervenors "have demonstrated a substantial interest" in the litigation, as "their members will suffer from heightened regulatory burdens if the Court grants Plaintiffs their requested relied." *California v. Bureau of Land Mgmt.*, 2018 WL 3439435, at *8 (N.D. Cal. July 17, 2018); *see also Supreme Beef Processors, Inc. v. U.S. Dep't of Agric.*, 275 F.3d 432, 437 n.14 (5th Cir. 2001)("[t]here can be no serious dispute" that an association had an interest in a lawsuit "given that it deals with the application of a performance standard that affects [its] members").

Plaintiffs seek to overturn the 2020 Rule. If successful, Plaintiffs would deprive regulated parties, including Intervenors and their members, of much needed clarity and predictability. Indeed, in promulgating the 2020 Rule, Agency Defendants explained that the 2020 Rule "is intended to establish categorical bright lines that provide clarity and predictability for regulators and the regulated community" (85 Fed. Reg. at 22,325), as well as resolve the legal deficiencies of the 2015 Rule (*id*. at 22,272). If, as Plaintiffs request, the Court reinstates an expanded version of the 2015 Rule, Intervenors and their members will be subjected to heightened regulatory burdens and potential enforcement. Each would be required to comply with a broader definition of WOTUS and the CWA's prohibition against unauthorized "discharges." Further, depending on the outcome of the

litigation, many of Intervenors' members may be required to obtain costly permits. A declaration that the 2020 Rule is unlawful or a reinstatement of the 2015 Rule would substantially impair or impede the interests of Intervenors' members; therefore, in order to protect those interests, Intervenors request the opportunity to litigate the lawful WOTUS standard in this matter.

3. Agency Defendants do not adequately represent Intervenors' interests.

Intervenors cannot rely on Agency Defendants 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. V. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). In evaluating the adequacy of representation, courts consider three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect." *Citizens for Balanced Use*, 647 F.3d at 898 (quoting *Arakaki*, 324 F.3d at 1086. Each factor weighs in favor of allowing Intervenors to join this litigation.

a. Intervenors have interests in the 2020 Rule that are not adequately represented by Agency Defendants.

First, "[t]he 'most important factor' to determine whether a proposed intervenor is adequately represented by a present party to the action is 'how the [intervenor's] interest compares with the interests of existing parties.'" *Perry v. Proposition Official Proponents*, 587 F.3d 947. 950-51 (9th Cir.2009) (quoting *Arakaki*, 324 F.3d at 1086). Although courts apply a presumption of adequacy when a proposed intervenor shares the same ultimate objective as an existing party, Agency Defendants and Intervenors here possess "distinctly different" interests that overcome the presumption of adequacy and demonstrate the high

possibility of inadequate representation of the Intervenors' interests by Agency Defendants. *Lockyer*, 450 F.3d at 444.

Agency Defendants' interests in the management of natural and economic resources is not the same as Intervenors' interests in using, harvesting, or extracting those resources. The interest of private business is just one among many varied and often competing constituencies represented by Agency Defendants, which bear statutory obligations on behalf of the "general public." *Forest Conservation Council*, 66 F.3d at 1499 (internal quotations 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). This alone is enough to satisfy the Intervenors' obligation to demonstrate inadequate representation. 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.*, *Sierra Club v. McLerran*, 2012 WL 12846108, at *2 (W.D. Wash. 2012) ("the County's interest as a governmental entity may cause it to take positions inconsistent with those of a purely private entity"); *Puget Soundkeeper All. v. Pruitt*, 2018 WL 3569862, at *2 (granting intervention as "Proposed Intervenors could be adverse to the Agencies in future litigation … which could lead to divergent strategies or interests in this proceeding.").[2]

Intervenors did not seek intervention in this lawsuit when the Complaint was originally filed because Agency Defendants intended to vigorously defend the 2020 Rule. That has now changed. President Biden was elected; he immediately issued an Executive Order calling for the review of the 2020 Rule; and Mr. Regan, who has opposed the 2020 Rule, was confirmed as the new EPA Administrator. These changed circumstances make

[2] Other courts have recognized the divergent interests between a proposed intervenor and the agencies despite sharing a similar objective: "The EPA is, after all, in the business of protecting the environment— not protecting business interests. The EPA's stated motivation in enacting the [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." *See, e.g.*, *SCCCL*, 2018 WL 2184395, at *9.

it unclear if Agency Defendants will defend the 2020 Rule, which Intervenors support and believe protects their lands and property interests. Intervenors seek intervention to insure that the 2020 Rule and their interests are defended against the Plaintiffs' numerous challenges and allegations.

Similar to *Citizens for Balanced Use*, Agency Defendants are compelled to participate in this litigation as a result of the Trump Administration's promulgation of the 2020 Rule. At the same time, the Biden Administration is reviewing and may overturn the 2020 Rule and to possibly reinstate the 2015 Rule. This means that Intervenors and Agency Defendants may be adverse to each other as a result of the pending review of the 2020 Rule under President Biden's Executive Order. As a result, Intervenors and Agency Defendants may no longer share the same interests and objectives, which justifies allowing Intervenors to participate in this litigation.

b. Agency Defendants are not capable of making all Intervenors' arguments.

The Ninth Circuit also has recognized a right to intervene when an agency "may not put forth as strong of an argument in defense" or "may be unable or unwilling to pursue vigorously all available arguments in support of the Applicant's interest." *Citizens for Balanced Use*, 647 F.3d at 900. In *Citizens for Balanced Use*, the Ninth Circuit determined that because of the federal agency's "prior litigation position," among other prior agency actions, "we cannot conclude that the [agency] will undoubtedly make all of Applicant's arguments, nor can we be assured that the [agency] is capable of making and willing to make such arguments." *Id.* at 900-01; *see also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir.1995)(concluding inadequate representation when the federal agency is "unlikely to argue on behalf of [intevenor]" when the agency reluctantly assumed the litigation and has taken prior contradictory positions); *Forsyth v. HP Inc.*, 2020 WL 71379, at *4 (N.D. Cal. 2020) (granting intervention "because it was unclear if" a federal agency "would make or would be capable of making arguments" in favor of the proposed intervenor).

As discussed above, based on President Biden's Executive Order and EPA Administrator Regan's prior litigation position on the 2020 Rule, it is unlikely that Agency Defendants are "capable of making and willing to make such arguments" to ensure that the interests of Intervenors and their members are not impaired. Agency Defendants may not vigorously defend the 2020 Rule or oppose reinstatement of the 2015 Rule, which is what Intervenors will do in this litigation if allowed to intervene.

Additionally, Agency Defendants may not be willing to vigorously pursue appeals, if necessary and appropriate. Intervenors cannot rely on Agency Defendants to "stick up for [their] actions in response to [Plaintiff's challenge]," let alone "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. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004). In other words, Intervenors and their members have no guarantee that Agency Defendants would exhaust their appellate remedies in the event of an unfavorable decision, which was the case when business trade groups petitioned for *certiorari* from the Sixth Circuit's denial of their motion to dismiss petitions for review of Agency Defendants' action, and Agency Defendants vigorously opposed certiorari. *See Nat'l Ass'n of Mfrs. v. Dept. of Def.*, 138 S. Ct. 617 (2018). Agency Defendants then continued to oppose the petition in the Supreme Court on the merits, losing in a 9-0 ruling. *Id.* at 624.

c. Intervenors have unique knowledge and experiences.

Finally, as regulated parties, Intervenors have unique knowledge, substantial experience, and a different outlook about the 2020 Rule from that of Agency Defendants, which will assist the Court in resolving this matter. As noted above, Agency Defendants cannot represent the economic interests that may be impaired by Plaintiffs' lawsuit, and Intervenors can address the common questions of law and fact regarding Agency Defendants' obligations under the CWA and the APA, which may not be raised by the Biden Administration in light of its changing policies and interests. Intervenors should be allowed to intervene to place their members "on equal terms" and allowed "to make their

own decisions about the wisdom of carrying the battle forward" should the need arise. *Sierra Club, Inc.*, 358 F.3d at 518.

D. Alternatively, Intervenors should be allowed to permissively intervene.

Alternatively, even when intervention is unavailable as of right, the Court may grant permissive intervention under Fed. R. Civ. P. 24(b)(1)(B) to anyone who "has a claim or defense that shares with the main action a common question of law or fact." "The standard for permissive intervention is a low one." *McLerran*, 2012 WL 12846108, at *1. Intervenors' defenses to Plaintiffs' claims in this litigation will involve common questions of law and fact regarding Agency Defendants' obligations under the CWA and APA. It also will conserve judicial resources to allow Intervenors to participate in this proceeding rather than force Intervenors to file a collateral action to protect their interests. Permitting Intervenors to intervene will allow them to protect their substantial interests and, given the timing of this request and the early stages of this litigation and before briefing on the merits, would neither delay this case nor prejudice any of the parties. For these reasons, Intervenors request that the Court allow them to permissively intervene in this matter.

II. CONCLUSION

For the foregoing reasons, Intervenors respectfully request the Court grant this Motion to Intervene and allow Intervenors to participate as Defendants. Intervenors will fully comply with and do not request any changes to the Court's Scheduling Orders (Docs. 20, 24). Pursuant to Plaintiffs' request, Intervenors also ask that Plaintiffs receive an additional 3,000 words (*i.e.*, limited to 17,000 words) for a combined reply/response to cross motions for summary judgment. Finally, pursuant to Fed. R. Civ. P. 24(c), Intervenors have attached their Answer to the Complaint (Doc. 1), which sets out Intervenors' claims and defenses for which intervention is sought.

RESPECTFULLY SUBMITTED this 30th day of April, 2021.

GALLAGHER & KENNEDY, P.A.

By: */s/ Bradley J. Glass*

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, I electronically transmitted the foregoing Unopposed Motion to Intervene to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

/s/ Bradley J. Glass
Bradley J. Glass