IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:24-cv-00013-BO-RJ

ROBERT D. WHITE,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency; UNITED STATES ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as Chief of Engineers and Commanding General, United States Army Corps of Engineers; MICHAEL L. CONNOR, in his official capacity as Assistant Secretary of the Army (Civil Works); and the UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION OF NATIONAL WILDLIFE FEDERATION AND NORTH CAROLINA WILDLIFE FEDERATION TO INTERVENE AS DEFENDANTS

Fed. R. Civ. P. 24(b)
Local Civil Rules 7.1(e), 7.2

Pursuant to Federal Rule of Civil Procedure 24(b) and Local Civil Rules 7.1(e) and 7.2, the National Wildlife Federation and North Carolina Wildlife Federation (collectively, "Wildlife Federations") hereby submit this memorandum in support of their motion to intervene as defendants in this case. The Wildlife Federations meet the standard for permissive intervention under Federal Rule of Civil Procedure 24(b).

BACKGROUND

In this action, North Carolina landowner Robert White challenges a regulation promulgated in January 2023 and amended in September 2023 by the U.S. Environmental

Protection Agency and U.S. Army Corps of Engineers (collectively, the "Agencies") to define "waters of the United States" under the Clean Water Act. *See* "Revised Definition of 'Waters of the United States,'" 88 Fed. Reg. 3004 (Jan. 18, 2023) (the "January 2023 Rule"); Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023) (together, the "Amended Rule").

The January 2023 Rule protected critical streams, wetlands, and other waters crucial for fish, wildlife, and outdoor recreation by restoring the longstanding regulatory definition of "waters of the United States" under the Clean Water Act, with updates to reflect then-prevailing Supreme Court case law and the Agencies' decades of implementation experience. *See* 88 Fed. Reg. 3004. The Agencies subsequently revised portions of the January 2023 Rule to conform to the Supreme Court's May 2023 decision in *Sackett v. EPA*, 598 U.S. 651 (2023). *See* 88 Fed. Reg. 61,964.

Because the term "waters of the United States" is the jurisdictional linchpin for the Clean Water Act's key safeguards, a scientifically and legally sound definition of the term is essential to achieving the objective set forth by Congress in the statute: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Amended Rule's coverage of "adjacent wetlands"—through the regulatory provisions that White challenges in this case—helps to ensure the integrity of those wetlands and the waters to which they connect. Healthy waters—including wetlands, rivers, and estuaries—support healthy fish and wildlife and sustain hunting, fishing, and other water activities, including the nearly $788 billion domestic outdoor-recreation industry and the $183 billion domestic commercial fishing

and seafood industry.[1] As non-profit member organizations representing hunters, anglers, wildlife champions, and other outdoor enthusiasts who use and enjoy water resources in North Carolina and throughout the United States, the Wildlife Federations and their members have a significant interest in the scope of the Clean Water Act and the ecological integrity of wetlands and other waters affected by the Amended Rule.

Founded in 1936, the National Wildlife Federation is a non-profit organization representing more than six million conservation-minded hunters, anglers, and other outdoor enthusiasts nationwide. Decl. of James Murphy ¶ 4 (Ex. A to Wildlife Federations' Mot. to Intervene). Since the Clean Water Act's passage in 1972, the organization has consistently advocated for broad protections to conserve the nation's wetlands, streams, and rivers. *Id.* ¶¶ 6–10. The organization has co-produced and publicly distributed three major reports focusing on the heightened risk to wetlands and water resources following the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006), and the 2003 and 2008 guidance documents that the Agencies adopted in the wake of those decisions. Murphy Decl. ¶ 9(a). The National Wildlife Federation has also conducted scores of presentations and roundtables around the country to inform the public of the need to restore Clean Water Act protections to vulnerable wetlands and streams and has submitted extensive written comments to the Agencies over the past two decades on their proposed rules and guidance concerning the definition of "waters of the United States." *Id.* ¶ 9(b), (d), (g), (h).

[1] Dirk van Duym, *Outdoor Recreation Satellite Account: National and State Statistics 2012-2019*, Bureau of Econ. Analysis, at 3 (2020), https://perma.cc/YCB7-CR5J; Nat'l Marine Fisheries Serv., *Fisheries Economics of the United States 2022*, at 3 (2024), https://perma.cc/7S42-LSEU.

In addition to its direct work on the legal scope of the Clean Water Act, the National Wildlife Federation regularly works on projects to restore and protect rivers, bays, wetlands, and watersheds across the country, including those affected by the Amended Rule. *Id.* ¶ 11. The National Wildlife Federation also supports affiliate organizations in 52 states and territories, including the North Carolina Wildlife Federation. *Id.* ¶ 4. Like the National Wildlife Federation, each of these affiliates plays a significant role in advocating for the prevention of wetland and stream destruction and pollution through the Clean Water Act.

Since 1945, the North Carolina Wildlife Federation has worked with outdoor enthusiasts, hunters and anglers, government, and industry to safeguard North Carolina's natural resources—not only as habitat for native wildlife but also as recreational, hunting, fishing, and wildlife observation areas. Decl. of Tim Gestwicki ¶ 6 (Ex. B to Wildlife Federations' Mot. to Intervene). As North Carolina's oldest and largest statewide non-profit conservation organization, the organization has more than ten thousand members and supporters, over sixty affiliates, and seventeen community chapters. *Id.* ¶ 5. Through policy and protection work, research and education, and direct hands-on conservation projects, the North Carolina Wildlife Federation works to protect water quality throughout North Carolina. *Id*. ¶ 7.

The Wildlife Federations' individual members also have significant recreational, aesthetic, and conservation interests in wetlands and other waters protected by the Amended Rule that are represented by the National Wildlife Federation and the North Carolina Wildlife Federation. The Wildlife Federations' members hunt in and around wetlands;[2] fish and paddle in

[2] Decl. of Tim Aydlett ¶ 8 (Ex. C to Wildlife Federations' Mot. to Intervene); Decl. of John Stanton ¶ 12 (Ex. F to Wildlife Federations' Mot. to Intervene).

rivers, streams, and estuaries that are connected to wetlands;[3] and hike and observe wildlife in wetland areas.[4]

These members have also worked and volunteered in various capacities to promote the conservation of wetlands, other waters, and the wildlife they support, informing their concerns over the relief sought by White in this case. For example, John Stanton devoted his career to serving as a wildlife biologist with the U.S. Fish and Wildlife Service, and his work on coastal wildlife refuges led to a deep appreciation for the value of wetlands to water quality and wildlife habitat. Stanton Decl. ¶¶ 3–5, 15–16. Tim Aydlett has served as a Hunter Education Instructor for the North Carolina Wildlife Resources Commission and as President of North Carolina Friends of State Parks, and he received the Order of the Long Leaf Pine from North Carolina's governor for his contributions to conservation and education. Aydlett Decl. ¶¶ 9, 13, 14. And Anne Radke and Jane Plough have likewise devoted much of their adult lives to preserving wilderness, educating others about the value of wetlands generally, preserving wildlife habitat, and engaging with nature professionally. Radke Decl. ¶¶ 4–9, 14; Plough Decl. ¶¶ 4, 9–11.

Further, members of the Wildlife Federations are intimately familiar with wetlands and waters in the vicinity of Elizabeth City that would be affected should White obtain the relief he is seeking in this case. Tim Aydlett, for example, regularly goes duck hunting in and around wetlands in Pasquotank County and surrounding counties, including on Big Flatty Creek, Little Flatty Creek, the North River, the Little River, and the Currituck Sound. Aydlett Decl. ¶ 8. He has also boated and fished for years in the Little River, Big Flatty Creek, Little Flatty Creek, the

[3] Decl. of Anne Radke ¶¶ 12, 13 (Ex. E to Wildlife Federations' Mot. to Intervene); Decl. of Jane Plough ¶¶ 7, 10 (Ex. D to Wildlife Federations' Mot. to Intervene); Stanton Decl. ¶¶ 10, 11; Aydlett Decl. ¶ 11.
[4] Radke Decl. ¶¶ 12, 14; Plough Decl. ¶¶ 7, 8, 10.

Pasquotank River, and the Albemarle Sound. *Id.* ¶ 11. Anne Radke, a resident of Elizabeth City, frequently fishes from her dock on the Pasquotank River, paddles her kayak on the Pasquotank River and Big Flatty Creek, and hikes in the neighboring wetlands. Radke Decl. ¶¶ 12, 13. Elizabeth City resident Jane Plough takes her canoe and kayak out in the Pasquotank River, Big Flatty Creek, Little River, and Bennett's Creek and leads paddling excursions to observe wildlife in the area's streams, marshes, and wetlands. Plough Decl. ¶¶ 7, 10. Tyrrell County resident John Stanton canoes in the Pasquotank River, kayaks in nearby creeks, and hunts for ducks in waters downstream of White's properties. Stanton Decl. ¶¶ 10–12. These members' concerns about White obtaining the relief he seeks in this case are both broad in scope and acutely local.

The relief sought by White—as articulated in his Complaint and as framed by the Complaint's strained reading of the applicable law—would so severely narrow the definition of "adjacent wetlands" covered by the Clean Water Act as to make it difficult, if not impossible, to protect the integrity of wetlands and other waters that the Wildlife Federations' members rely on for fishing, hunting, boating, and other outdoor recreation activities. If all wetlands except the few, if any, wetlands that meet White's narrow proposed standard could be destroyed without a federal permit, there would be little stopping White or anyone else from freely destroying critical wetlands without the need to meet the longstanding, conventional permitting requirements for avoiding, minimizing, and mitigating harm. Such an outcome would have a direct, adverse effect on the interests of the Wildlife Federations and their members.

The Wildlife Federations and similar organizations have previously been granted intervention in lawsuits challenging rules issued by the Agencies to define "waters of the United

States."[5] Here, too, the Wildlife Federations should be granted intervention, for the reasons set forth in this memorandum.

ARGUMENT

Under Federal Rule of Civil Procedure 24(b), a court may permit a movant to intervene on a timely motion where the movant's claim or defense shares with the main action a common question of law or fact and the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b); *North Carolina v. Alcoa Power Generating, Inc.*, No. 5:13-CV-633-BO, 2013 WL 12177042 (E.D.N.C. Oct. 29, 2013) (Boyle, J.). The U.S. Court of Appeals for the Fourth Circuit has directed trial courts to construe Rule 24 liberally, finding that "liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." *Feller v. Brock,* 802 F.2d 722, 729 (4th Cir. 1986) (internal quotation marks and citation omitted). Because the Wildlife Federations' proposed intervention is timely, involves common questions of law and fact with the main action, and would not cause undue prejudice or delay, the Wildlife Federations respectfully request that the Court grant their motion to intervene.[6]

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[5] *See, e.g.*, *Texas v. EPA,* No. 3:23-cv-00017, ECF No. 30 (S.D. Tex. Feb. 14, 2023) (Ex. A) (granting motion to intervene by conservation group in challenge to January 2023 Rule); *In re: EPA & Dep't of Defense*, No. 15-3799, ECF No. 25-2 (6th Cir. Sept. 16, 2015) (Ex. B) (granting motion to intervene by National Wildlife Federation and 14 other conservation groups in challenge to 2015 Clean Water Rule); *Georgia v. McCarthy*, No. 2:15-cv-79, ECF No. 182 (S.D. Ga. July 3, 2018) (Ex. C) (granting motion to intervene by National Wildlife Federation and three other organizations in challenge to 2015 Clean Water Rule); *North Dakota v. EPA*, No. 3:15-cv-59, ECF No. 198, at 2–3 (D.N.D. Apr. 19, 2018) (Ex. D) (granting motion to intervene by conservation group in challenge to 2015 Clean Water Rule).

[6] The Wildlife Federations need not demonstrate Article III standing to participate in the case as permissive intervenors on the side of existing parties with standing. *See Shaw v. Hunt*, 154 F.3d 161, 165 (4th Cir. 1998); *Alcoa Power Generating*, 2013 WL 12177042, at *1 (Boyle, J.)

I. The motion to intervene is timely.

A district court assesses three factors in determining whether a motion to intervene is timely: "first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014).

Under this standard, the Wildlife Federations' motion to intervene is timely. There has been no delay in filing this motion: the Wildlife Federations are moving to intervene 27 days after Plaintiff first served his complaint and more than a month before the deadline for Defendants to file a responsive pleading. Nor would the Wildlife Federations' intervention delay the disposition of the case. In particular, the Wildlife Federations are filing their motion on the May 7, 2024, deadline for Defendants' response to White's motion for preliminary injunction and are concurrently filing a proposed response to that preliminary injunction motion for the Court to consider should it permit the Wildlife Federations to intervene. Because the Wildlife Federations have moved to intervene at the earliest stages of the litigation and are seeking no extension of the existing briefing schedule, their intervention will cause no resulting delay or prejudice to any party, and the motion is timely.

("Permissive intervention does not require that the intervenor have a direct personal or pecuniary interest in the litigation") (citing *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940)). In any event, the Wildlife Federations ably demonstrate Article III standing. As shown through the declarations submitted in support of this motion, the Wildlife Federations' interests in the subject matter of this action are intertwined with injuries its members stand to suffer to their interests. Those injuries would be fairly traceable to a decision vacating portions of the Amended Rule and are redressable by a favorable decision from this Court.

II. The Wildlife Federations' defense of the Amended Rule shares common questions of law and fact with the main action.

A proposed intervenor must have "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). Here, the Wildlife Federations seek to intervene on the side of the government Defendants to defend as lawful the same provisions of the Amended Rule that White asks the Court to set aside as unlawful. *See* Compl. ¶¶ 142–156; *see generally* Proposed Answer (Ex. G to Wildlife Federations' Mot. to Intervene); *see id.* ¶¶ 134, 142–56. Multiple district courts in the Fourth Circuit have held that a proposed intervenor seeking to defend a government action alongside the government asserts a common question of law or fact sufficient to satisfy Rule 24(b).[7] Those are precisely the circumstances here.

Courts, including this Court, have also considered the knowledge and expertise that a proposed intervenor offers on a particular question of fact or law and whether intervention would contribute to the just adjudication of the claims. *See, e.g., Students for Fair Admissions Inc. v. Univ. of N.C.*, 319 F.R.D. 490, 496 (M.D.N.C. 2017) ("[C]ourts may consider whether such intervention will 'contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.'"); *Am. Humanist Ass'n v. Md.-Nat'l Cap. Park and Plan. Comm'n*, 303 F.R.D. 266, 271 (D. Md. 2014) (finding that

[7] *See, e.g.*, *Moore v. Circosta*, No. 1:20-cv-911, 2020 WL 6597291, at *2 (M.D.N.C. Oct. 8, 2020) (granting permissive intervention to organization and individuals seeking to defend legality of state election laws); *Students for Fair Admissions Inc. v. Univ. of N.C.*, 319 F.R.D. 490, 494–97 (M.D.N.C. 2017) (granting permissive intervention to students seeking to defend state university's admissions policy); *Am. Humanist Ass'n v. Md.-Nat'l Cap. Park and Plan. Comm'n*, 303 F.R.D. 266, 270–72 (D. Md. 2014) (granting permissive intervention to veterans organization seeking to defend government's display of veterans' memorial); *N.C. Growers' Ass'n, Inc. v. Solis*, No. 1:09-cv-411, 2009 WL 4729113, at *1 (M.D.N.C. Dec. 3, 2009) (granting permissive intervention to labor union seeking to defend rules promulgated by U.S. Department of Labor).

party's knowledge of underlying facts supported grant of permissive intervention); *Alcoa Power Generating*, 2013 WL 12177042, at *1 (Boyle, J.) (granting permissive intervention when movant's "experience in litigating the question forming the basis of this suit may serve to aid in judicial economy").

The Wildlife Federations' deep familiarity with North Carolina's wetlands and other waters enable them to offer a valuable perspective on the effects that the answer to the central question in this case—which wetlands are covered by the Clean Water Act after *Sackett*—is likely to have on critical resources in North Carolina and beyond. The Wildlife Federations' many members who live, work, and engage in recreation in the area that would be most affected by White's actions should he prevail will enable the Wildlife Federations to help the Court understand the competing interests at stake.

The Wildlife Federations can also aid in judicial economy by bringing to bear their extensive experience litigating over the scope of the Clean Water Act's definition of "waters of the United States." Over the last decade, one or both Wildlife Federations have been plaintiffs, intervenor-defendants, or *amici curiae* in five separate federal cases reviewing regulatory and judicial interpretations of this fundamental Clean Water Act term.[8] The Wildlife Federations

[8] *See Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky.) (Wildlife Federations as *amici curiae* in challenge to January 2023 Rule); *Sackett v. EPA*, No. 21-454 (U.S.) (National Wildlife Federation as *amicus curiae* in challenge to Agencies' interpretation of "waters of the United States"); *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687 (D.S.C.) (Wildlife Federations as plaintiffs in challenge to 2020 Navigable Waters Protection Rule); *S.C. Coastal Conservation League v. Wheeler*, No. 2:19-cv-03006 (D.S.C.) (Wildlife Federations as plaintiffs in challenge to 2019 rule that repealed Clean Water Rule); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga.) (National Wildlife Federation as intervenor-defendant in challenge to 2015 Clean Water Rule); Murphy Decl. ¶ 10; Gestwicki Decl. ¶ 15.

have also submitted detailed comments on several proposed rules by the Defendant agencies defining "waters of the United States."[9]

III. The Wildlife Federations' intervention will not unduly prejudice or delay the adjudication of the rights of the original parties.

As discussed in Section I, above, because the Wildlife Federations have moved to intervene at the earliest stages of the litigation and are prepared to comply with the existing briefing schedule on White's motion for a preliminary injunction, the Wildlife Federations' intervention will not delay this action.

Nor will intervention unduly prejudice the adjudication of the rights of the existing parties. Defendants, for their part, have already represented that they do not oppose the Wildlife Federations' intervention; only White, through counsel, has indicated any opposition. The Wildlife Federations are not asserting any new claims in this action and do not expect to assert any defenses beyond those that may be raised by the existing Defendants. Rather, the Wildlife Federations seek to become parties to protect their distinct interests and the interests of their members, and to present the Court with their knowledge and expertise as to the questions that already form the heart of this case. Accordingly, the Wildlife Federations' intervention will not unduly prejudice White, and the Court should grant them permission to intervene.

CONCLUSION

For the foregoing reasons, the Wildlife Federations respectfully request that they be granted intervention as defendants in this action.

[9] Murphy Decl. ¶ 9(d), (g), (h); Gestwicki Decl. ¶ 14.

This the 7th day of May, 2024.

Respectfully submitted,

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** Notice of Special Appearance filed concurrently*

CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.2(f)(3), I hereby certify that this memorandum contains 3,243 words, inclusive of the elements required by Local Rule 7.2(f)(1).

Respectfully submitted,

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Attorney for the Wildlife Federations

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2024, I electronically filed the foregoing Memorandum in Support of Motion of National Wildlife Federation and North Carolina Wildlife Federation to Intervene as Defendants with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted,

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Exhibit A

Order in *Texas v. EPA*, No. 3:23-cv-00017, ECF No. 30 (S.D. Tex. Feb. 14, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, et al.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	3:23-cv-17
	§	
UNITED STATES ENVIRONMENTAL PROTECTION, et al.,	§	
	§	
	§	
Defendants.	§	

ORDER

Before the court is Bayou City Waterkeeper's unopposed motion to intervene as a matter of right under Fed. R. Civ. P. 24(a) or, alternatively, requesting permissive intervention pursuant to Fed. R. Civ. P. 24(b). Dkt. 2. Finding that it satisfies the standards for both tests, the court grants the motion.

Signed on Galveston Island this 14th day of February, 2023.

JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

Exhibit B

Order in *In re: EPA & Dep't of Defense*, No. 15-3799, ECF No. 25-2 (6th Cir. Sept. 16, 2015)

Nos. 15-3751/3799/3817/3820/3822/3823/3831/3837/3839/3850/3853/3858/3885/3887/3948

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 16, 2015
DEBORAH S. HUNT, Clerk

In re: ENVIRONMENTAL PROTECTION AGENCY AND DEPARTMENT OF DEFENSE, FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES," 80 FED.REG.37,054, PUBLISHED ON JUNE 29, 2015 (MCP NO. 135).

O R D E R

The Judicial Panel on Multidistrict Litigation issued a consolidation order designating this court as the transferee circuit for a number of petitions for review of final rules of the United States Environmental Protection Agency and the United States Army Corps of Engineers. Pursuant to that order, multiple petitions for review were transferred to this court, and additional petitions for review were filed in this court.

In view of the nationwide scope of the rules of which review is sought, multiple and diverse parties have moved to intervene in these petitions. Some would-be intervenors seek intervention in all petitions; others only in a single petition. Some intervenors seek intervention insupport of the petitioners in some cases and in support of the respondents in others.

Upon review, all motions to intervene in these petitions hereby are GRANTED. The intervenors will be added as parties in the individual petitions and under the party alignments that they have sought.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Exhibit C

Order in *Georgia v. McCarthy*, No. 2:15-cv-79, ECF No. 182 (S.D. Ga. July 3, 2018)

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

STATE OF GEORGIA, et al., Plaintiffs, v. REGINA A. MCCARTHY, et al., Defendants.	CIVIL ACTION NO.: 2:15-cv-79

O R D E R

Presently before the Court is the National Wildlife Federation and One Hundred Miles' Renewed Motion to Intervene in this cause of action.[1] (Doc. 136.) For the reasons set forth below, as well as those set forth in the Renewed Motion to Intervene and the original Motion to Intervene, (doc. 36), the Court **GRANTS** the Renewed Motion.

This cause of action was brought by the Attorneys General for the States of Georgia, West Virginia, Alabama, Florida, Kansas, Kentucky, South Carolina, Utah, and Wisconsin, ("Plaintiffs" or "the States"), against Defendants Regina McCarthy, Administrator of the Environmental Protection Agency ("EPA"); the EPA; Jo-Ellen Darcy, the Assistant Secretary of the Army; and the United States Army Corps of Engineers, ("Defendants" or "the Agencies"). According to Plaintiffs, the Defendant agencies are attempting to "usurp the States' primary responsibility for the management, protection, and care of intrastate waters and lands. The federal agencies' assertion of authority should be vacated and enjoined because it violates the

[1] National Wildlife Federation and One Hundred Miles' Motion is actually entitled "Motion to Renew Motion to Intervene". (Doc. 136.) However, it appears this nomenclature is a misnomer. (Id. at p. 4 ("renew their Motion [to Intervene] . . .").) Thus, the Court considers the present Motion to be a renewal of the original Motion.

Clean Water Act, the Administrative Procedures Act, and the Constitution." (Doc. 1, p. 3.) The Natural Resources Defense Council, National Wildlife Federation, One Hundred Miles, and the South Carolina Coastal Conservation League, (the "Conservation Groups"), moved to intervene in this cause of action on July 31, 2015, pursuant to Rule 24 of the Federal Rules of Civil Procedure. (Doc. 36.)

On August 27, 2015, the Honorable Lisa Godbey Wood denied Plaintiffs' Motion for a Preliminary Injunction. (Doc. 77.) In so doing, Judge Wood determined this Court did not have jurisdiction to hear a challenge to the Waters of the United States Rule, or "WOTUS Rule," "as that jurisdiction is exclusively vested in the Court[s] of Appeals." (Id. at p. 6) (agreeing with the Northern District of West Virginia's jurisdictional finding in Murray Energy Corp. v. EPA, et al., No. 1:15CV110 (N.D.W. Va. Aug. 26, 2015).). In light of Judge Wood's Order dated August 27, 2015, this Court dismissed without prejudice the Conservation Groups' unopposed Motion to Intervene. The Court instructed the Conservation Groups to re-urge their Motion should Judge Wood's ruling be reversed on appeal. (Doc. 94.) The Eleventh Circuit Court of Appeals vacated and remanded Judge Wood's Order in light of the decision in National Association of Manufacturers v. Department of Defense, 583 U.S. ___, 138 S. Ct. 617 (2018).[2] (Doc. 122, p. 3; Doc. 133.) One Hundred Miles and the National Wildlife Federation renewed their Motion to Intervene. (Doc. 136.)

Upon due consideration, the Court **GRANTS** the unopposed Renewed Motion to Intervene, pursuant to Federal Rule of Civil Procedure 24. The Court **DIRECTS** the Clerk of Court to add "National Wildlife Federation" and "One Hundred Miles" as Intervenor-Defendants

[2] "[A]ny challenges to the [WOTUS] Rule . . . must be filed in federal district courts." Nat'l Ass'n, 583 U.S. at ___, 138 S. Ct. at 624.

and to file the "Proposed Answer and Defenses", (doc. 36-2), as the Intervenor-Defendants' Answer and Defenses to Plaintiffs' Amended Complaint upon the record and docket of this case.

SO ORDERED, this 3rd day of July, 2018.

R. STAN BAKER
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

Exhibit D

Order in *North Dakota v. EPA*, No. 3:15-cv-59, ECF No. 198 (D.N.D. Apr. 19, 2018)

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

States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming; New Mexico Environment Department; and New Mexico State Engineer, Plaintiffs, and Kimberly K. Reynolds, Governor of the State of Iowa, Plaintiff-Intervenor, vs. U.S. Environmental Protection Agency; Scott Pruit, in his official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. Army Corps of Engineers; and R.D. James, in his official capacity as Assistant Secretary of the Army (Civil Works), Defendants.	)	Case No. 3:15-cv-59 **ORDER**

Plaintiffs—twelve states and two agencies of a thirteenth state—seek judicial review of a final regulation promulgated under the Clean Water Act (CWA). A May 24, 2016 order stayed the case pending a decision on whether jurisdiction to review the regulation was proper in the district courts or in the circuit courts. (Doc. #156). On January 22, 2018, the Supreme Court held that district courts have jurisdiction to review the regulation. Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S.Ct. 617 (2018). Subsequent to the Supreme Court's decision, this court lifted the May 2016 stay and denied the defendants' motion for a stay pending further administrative proceedings. (Doc. #185).

Discussion

1. Completion of Administrative Record

Before the stay was ordered, the plaintiffs had filed a motion seeking completion of the administrative record, which asserted that the certified record filed by defendants omitted certain documents. (Doc. #104). Given the time that had elapsed since the plaintiffs filed that motion, the order which lifted the stay allowed the parties time to file supplemental briefs concerning the motion.

The parties then stipulated that the defendants would file a revised certified index to the administrative record and that the plaintiffs would withdraw their motion to complete the administrative record. The revised certified index is described as "identical in substance" to that filed in the Court of Appeals for the Sixth Circuit in related litigation. (Doc. #190, p. 1). In accordance with the parties' stipulation, on April 16, 2018, the defendants filed the revised certified index to the record. (Doc. #195). The plaintiffs' motion concerning completion of the administrative record is, therefore, **MOOT**.

2. Motion to Intervene

Prior to the May 2016 stay, the Sierra Club had moved to intervene as a defendant. (Doc. #111). The motion claimed intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2) and asserted a right to advocate for a position distinct from that advanced by either the plaintiffs or the defendants. (Doc. #112, p. 6). At the time the Sierra Club filed that motion, the plaintiffs opposed it, (Doc. #127), and the defendants took no position on it.

The order lifting the stay allowed the parties time to file supplemental briefs

concerning the motion to intervene. The plaintiffs and the Sierra Club then reached an agreement, under which the plaintiffs no longer oppose the intervention provided that the Sierra Club's intervention be "for defensive purposes only in relation to claims raised against the WOTUS Rule" and that the Sierra Club "not raise claims as a plaintiff" concerning the WOTUS Rule. (Doc. # 189).

The Sierra Club filed a supplemental brief, asserting that, "in light of the change in administration and the defendant agencies' new policy direction, Sierra Club is not adequately represented by the existing parties." (Doc. #187, p. 2). The defendants have made no supplemental filings, so the court assumes they maintain their "no position" stance.

There being no current objection, the Sierra Club's motion to intervene as a defendant is **GRANTED** subject to the limitations of the stipulation of record. (Doc. #189).

3. Scheduling Plan

The order lifting the stay also directed the parties to confer regarding a proposed scheduling plan. The parties conferred but did not agree on a scheduling plan.

The plaintiffs request:

(1) that their merits brief be due within thirty days of orders regarding the motions concerning the administrative record and concerning the Sierra Club's proposed intervention;

(2) that the defendants and the defendant-intervenor file responsive briefs within twenty-one days of the plaintiffs filing their brief;

(3) that the plaintiffs' reply brief be due no more than fourteen days after the

defendants and defendant-intervenor file their briefs; and

(4) that a hearing on the merits be scheduled expeditiously after merits briefing is completed.

(Doc. #193). The Sierra Club agrees with the plaintiffs' position on the scheduling order. (Doc. #189).

The defendants request that no scheduling order be issued until the chief district judge's decision on a pending appeal of the order denying a continued stay. If a scheduling order is issued prior to the chief judge's decision on the appeal, the defendants request that, within fifteen days of a decision on the Sierra Club's motion to intervene:

(1) the defendants file a status update concerning developments in the pending administrative proceedings and in the related litigation which is pending in other districts;

(2) the parties, including the intervenor, confer again regarding a proposed schedule to resolve the merits of the case; and

(3) the parties either file a joint proposed schedule, or submit their separate proposed schedules.

Alternatively, the defendants request that plaintiff-intervenors be required to file their brief within fourteen days after plaintiffs' brief and that the defendants' response to the plaintiffs' brief be due no earlier than sixty days after the brief of the plaintiff-intervenors. (Doc. #191).

Given their lack of agreement to date, the court has no reason to think that additional time to confer will lead to the parties submitting a joint proposed schedule.

And the defendants are free to update the court concerning the administrative process and other litigation at any time. But, if the parties are required to complete briefing prior to a decision on the pending appeal to the chief district judge and if that decision is reversed, the parties will have expended considerable resources unnecessarily. The court, therefore, orders that, if the March 23, 2018 order is affirmed on appeal:

(1) The plaintiffs and the plaintiff-intervenor shall file their merits briefs within thirty days of the chief district judge's decision on the pending appeal of the March 23, 2018 order.

(2) The defendants' response, which may include a cross-motion for summary judgment, shall be filed within forty-five days of filing of the plaintiffs' and plaintiff-intervenor's merits briefs.

(3) The plaintiffs may file a reply brief within fourteen days of filing of the briefs of the defendants and the defendant-intervenor.

(4) Unless prior permission is requested and granted, no brief shall exceed the page limits set forth in Civil Local Rule 7.1.

IT IS SO ORDERED.

Dated this 19th day of April, 2018.

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