UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., Mike Hunter, in his official capacity as the Attorney General of Oklahoma, Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, ANDREW WHEELER, in his official capacity as Acting Administrator of the U.S. Environmental Protection Agency, U.S. ARMY CORPS OF ENGINEERS, and Ricky James, in his official capacity as Assistant Secretary of the Army (Civil Works)[1], Defendants, and Waterkeeper Alliance and L.E.A.D. Agency, Inc., Proposed Defendant-Intervenors.	Case No. 15-0381-CVE-FHM
CHAMBER OF COMMERCE ET AL., Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, ANDREW WHEELER, in his official capacity as Acting Administrator of the U.S. Environmental Protection Agency, U.S. ARMY CORPS OF ENGINEERS, and Ricky James, in his official capacity as Assistant Secretary of the Army (Civil Works), Defendants,	Case No. 15-0386-CVE-PJC

[1] Pursuant to Fed. R. Civ. P. 25, Acting Administrator Andrew Wheeler and Assistant Secretary Ricky James are substituted for their predecessors in office.

and

Waterkeeper Alliance and L.E.A.D. Agency, Inc.,

Proposed Defendant-Intervenors.

MOTION TO INTERVENE AS DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 24(a), Waterkeeper Alliance, and Grand Riverkeeper and Tar Creekkeeper, projects of LEAD Agency, Inc. ("Waterkeepers"), hereby respectfully request leave to intervene as of right in the above-captioned companion cases. In the alternative, the Waterkeepers move for permissive intervention under Federal Rule of Civil Procedure 24(b). In support of this motion, the Waterkeepers submit the attached Memorandum in Support of Intervention.

Counsel for the Waterkeepers have contacted counsel for Plaintiffs in this case and they have indicated that their clients take no position on this motion.

Counsel for the Waterkeepers have also contacted counsel for the United States, who have indicated that the United States takes no position on this motion.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

INTRODUCTION

Waterkeeper Alliance, and the Grand Riverkeeper and Tar Creekkeeper, projects within Local Environmental Action Demanded Agency, Inc., (the "Waterkeepers") seek to intervene in the above-listed companion actions pursuant to Fed. R. Civ. P. 24. In their respective complaints, the State of Oklahoma in N.D. Okla. No. 15-CV-381-CVE-FHM (hereafter "State"), and the Chamber of Commerce of the United States of America et al., in N.D. Okla. No. 15-CV-386-CVE-PJC, (collectively, the "Business Groups")[2] challenge a Clean Water Act final rule ("Rule" or "Final Rule") issued jointly by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, "agencies") entitled "Clean Water Rule: Definition of 'Waters of the United States.'" 80 Fed. Reg. 37,054 (June 29, 2015). The Rule revises and in many respects streamlines the agencies' regulatory interpretation of the scope of their jurisdiction under the Clean Water Act to regulate waters across the country, and, in so doing, makes determinations about which categories of waters the agencies will decide qualify for protections from destruction or pollution under federal law. 80 Fed. Reg. at 37,054/1-2. The Waterkeepers request this Court's permission to intervene in order to oppose both the State's and the Business Groups' claims against the Rule and to advance an interpretation of Clean Water Act jurisdiction that is distinct from that advanced by either the Plaintiffs or Defendants and consideration of which is necessary to adequately protect the Waterkeepers' interests in this case.

[2] Plaintiffs in N.D. Okla. 15-CV-386-CVE-PJC also include the National Federation of Independent Business, the State Chamber of Oklahoma, the Tulsa Regional Chamber, and the Portland Cement Association.

The Waterkeepers and their members are long-standing clean water advocates nationally and within Oklahoma. Waterkeeper Alliance participated in the public process culminating in the Final Rule, submitting extensive comments on the agencies' proposal. Since the Rule's promulgation, the Waterkeeper Alliance has been involved in litigation to defend those aspects of the Rule it supported during rulemaking and to challenge those aspects not in accordance with the language or history of the Clean Water Act. Waterkeeper Alliance, along with other water advocates, is currently a plaintiff in an action filed in the United States District Court for the Northern District of California, *Waterkeeper Alliance, Inc. et al. v. Pruitt et al.*, No. 3:18-cv-03521-RS (N.D. Cal. filed June 13, 2018).[3] Waterkeeper Alliance was also a petitioner in *Waterkeeper Alliance et al. v. EPA*, No. 15-3837 (6th Cir. filed Aug. 4, 2015) originally before the Ninth Circuit, which case was consolidated by order of the panel on multi-district litigation before the Sixth Circuit as *In re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States"*, Case Nos. 15-3751, 15-3799, 15-3822, 15-3823, 15-3831, 15-3850, 15-3853, 15-3858, 15-3885, 15-3887.

In January of 2018, the United States Supreme Court ruled that jurisdiction for challenges to the Rule are properly in the District Courts of the United States, not the Circuit Courts. *See* decision in *National Ass'n of Manufacturers v. Dep't of Defense*, 138 S. Ct. 617 (2018). The Supreme Court remanded the matter to the Sixth Circuit for action consistent with the Supreme Court's ruling. *Id.* Here in Oklahoma, the Tenth Circuit has remanded these cases back to the Northern District of Oklahoma in keeping with the ruling by the United States Supreme Court.

[3] Waterkeeper Alliance had previously filed an action challenging certain aspects of the Rule in the District Court for the Northern District of California, *Waterkeeper Alliance et al. v. EPA*, No. 15-3927 (N.D. Cal. filed Aug. 27, 2015), before voluntarily dismissing that action on June 19, 2016, Dkt. 20.

See N.D. Okla. No. 15-CV-381-CVE-FHM, Dkt. No. 50 (Jan. 29, 2018). After hearing the Plaintiffs' responses to the Court's Order to Show Cause, *id.* Dkt. No. 52 (Feb. 21, 2018), the Court issued an Order on March 9, 2018, directing that the Court Clerk administratively close these cases pending either an order of the Court reopening the action, or until the cases are dismissed with prejudice by stipulation of the parties, *id.* Dkt. 56. On August 17, 2018, Plaintiffs in both actions jointly filed a Motion to Reopen Cases and Request for Ruling on Pending Preliminary Injunction Motions. *Id*. Dkt. 58.

The Waterkeepers have a legal interest in this action that meets the requirements for intervention, and disposition of this action may, as a practical matter, impair their ability to protect their interests. Members of the Waterkeepers regularly live, work, and recreate in and around water bodies that may lose Clean Water Act protections making them vulnerable to pollution, impairment, or destruction should Plaintiffs prevail in this action. It is vital to the interests of the Waterkeepers that the Rule lawfully define "waters of the United States" with the breadth required by the Clean Water Act and applicable case law.

Accordingly, the Waterkeepers seek to intervene as of right in this action pursuant to Fed. R. Civ. P. 24(a)(2). In the alternative, the Waterkeepers seek permissive intervention in this action pursuant to Fed. R. Civ. P. 24(b)(1).

Counsel for the Waterkeepers have queried counsel for all others parties regarding their position on this Motion to Intervene. At the time of this motion Counsel for both the State and the Chamber of Commerce, et al. state that the Plaintiffs take no position on the motion to intervene at this time, and reserve the right to oppose the motion after it has been filed.

BACKGROUND

The Clean Water Act is the primary federal law governing water pollution in the United States. Its purpose is "to restore and maintain the chemical, physical, and biological integrity of

the Nation's waters" by preventing pollution discharges into waters, providing assistance to publicly owned treatment works for the improvement of wastewater treatment, and maintaining the integrity of wetlands. 33 U.S.C. § 1251(a). The cornerstone of the Act is its prohibition against the "discharge of any pollutant by any person" except in compliance with the Act's permitting requirements and other pollution prevention programs. *Id.* § 1311(a). The key determinant of whether a water body is protected under the Act is whether that water body finds itself included within the agencies' definition of "waters of the United States."

Pollutant discharges into U.S. waters remain a serious issue, notwithstanding water quality improvements in many U.S. waters since the Act's passage in 1972. Due to discharges from industrial facilities, sewage treatment plants, construction sites, municipal storm sewers, and other sources, many U.S. waters remain polluted and are harmful to public health and the ecosystems and wildlife that rely on those waters. According to EPA, over fifty percent of U.S. streams and rivers assessed by state agencies remain "impaired." *See* EPA, *National Summary of State Information*, http://iaspub.epa.gov/waters10/attains_nation_cy.control (last updated Aug. 29, 2018).

The scope of the Act's jurisdiction determines which waters are protected by Clean Water Act programs and which are not. The Act itself provides that its jurisdiction extends to "navigable waters," which are in turn defined as "the waters of the United States, including the territorial seas." *See* 33 U.S.C. §§ 1251, 1321, 1342, 1344; *see also id*. § 1362(7). The Act's legislative history demonstrates that Congress intended the term "waters of the United States" to be applied broadly, with members expressing their intent that their use of the word "navigable" *not* be read to limit the application of the Act in any way. *See* Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, at 178, 250-51, 327, 818, 1495 (1973).

The Final Rule is the first revision to regulations interpreting "navigable waters" and "waters of the United States" in more than thirty years. 33 U.S.C. §§ 1251-1388; 80 Fed. Reg. at 37,073-74. The Rule contains various provisions that, for the first time, adopt standardized definitions for key terms such as "tributary" and "adjacent." 80 Fed. Reg. at 37,075-86. Waters within these categories have always been subject to jurisdiction under the Clean Water Act and relevant case law, based on requirements in the Clean Water Act and case-specific jurisdictional analyses demonstrating "significant nexus" to an interstate water, traditional navigable water, or territorial sea. *See id.* at 37,056. The Rule's new definitions were determined based on extensive scientific evidence showing that the waters within these defined categories all bear a significant nexus to downstream or adjacent jurisdictional waters, because of their inherent hydrological features. *Id.* at 37,065. Using the standardized definitions, the new Rule obviates the need for case-by-case determinations of significant nexus for those categories of waters defined as "jurisdictional by rule." *See id.* at 37,058. For example, once regulatory officials determine that a particular body of water meets the new definition of "tributary," it is deemed to be a "water of the United States," *per se*. *Id.* at 37,075-80; 40 C.F.R. § 401.11(*l*)(1)(v). In these respects, the new jurisdictional rule does not expand the reach of the Clean Water Act; it merely serves to streamline and clarify the process for the agencies, interested parties, and the public.

The Rule also contains provisions categorically deeming certain waters "not jurisdictional," or not regulated under the Act, including "waste treatment systems designed consistent with the requirements of the Clean Water Act," "prior converted cropland," and water transfers. 80 Fed. Reg. at 37,073. Many waters falling outside of the jurisdictional-by-rule categories, including all of these specifically excluded waters, are no longer considered jurisdictional by the agencies, regardless of whether they have a significant nexus to another

"water of the United States." *See, e.g.*, 40 C.F.R. § 401.11(*l*)(1)(viii) (excluding waters more than 4,000 feet from the high tide line or ordinary high water mark of a traditional navigable water, interstate water, territorial sea, or impoundment from the definition of "waters of the United States," regardless of significant nexus).

Finally, the jurisdictional status of a smaller subset of waters will still be assessed under the Rule on a case-by-case basis, and jurisdiction over the water will depend on whether the waterbody has a "significant nexus" to a water of the U.S. 80 Fed. Reg. at 37,086-095.

The Waterkeepers are all non-profit organizations engaged for years in advocacy focused on protecting and improving the quality of U.S. water bodies adversely impacted by pollutant discharges. Waterkeeper Alliance is organized and existing under the laws of New York, with its headquarters in New York City. *See*, Decl. of Daniel E. Estrin. It is a global organization, but it also provides support and coordination for many local waterkeepers in states and watersheds throughout the United States, each dedicated to protecting public health and the environment, including clean water. Estrin Decl. at ¶ 5.

The local waterkeepers here, Grand Riverkeeper and Tar Creekkeeper are two such local organizations dedicated to protecting the health and clean water of their respective watersheds. Grand Riverkeeper and Tar Creekkeeper are projects within the nonprofit organization Local Environmental Action Demanded ("L.E.A.D.") Agency, Inc., an Oklahoma non-profit dedicated to educating the public and taking action to address hazards to natural resources, including water, in Northeast Oklahoma. These waterkeepers accomplish their work, in part, by pursuing enforcement of the Clean Water Act's permitting requirements and by advocating to preserve the full scope of the Act's jurisdiction.

Waterkeeper Alliance submitted timely public comments on the proposed rule before the

Rule was finalized and published on June 29, 2015. In its comments, Waterkeeper Alliance articulated its support for several of the Rule's specific provisions, including the jurisdictional-by-rule provisions at issue in this litigation, while highlighting that certain other provisions unlawfully exclude from protection waters that fall within the Act's jurisdictional scope as established by the terms of the Act itself and by relevant case law. *See* Comments of Waterkeeper Alliance and Waterkeeper Organizations – Proposed Definition of Waters of the United States Under the Clean Water Act, EPA-HQ-OW-2011-0880-16413 (Nov. 14, 2014).[4]

On July 8, 2015, the State filed its action challenging the Rule, N.D. Okla. 15-CV-381-CVE-FHM, Dkt. No. 2, followed shortly by the Business Groups' complaint on July 10, 2015, N.D. Okla. 15-CV-386-CVE-PJC. Both complaints make clear the plaintiffs' opposition to the entire Rule, including the many provisions supported by the Waterkeepers. The Waterkeepers now ask to intervene in order to defend those aspects of the Rule that Waterkeepers support, and to defend the Clean Water Act's full jurisdiction from improper limitation.

ARGUMENT

The Waterkeepers are entitled to intervene as a matter of right to defend the Rule against Plaintiffs' claims in this action. The Waterkeepers satisfy the criteria necessary to support such intervention pursuant to Fed. R. Civ. P. 24(a)(2).

I. THE WATERKEEPERS SATISFY THE REQUIREMENTS OF RULE 24(a)(2) TO INTERVENE AS OF RIGHT.

Under Rule 24(a)(2) the court will permit anyone to intervene who (1) files a timely motion to intervene; (2) claims an interest relating to the subject matter of the action; (3) is situated so that disposing of the action may, as a practical matter, impair or impede the movant's ability to protect that interest; and (4) is not adequately represented by the existing parties.

[4] *Available at:* https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-16413.

Western Energy Alliance v. Zinke, 877 F.3d 1157, 1164 (10th Cir. 2017). *See also WildEarth Guardians v. U.S. Forest Service*, 573 F.3d 992, 995 (10th Cir. 2009). The Tenth Circuit has "historically taken a 'liberal' approach to intervention," favoring granting motions to intervene. *Western Energy Alliance*, 877 F.3d at 1164. *See also WildEarth Guardians*, 573 F.3d at 995 (quoting *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001)).

A. The Waterkeepers Timely Filed This Motion to Intervene.

This Circuit considers all of the circumstances of a case when deciding if a motion to intervene is timely, and the analysis is contextual, not based on an absolute measure. *Western Energy Alliance*, 877 F.3d at 1164; *Utah Ass'n of Counties*, 255 F.3d at 1250. Courts in the Tenth Circuit will gives particular consideration to three non-exhaustive factors: the length of time since movant knew of their interests in the case; prejudice, if any, to the non-moving or opposing parties; and prejudice, if any, to the movant. *Western Energy Alliance*, 877 F.3d at 1164 (citing *Okla. ex rel. Edmondson v. Tyson Foods*, 619 F.3d 1223, 1232 (10th Cir. 2010)). In assessing timeliness and delay, the Tenth Circuit has adopted the majority approach of measuring delay from when the movant was on notice that its interests may not be protected by a party already in the case. *Okla. ex rel. Edmondson*, 619 F.3d at 1232. As to assessing prejudice, the question of prejudice turns on whether existing parties may be prejudiced by any delay in moving to intervene, not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change. *Utah Ass'n of Counties*, 255 F.3d at 1251.

This litigation is still in its earliest stages due to the dispute over jurisdiction in the circuit as opposed to district courts. The dispute concerning jurisdiction was resolved by the ruling of the Supreme Court on January 22, 2018, and judgment entered February 23, 2018. While this case was filed in 2015, it was pending in this Court for only a short time before being dismissed,

N.D. Okla. 15-CV-381-CVE-FHM, Dkt. No. 36, with appeal of that dismissal taken to the Tenth Circuit and appeal then abated pending action at the Supreme Court. *Id.*, Dkt. No. 44. Defendants have not filed an Answer yet in this litigation. It is also important to note that the defendant agencies have proposed to repeal the Rule, confirming that the Waterkeepers' interests are not represented or protected by the existing parties. *Id.*, Dkt. No. 58 at 3; 83 Fed. Reg. 32,227 (July 12, 2018) (supplemental notice confirming and expanding on the agencies' original proposal to rescind the Rule).

Because the litigation is in the earliest stages, no party will be prejudiced by the timing of this Motion to Intervene. There will be no need to repeat or slow any part of the case as a result of Waterkeepers' intervention.[5] There will be no delay in reaching a final conclusion as a result of the timing of intervention. Waterkeepers' Motion to Intervene is timely.

B. The Waterkeepers Have a Recognized Legal Interest in the Subject Matter of the Litigation.

A protectable interest is one where the work of the organization will potentially be impeded by the disposition of the litigation. *Western Energy Alliance*, 877 F.3d at 1165. This Circuit has recognized that it is "indisputable" that an environmental organization may intervene to protect natural resources falling in the scope of its advocacy work. *Id. See also WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010). In so holding, the court in *Western Energy Alliance* recognized that the environmental organizations had a record of working to protect public lands and had a demonstrated concern for the issues in the litigation. 877 F.3d at 1165.

[5] Prior to the case being closed, motions requesting injunctive relief and consolidation had been filed but not decided. If the Court considers the motion for injunctive relief, the Waterkeepers would seek to file a brief opposing the injunction.

The Waterkeepers have a strong interest in the outcome of this case, as evidenced by their involvement in this national Rule's public process and by their history of advocacy in Northeastern Oklahoma under the Clean Water Act. *See generally* Hatley and Estrin Decls. L.E.A.D. has worked for years to educate the public regarding the Grand River and its tributaries and has worked (indeed was in part formed and organized for the purpose) to protect those waters from numerous threats of pollution and development. Hatley Decl.

C. The Waterkeepers' Interests Might Be Impaired as a Result of This Litigation.

Rule 24(a) requires that an applicant for intervention show that it is "possible" that its interest will be impaired by the pending litigation. *Western Energy Alliance*, 877 F.3d at 1167. The Tenth Circuit follows a liberal approach on this factor where its central concern is the practical effect on the applicant. *WildEarth Guardians*, 573 F.3d at 995. If the interest would be affected in a practical sense, the court will allow intervention. *Id.* (citing *San Juan County v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007)).

Any result in this case that confines or limits the Clean Water Act's jurisdiction such that some waters are left unprotected or vulnerable to less protection would prejudice the Waterkeepers' ability to protect Northeast Oklahoma's waters on behalf of their members who use and enjoy those waters. A ruling by this Court that adopts an interpretation of the Clean Water Act advanced by the Plaintiffs would undermine the Waterkeepers' efforts to protect the broad jurisdiction that Congress envisioned for the Clean Water Act and would prejudice its ability to protect the waters by which its members work, live, and recreate. Invalidation of provisions in the Rule that define large categories of water bodies throughout the United States as jurisdictional-by-rule, including certain tributaries and wetlands, could strip federal pollution protection from hundreds of thousands of miles of ecologically significant and ecologically

connected streams, rivers, and other water bodies. These waters, and the people who live, work, and recreate in and around these waters—including the Waterkeeper organizations and their members—will be made vulnerable to the adverse impacts of unregulated pollution discharges, degradation of water quality, and unrestricted dredging and filling.

D. The Existing Parties Do Not Adequately Represent The Waterkeepers' Interests.

A putative intervenor under Rule 24(a) must show that no other party adequately represents its interests; in this Circuit, the burden requires a minimal showing. The Tenth Circuit has recognized that where a government entity is tasked with trying to represent the broad public interest, it cannot then also represent a private interest and vice versa. *Western Energy Alliance*, 877 F.3d at 1168 (citing *WildEarth Guardians*, 573 F.3d at 996-97). Perhaps more importantly, here the EPA has stated that it intends to change course and no longer defend the Rule, making EPA's interests more aligned with those of the Business Groups and adverse to those of the Waterkeepers. *Western Energy Alliance*, 877 F.3d at 1169 (determining that the agency cannot adequately represent the interests of the groups seeking intervention in a situation where, as here, the federal agency stated its intention to revisit its earlier regulation and possibly reverse course, refusing to defend the regulation.) Plainly, Waterkeepers' interest in ensuring broad application of the Clean Water Act's protections is not adequately represented by any of the parties currently in the case, including the EPA.

The Waterkeepers take a more expansive view of the Clean Water Act's jurisdiction, consistent with Congressional intent, than do the agencies. Indeed, Waterkeeper Alliance has opposed the agencies' limited construction of the Act during the entire public rulemaking process. *See* Comments of Waterkeeper Alliance and Waterkeeper Organizations, *supra* at 6-7; *Waterkeeper Alliance, Inc. et al v. Pruitt et al.*, No. 3:18-cv-03521-RS (N.D. Cal. filed June 13,

2018). Consistent with that position, the Waterkeepers seek to present information and arguments showing that the provisions of the Rule challenged by Plaintiffs in this case are not only well within the scope of the Defendants' authority – and fully supported by the scientific evidence in the administrative record – but in some cases fall short of the full reach of the Clean Water Act, a position not likely to be pressed by the agencies here.

II. IN THE ALTERNATIVE, THE WATERKEEPERS SHOULD BE ALLOWED PERMISSIVE INTERVENTION.

The Waterkeepers alternatively seek permissive intervention. Permissive intervention is proper where the motion is timely, the claim or defense shares a common question of law or fact with the underlying litigation, and the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b)(1), (3). Because the Waterkeepers' request to intervene is timely, because they have a significant interest in the question of the Clean Water Act's jurisdiction, and because intervention will not delay or prejudice the rights of the existing parties, permissive intervention is proper here.

CONCLUSION

For the reasons set forth above, the Waterkeeper Alliance, and Grand Riverkeeper and Tar Creekkeeper as projects of L.E.A.D. Agency Inc., request leave to intervene as defendants in this litigation as a matter of right or, in the alternative, to intervene permissively.

Respectfully submitted this 4th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I electronically filed the foregoing Motion to Intervene as Defendants and Memorandum In Support with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon counsel of record, and I have mailed copies to any counsel on the Manual Notice List.

/s/ David P. Page
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