UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

STATE OF LOUISIANA, STATE OF ALASKA, STATE OF ARKANSAS, COMMONWEALTH OF KENTUCKY, STATE OF MISSISSIPPI, STATE OF MISSOURI, STATE OF MONTANA, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF WEST VIRGINIA, AND STATE OF WYOMING, AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and NATIONAL HYDROPOWER ASSOCIATION, **Plaintiffs,** **v.** **U.S. ENVIRONMENTAL PROTECTION AGENCY and MICHAEL REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency,** **Defendants.**	**Civil No. 2:23-cv-01714** **Judge James D. Cain, Jr.** **Magistrate Judge Thomas P. LeBlanc**

MOVANT-INTERVENOR STATES' MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24 and Local Rule 7.6, the States of California, the California Water Resources Control Board, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia (collectively Movant-Intervenor States) move for leave to intervene for the purpose of defending the challenged *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 88 Fed. Reg. 66,558 (Sept. 27, 2023) (2023 Rule).

The grounds for this timely motion, established more fully in the memorandum below, are that Movant-Intervenor States have significant interests in defending the challenged rule and in

preserving the full extent of their sovereign authority reserved by Congress under section 401 of the Clean Water Act, 33 U.S.C. § 1341 (section 401). Both of those interests are within the subject matter of this case and rely upon common questions of law and fact. Moreover, Movant-Intervenor States' position is not adequately represented by any existing party to this case.

This motion is based on: (1) the memorandum in support below; (2) Movant-Intervenor States' comment letter dated August 8, 2022, on the U.S. Environmental Protection Agency's (EPA) *Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 87 Fed. Reg. 35,318 (June 9, 2022), Docket ID No. EPA-HQ-OW-2022-0128 (Comment ID EPA-HQ-OW-2022-0128-0140); (3) arguments of counsel; (4) all records and pleadings on file in this matter; and (5) the attached declarations.

Plaintiffs do not oppose intervention. EPA states that, while it believes as a general matter the United States is an adequate representative of the public's interests in rulemaking challenges under the Administrative Procedure Act per Federal Rule of Civil Procedure 24(a)(2), the United States does not oppose the movants' permissive intervention in this case.

MEMORANDUM IN SUPPORT

I. BACKGROUND

Movant-Intervenor States exercise authority under section 401 to issue or deny water quality certifications for activities that require a federal license or permit and may result in a discharge into waters of the United States. *See generally* 33 U.S.C. § 1341. For more than fifty years, and pursuant to the policy Congress expressed in the Clean Water Act to "recognize, preserve, and protect the primary responsibilities of rights of States," 33 U.S.C. § 1251(b), states have successfully implemented section 401 in a manner that is consistent with the Clean Water Act, state laws, and the states' sovereign, proprietary, and other interests in water quality within their borders.

In 2020, EPA adopted a new rule titled *Clean Water Act Section 401 Certification Rule*, which represented a radical departure from the plain language and intent of the Clean Water Act, U.S. Supreme Court precedent interpreting section 401, and decades of established section 401

practice. *See generally Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) (2020 Rule). Importantly, the 2020 Rule attempted to significantly curtail state authority under section 401.

EPA has since corrected course. In June 2021, EPA announced its intent to revise the 2020 Rule and opened a public docket to receive written pre-proposal recommendations. *See Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule*, 86 Fed. Reg. 29,541, 29,542 (June 2, 2021). Movant-Intervenor States submitted written comments in response and many states participated in multiple listening sessions held by EPA on the rule revision proposal. Decl. of Alexandria Doolittle in Support of Mot. to Intervene (Doolittle Decl.), Ex. A. On June 9, 2022, EPA published its proposed rule revising the 2020 Rule and solicited feedback on the proposed rule. 87 Fed. Reg. 35,318 (June 9, 2022). On August 8, 2022, Movant-Intervenor States submitted a comprehensive comment on the proposed rule. Doolittle Decl. Ex. B; Decl. of Eric Oppenheimer In Support of Movant-Intervenor States' Notice and Motion to Intervene (Oppenheimer Decl.), Ex. A.

In September of 2023, EPA published the final 2023 Rule, which revised and replaced the 2020 Rule. 88 Fed. Reg. 66,558 (Sept. 27, 2023). Among other things, the 2023 Rule realigns EPA's regulations implementing section 401 with the Clean Water Act's system of "cooperative federalism" and Congress's express policy to recognize and retain state authority over water quality. Critically, the 2023 Rule, consistent with comments submitted by Movant-Intervenor States, restores adherence to the scope of section 401 certification review consistent with the Supreme Court's precedent in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994). Additionally, the 2023 Rule rectifies many other shortcomings of the 2020 Rule, including simplifying pre-meeting requests requirements, clarifying the materials that applicants are required to submit with a certification request under section 401, and encouraging federal agencies and states to set agreed-upon schedules for state certification decisions.

Plaintiffs filed this action challenging the final 2023 Rule. Movant-Intervenor States seek leave to intervene to defend their interests in the rule.

II. LEGAL STANDARD

Intervention as a matter of right is appropriate where a party files a timely motion claiming "an interest relating to the property or transaction that is the subject of the action," and the outcome of the case may "impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2); *Entergy Gulf States Louisiana, L.L.C. v. U.S. E.P.A.*, 817 F.3d 198, 203 (5th Cir. 2016) (quoting Fed. R. Civ. P. 24(a)(2)).

Courts also have broad discretion to grant "permissive intervention" where a party files a timely motion and, as relevant here, "has a claim or defense that shares with the main action a common question of law or fact," Federal Rule of Civil Procedure 24(b)(1)(B), or a federal or state governmental officer or agency has a claim or defense that is "based on . . . a statute or executive order administered by the officer or agency." Fed. R. Civ. P. 24(b)(2); *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 470-71 (5th Cir. 1984). As set out below, Movant-Intervenor States readily meet the standard for intervention under either theory.

III. INTEREST AND GROUNDS FOR INTERVENTION

A. Movant-Intervenor States Are Entitled to Intervention as of Right

The Court should grant Movant-Intervenor States' timely motion to intervene in this case. Movant-Intervenor States have a clear and direct interest in upholding the 2023 Rule to preserve their sovereign authority over water quality within their respective states under section 401 of the Clean Water Act, 33 U.S.C. § 1341. Movant-Intervenor States' interests are protectable, they are the subject matter of this case, and they may be impaired or impeded by the outcome of this case. *Entergy Gulf States Louisiana, L.L.C.*, 817 F.3d at 203. These interests are not adequately represented by the existing parties. *Id.*

1. The motion is timely

Plaintiffs filed their complaint on December 4, 2023, and Defendants' deadline to respond to the complaint is still weeks away. Aside from the initiation of the lawsuit and its accompanying

narrow preliminary injunction motion, there has been only very limited procedural activity in this case. Moreover, Movant-Intervenor States, while strongly disagreeing with the characterization of the 2023 Rule in Plaintiffs' preliminary injunction motion, do not intend to take a position on the merits of the motion, which seeks an injunction only within Plaintiff states. Thus, Movant-Intervenor States' intervention will not affect the briefing on the motion for preliminary injunction. As such, this motion to intervene is timely and poses no delay or prejudice to the parties. *Rotstain v. Mendez*, 986 F.3d 931, 938 (5th Cir. 2021) (finding that a delay of 18 months weighed against timeliness).

2. Movant-Intervenor States have protectable interests that may be impeded by the outcome of this case

Both as sovereign states and certifying authorities operating under the 2023 Rule, Movant-Intervenor States' interests are plainly implicated by this case. Under the Clean Water Act, applicants for a federal license or permit to engage in any activity that may result in a discharge into waters of the United States must seek certification from the affected state that any such discharge complies with applicable water quality requirements. *See* 33 U.S.C. § 1341(a)(1). Federal agencies may proceed with licensing and permitting such activities only after the certifying authority grants the application or waives its authority to do so. *Id*. This certification process is a critically important way that states can exercise their right to protect water quality when hydropower and other projects are considered for permitting or licensure by the Federal Energy Regulatory Commission. Because the 2023 Rule implements section 401 by setting forth procedural requirements for approving and denying certification requests, the 2023 Rule is critical to Movant-Intervenor States' execution of their responsibilities under section 401. Moreover, because the very purpose of those responsibilities is to ensure that federally licensed or approved projects satisfy state water quality goals (among other requirements), Movant-Intervenor States also have a clear interest in defending the 2023 Rule, which is consistent with the Clean Water Act's intent to retain state authority over water quality. Decl. of Loree' Randall in Support of Mot. to Intervene; Oppenheimer Decl.

Plaintiffs seek to invalidate the 2023 Rule and return to the 2020 Rule that—contrary to the plain language of the Clean Water Act and clear intent of Congress—significantly limited state rights under the Act and expanded federal powers. Thus, the disposition of this case will directly impact and may "impair or impede [Movant-Intervenor States] ability to protect [their] interest[s]." Fed. R. Civ. P. 24(a)(2). Indeed, any arguments made by Plaintiffs that result in a limitation on state certifications threaten to impair or impede Movant-Intervenor States' interests. For example, Plaintiffs boldly claim that EPA's return to an understanding of section 401 certification that governed the Clean Water Act for over 50 years is overly broad or burdensome. ECF No. 1, ¶ 8. The opposite is true. Placing the ultimate authority to ensure proposed projects comply with state water quality requirements in the hands of states is the core reason Congress included the section 401 certification requirement in the first place. *See, e.g., PUD No. 1*, 511 U.S. at 711-12. Diluting the states' rights recognized and preserved by Congress in the Clean Water Act by placing more power in the hands of the federal government is antithetical to the interests of Movant-Intervenor States. The protectable interest element of intervention is readily met.

3. Movant-Intervenor States' interests are not adequately represented by existing parties

While Federal Rule of Civil Procedure 24(a) requires intervenors to show an interest not represented by existing parties, this requirement must be liberally construed. Movant-Intervenor States' burden to meet this prong is minimal, and courts must resolve any doubts in favor of granting intervention. *Entergy Gulf States Louisiana, L.L.C.*, 817 F.3d at 203. Importantly, intervenors are not required to show that "the representation by existing parties will be, for certain, inadequate" but only that it "may be inadequate." *Brumfeld v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014) (internal quotations omitted).

Here, Movant-Intervenor States' sovereign interests in upholding the 2023 Rule's restoration of state section 401 authority are not adequately represented by the existing parties. To the contrary, Plaintiff States seek to actually *limit* states' rights in favor of expanding the federal government's power under section 401, and thus clearly do not represent Movant-Intervenor

States' interests. Nor does EPA. Congress's longstanding policy of preserving state authority over water quality—and the unequivocal codification of that policy in the Clean Water Act—makes clear that states alone can represent their sovereign interests in section 401 matters. 33 U.S.C. § 1251(b). The cooperative federalism mandated by the Clean Water Act requires states and the federal government to hold their own unique role in evaluating projects and delivering on the shared goal of protecting water quality. This separation of authority within the Act, and within section 401 itself, demonstrates that EPA is not positioned to adequately represent Movant-Intervenor States' interests because EPA's interests diverge from the movants' interests "in a manner germane to the case." *Texas v. United States*, 805 F.3d 653, 662-63 (5th Cir. 2015) (finding that intervenors were entitled to intervene, because they "specif[ied] the particular ways in which their interests diverge[d] from the [party's]" and identified the particular way in which these divergent interests will impact the litigation).

Furthermore, as illustrated by certain actions of EPA over the course of the last six years, the approach and policy positions taken by EPA in relation to state water quality certifications under section 401 have at times diverged *significantly* from those of Movant-Intervenor States. *See generally In re Clean Water Act Rulemaking*, 60 F.4th 583 (9th Cir. 2023). Only through intervention will Movant-Intervenor States' interests be reliably, consistently, and adequately represented over the life of this case. For these reasons, Movant-Intervenor States readily establish that they are entitled to intervene because no existing party may adequately represent them in this action.

B. Alternatively, Movant-Intervenor States Should Be Granted Permissive Intervention

Movant-Intervenor States also meet the less burdensome requirements for permissive intervention. Permissive intervention is appropriate at the Court's discretion because Movant-Intervenor States' claims and defenses share common questions of law and fact with the main action. *See* Fed. R. Civ. P. 24(b)(1). Some of the common questions of law and fact here are whether the 2023 Rule is consistent with the Clean Water Act, Congressional intent, and established Supreme Court precedent and whether, in promulgating the 2023 Rule, EPA complied

with the rulemaking requirements of the federal Administrative Procedure Act. Moreover, Movant-Intervenor States are "state governmental officer(s) or agenc(ies)" seeking to intervene in this lawsuit where the parties' claims and defenses are "based on (A) a statute administered" by the Movant-Intervenor State or "(B) any regulation . . . issued . . . under the statute." Fed. R. Civ. P. 24(b)(2). Specifically, the claims in the complaint and the likely defenses that will be raised by Defendants directly pertain to section 401, the 2023 Rule that implements section 401, and affect the Movant-Intervenors States' ability to perform section 401 certifications.

As demonstrated above, Movant-Intervenors have a compelling interest that is unrepresented by the existing parties in a way that will "significantly contribute to full development of the underlying factual issues in the suit." *New Orleans Pub. Serv., Inc.*, 732 F.2d at 470-71. Movant-Intervenor States will illuminate the underlying legal and factual issues related to preserving the full scope of state authority over water quality within their states through section 401 certifications. This includes, but is not limited to, whether an applicant must seek state certification for a particular activity in accordance with *PUD No. 1*, 511 U.S. 700 (1994); the timeframe within which states must complete section 401 certifications; the ability of a state to require an applicant to provide information important to making a well-informed decision; and the ability of a state to evaluate the application under all applicable water quality requirements. As such, Movant-Intervenor States meet the requirements for permissive intervention.

IV. CONCLUSION

For the aforementioned reasons, this motion to intervene should be granted.

RESPECTFULLY SUBMITTED this 12th day of January 2024.

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