UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 663; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 440; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 2; and UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO, CLC,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

Case No. 0:19-cv-02660-JNE-TNL

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO SEABOARD FOODS LLC'S MOTION FOR LEAVE TO INTERVENE

INTRODUCTION

Nearly one year ago, the parties in this case briefed both the merits and the question of what remedy should be granted should Plaintiffs prevail on their claims that the line-speed provision of a Final Rule issued by Defendant U.S. Department of Agriculture (USDA) establishing the "New Swine Inspection System" (NSIS) was arbitrary and capricious, in violation of the Administrative Procedure Act (APA). Plaintiffs argued that any financial consequences to swine slaughter establishments that would result from vacatur were outweighed by the

increased risk of injuries to workers that would result from keeping the rule in place. USDA and industry amici argued otherwise, supported by declarations from management of three plants, including Seaboard Foods' plant in Guymon, Oklahoma. Notably, no party argued that, should the Court vacate the rule in whole or in part, the Court should provide a transition period for plants that opted into NSIS, allowing them to continue to run their lines at rates above 1106 hogs per hour (hph)—the maximum rate allowed for non-NSIS plants.

On March 31, 2021, this Court ruled on the parties' cross-motions for summary judgment. The Court agreed with Plaintiffs that the line-speed provision was unlawful and agreed that vacatur was the appropriate remedy—despite the costs to companies like Seaboard. Although neither USDA nor industry amici requested it, the Court, in its discretion, delayed vacatur for 90 days to allow USDA and industry time to adjust.

Now, one month into the three-month transition period, Seaboard seeks to intervene to relitigate the Court's remedy, relying on the same arguments about the impact of vacatur and financial costs that both USDA and industry amici, on Seaboard's behalf and with Seaboard's participation, made last year. But intervention is not a tool "to relitigate matters already determined in the case." *Arizona v. California*, 460 U.S. 605, 615 (1983). All of the arguments Seaboard seeks to raise—including whether a lengthy 13.5-month transition period is warranted—

could have been raised last summer. Seaboard has not justified its failure to raise them at that time. Seaboard's suggestion that a regulated entity can strategically choose not to advance arguments in litigation between a challenger and a federal agency concerning a federal regulation, and then intervene to make those arguments *after* judgment would intolerably disrupt the orderly conduct of APA litigation.

Moreover, whether Seaboard should now be given an exception from USDA's lawfully promulgated maximum line speed (which will apply to Seaboard upon the expiration of the 90-day period provided for in the Court's March 31, 2021 order) is a question for USDA, not this Court. This Court has not constrained USDA's authority with respect to that preexisting regulation, and USDA, who has sole responsibility for enforcing that regulation, is in a better position to assess whether an exception is warranted from that regulation than this Court. To indulge Seaboard's request for a carve-out that regulation would invite every plant that has converted to NSIS to do the same. The Rule 24 intervention process is not designed for such *ad seriatim* litigation.

Seaboard suggests that its uncertainty whether USDA will appeal is a "changed circumstance" that makes its motion to intervene timely. But USDA's uncertainty is irrelevant to Seaboard's request to intervene to ask *this* Court to revisit its order on summary judgment. At most, USDA's apparent unwillingness

to state whether it will appeal would be relevant to Seaboard's desire to prosecute an appeal of this Court's decision and seek a stay pending appeal. If the Court grants intervention, it should limit Seaboard's intervention accordingly.

BACKGROUND

I. The History of this Case through Summary Judgment

On October 1, 2019, USDA published a Final Rule creating NSIS. *See* Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300 (Oct. 1, 2019). Under the Rule, beginning March 30, 2020, certain high-volume plants that chose to participate in NSIS were able to make changes to their operations that departed from the requirements that otherwise applied to plants subject to inspection by USDA's Food Safety and Inspection Service (FSIS). USDA identified seven "key elements" of NSIS, two of which were at issue in this case: (1) the utilization of plant employees to conduct certain ante-mortem inspection tasks that were previously performed by FSIS employees and (2) the revocation of maximum line speeds on slaughter lines, which are set at 1106 hph for non-NSIS plants. *See id*. at 52,300.

Less than one week after USDA published the Final Rule, the United Food and Commercial Workers Union ("UFCW") and three of its local unions with members who work in plants that were identified as likely to convert to NSIS—including Local Union 2, which represents the workers at Seaboard's Guymon

plant—filed this action under the APA, arguing that the Final Rule was arbitrary, capricious, and contrary to law, and requesting that the entire Final Rule be vacated. Dkt. 1.

On December 6, 2019, USDA filed a motion to dismiss the action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. 14. On April 1, 2020, after briefing and oral argument, this Court granted the motion in part and denied it in part. Dkt. 30. The Court held that Plaintiffs lacked standing to challenge the use of plant employees to perform tasks previously performed by FSIS inspectors, but that they had adequately established standing to challenge the elimination of line-speed limits. *See id.* at 1. The Court also held that Plaintiffs had stated a claim that the line-speed provision was arbitrary and capricious, identifying serious shortcomings in the agency's reasoning, pointing out "internal inconsisten[cies]," "circular logic," and the "conclusory fashion" in which the agency addressed worker safety issues. *Id.* at 20–22. The Court held, as a matter of law, that the agency's explanation for "declining to consider" the effects of NSIS on workers "was not a rational explanation." *Id.* at 22.

On May 15, 2020, USDA filed a motion to stay summary judgment proceedings and for voluntary remand. Dkt. 40. Plaintiffs opposed, filing a lengthy brief arguing that a stay would cause irreparable harm to Plaintiffs' members—particularly those working at the Seaboard plant—due to the impact on their

health and safety, and that vacatur would be the appropriate remedy should Plaintiffs prevail on their remaining claim. *See* Dkt. 49. No representatives of the pork-processing industry sought to participate in the briefing on that motion. On July 22, 2020, the Court denied USDA's request for a stay, but it stated it would "consider the propriety of a voluntary remand without vacatur alongside" the motion for summary judgment Plaintiffs filed on July 9, 2020. Dkt. 85 at 1.

In connection with their motion for summary judgment, Plaintiffs argued that vacatur of the entire Final Rule was the appropriate remedy. They explained that "any disruption to regulated entities is easily outweighed by the increased risk of injuries to workers that would result from keeping the rule in place." Dkt. 69 at 34; *see also* Dkt. 107 at 22–24 (reply memorandum addressing USDA and industry amici arguments as to costs associated with vacatur). In its principal brief, filed in July 2020, USDA disagreed, arguing that entities like Seaboard had spent "tens, or even hundreds of thousands of dollars reconfiguring their facilities" in order to convert to NSIS, and that vacatur of the entire rule would generate extensive costs to regulated entities. Dkt. 89 at 30–31. As a fallback argument, USDA argued that vacatur should be limited to the line-speed provision. *Id.* at 31–33. USDA did not ask the Court to delay that vacatur. USDA later made these same arguments in reply, explicitly citing Seaboard's claim that vacatur would cost it

"an estimated $ 82 million and require its employees to work an additional 23 Saturdays per year." Dkt. 121 at 12–13.

Several amici curiae participated in the summary judgment briefing. *See* Dkt. 84 (Amicus Br. of Seven State Att'ys General); Dkt. 105 (Amicus Br. of North American Meat Institute & National Pork Producers Council). Three weeks *after* USDA filed its brief, in which it stated its position on remedy, the North American Meat Institute and National Pork Producers Council moved to appear as amicus curiae, with Plaintiffs' consent. Dkt. 102. Those amici purported to "speak on behalf of their member pork farmers and processors against vacatur of the New Swine Inspection System (NSIS) Rule," citing the "profound reliance interest in the NSIS Rule" by Seaboard, and the fact that lower line-speed limits "would likely deprive workers of additional Saturdays with their families," (i.e., by providing them paid overtime shifts). Dkt. 105 at 1. Amici asked the Court to "exercise its 'remedial discretion' concerning vacatur." *Id.* at 14. They did *not*, however, suggest that the Court should delay vacatur for 13.5 months from the date of decision or for any time at all.

Along with their brief, the industry trade association amici submitted declarations from three executives of three member companies whose plants were participating in NSIS, including a declaration from Stephen Summerlin, Senior Vice President of Operations at Seaboard Foods. Dkt. 104-3 (Summerlin Summ. J.

Decl.). Mr. Summerlin provided detail about Seaboard's Guymon, Oklahoma plant's operations and its March 2020 conversion to NSIS, including its expenses, and asserted that, "The Guymon facility, and Seaboard in general, will suffer significant operational impacts if the NSIS rule is vacated." *Id.* at ¶ 12. He stated that, "[t]o achieve non-NSIS production output comparable to its expected NSIS production output, the Guymon facility would have to operate an additional 23 Saturdays per year." *Id.* at ¶ 13. Mr. Summerlin's declaration did not suggest that operating on Saturdays was not feasible and did not mention any concern about "animal waste" or excess animal supply.

On October 13, 2020, this Court held a hearing on the parties' cross-motions for summary judgment and USDA's motion to remand without vacatur. Dkt. 124. On March 31, 2021, the Court granted in part Plaintiffs' motion for summary judgment and denied USDA's motion for summary judgment and motion for remand without vacatur. Dkt. 125. In that order, the Court held the USDA "failed to satisfy the APA's requirement of reasoned decision-making" in adopting the line-speed provision. *Id.* at 2. As a remedy, the Court vacated the line-speed provision, but "to give the agency and regulated entities an opportunity to adapt to the vacatur, …stay[ed] [its] order and entry of judgment for 90 days." *Id.*

The Court's eleven-page discussion of remedy examined and applied the relevant case law, arguments of the parties and amici, and evidentiary

submissions—including Seaboard's declaration. *Id.* at 57–68. First, the Court held that the line-speed provision was severable from the rest of the NSIS Final Rule, accepting USDA's arguments "that the agency would have still implemented NSIS even if it had retained the line speed limits" and "that the NSIS program can function without the elimination of line speed limits." *Id.* at 59. Second, the Court applied the factors set out by the D.C. Circuit in *Allied Signal, Inc. v. United States Nuclear Regulatory Commission*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), to determine whether the Court should depart from the default remedy of vacatur as to the unlawful provision, and instead remand without vacatur. Dkt. 125 at 60–61.

As to the first *Allied-Signal* factor, the Court stated that it was "unclear whether FSIS c[ould] rehabilitate its Final Rule without taking an entirely new agency action," thus counseling against remand without vacatur. *Id.* at 63. As to the second *Allied-Signal* factor, the Court considered potential disruptive effects of vacatur to industry. The Court specifically considered Seaboard's arguments "that it spent $82 million to upgrade to the NSIS," "that its employees would need to work an additional 23 Saturdays each year to achieve the same production absent the NSIS," and "that reimposing a line speed limit would disrupt the entire supply chain and add to the financial hardships caused by the COVID-19 pandemic," as well as Seaboard's argument that it had "relied upon the Final Rule and a vacatur would disrupt those settled expectations." *Id.* at 64.

Nonetheless, the Court found vacatur appropriate. First, it noted that many of the costs incurred in converting to NSIS would "not be forfeited by a vacatur of the line speed limit elimination under the NSIS." *Id.* at 65. Second, it noted that many plants had already slowed their line speeds due to the COVID-19 pandemic, and plants had managed to adapt. *Id.* Finally, the Court explained that leaving the line-speed provision in place for a period of remand would make it "likely that more facilities will increase production and adopt faster line speeds that may potentially need to be reduced in the future," whereas vacatur "would prevent more parties from relying on a line speed increase that may not be reinstated." *Id.* at 65.

Although the Court was "not persuaded … that it should exercise its discretion to depart from the normal APA remedy of vacatur," "the Court acknowledge[d] that FSIS created significant reliance interests by eliminating line speed limits under the NSIS," and that, if "vacatur were to take effect immediately, pork producers may be forced into a period of noncompliance with the line speed limits." *Id.* at 65–66. Thus, while no party had asked the Court to delay its vacatur, the Court invoked its "remedial discretion" to stay vacatur for 90 days to "allow the agency to decide how to proceed in light of this opinion and give regulated entities time to prepare for any operational change." *Id.* at 67-68.

Now, 36 of those 90 days have passed. Although Plaintiffs have requested that USDA provide information as to how it plans to proceed in light of the Court's opinion, USDA has declined to do so. Based on Seaboard's motion, however, it appears that USDA has shared some information with Seaboard and other members of the regulated industry. *See* Dkt. 130 at 12.

II. Seaboard Foods' Operations Pre- and Post-NSIS Conversion and the Impact of Vacatur

Plaintiffs dispute Seaboard's characterization of its operations and the impacts that would follow should it be required to abide by the line-speed regulation that it itself operated under until very recently, and under which the majority of plants in America are operating. In light of the short deadline to respond, and the fact that the Court need not address Seaboard's arguments about its operations in resolving the pending motion, Plaintiffs respond only briefly here to provide the Court a fuller, more accurate context. Should the Court grant Seaboard's motion to intervene, Plaintiffs will more thoroughly rebut Seaboard's claims in response to any motion to stay.

From approximately 2004 through 2019, Seaboard operated the line speeds on its kill floor at around 1060 to 1080 hogs per hour (hph). Decl. of Martin Rosas ¶ 14. In and around 2019, it started to increase its line speeds, while still subject to the 1106 hph regulatory limit. *Id.* ¶ 15; *see also* Dkt. 104-3 (Summerlin Summ. J. Decl.) ¶ 4. Throughout that time, Seaboard scheduled kill-floor workers on two,

10-hour shifts, which were scheduled Monday through Friday. Rosas Decl. ¶¶ 16–17. It also frequently scheduled Saturday shifts—approximately 26 to 30 per year. *Id.* ¶ 18. Plaintiffs' members who worked these Saturday shifts received premium pay. *Id.* ¶ 19.

In 2018, well before USDA issued the Final Rule at issue in this case, Seaboard began plans for capital improvements to its plant, similar to those it has regularly made over the years, and similar to those of its competitors—including those who have not participated in NSIS. *Id.* ¶¶ 23–36. At least $100 million for these improvements, which were staged over several years, was financed by the City of Guymon. *Id.* ¶¶ 24–25; Okla. Dep't of Com., Release, Guymon-Seaboard Agreement Will Bring $100 Million Dollar Plant Expansion (Feb. 3, 2020) (Oklahoma Commerce Release).[1] These improvements addressed several problems unrelated to line speeds. Rosas Decl. ¶ 29; Oklahoma Commerce Release. For example, Seaboard replaced its ammonia refrigeration system, problems with which had led to enforcement action by the Occupational Safety and Health Administration and the Environmental Protection Agency in recent years. Rosas Decl. ¶¶ 31–34. It also added more coolers and freezer capacity, as have many non-NSIS plants. *Id.* ¶ 36.

[1] https://www.okcommerce.gov/guymon-seaboard-economic-development-agreement-will-bring-100-million-dollar-plant/.

In March 2020, Seaboard converted to NSIS, and increased kill-floor line speeds to approximately 1350 hph. *Id.* ¶ 39; *see also* Dkt. 131-1 (Summerlin Decl.) ¶ 3; Dkt. 104-3 (Summerlin Summ J. Decl.) ¶¶ 3–4. Upon conversion to NSIS, Seaboard initially reduced Saturday shifts and eliminated overtime. Rosas Decl. ¶ 41. During discrete periods of COVID-19-related staff shortages, Seaboard temporarily restored Saturday shifts, and rolled back speeds to 1200 to 1220 hph. *Id.* ¶¶ 42, 44. Seaboard has now eliminated Saturday shifts, and is scheduling kill-floor workers for 9.5 hour shifts, Monday through Friday, and is running kill-floor line speeds at approximately 1250 hph. *Id.* ¶¶ 46–47. Although more than one month has passed since the Court issued its order, Seaboard has not produced any evidence that it has taken steps to prepare for a return to 1106 hph.

If Seaboard were required to return its kill floor line speeds to 1106 hph, this would result in a reduction of 140 hph, or 6,840 hogs per week. As Seaboard acknowledged in its declaration at the summary judgment stage, this shortfall could be solved simply by restoring Saturday hours, Dkt. 104-3 (Summerlin Summ. J. Decl.) ¶ 13, or by some combination of returning to 10-hour shifts and Saturday shifts. *See also* Rosas Decl. ¶¶ 50–51. Plaintiffs' members are eager and willing to work these Saturday shifts, and have repeatedly expressed they would rather work Saturdays at slower line speeds then Monday through Friday at higher rates. Rosas Decl. ¶¶ 13, 52–54.

LEGAL STANDARD

Seaboard seeks to intervene in this matter as of right and permissively "for the purpose of moving to stay the effect of the Court's forthcoming June 29 judgment by 313 days (10.5 months) as to Seaboard, and for the purpose of perfecting an appeal (and seeking a stay pending appeal) if necessary." Dkt. 128 at 1. Under Federal Rule of Civil Procedure 24(a)(2), a court must grant intervention as of right to a party that files a "timely motion" and "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Under Rule 24(b), a court may, in its discretion, grant permissive intervention to a party that demonstrates "(1) an independent ground for jurisdiction, (2) timeliness of the motion, and (3) that the applicant's claim or defense and the main action have a question of law or fact in common." *Flynt v. Lombardi*, 782 F.3d 963, 966 (8th Cir. 2015). In ruling on motions to intervene, "courts are not faced with an all-or-nothing choice between grant or denial: Rule 24 also provides for limited-in-scope intervention." *United States v. City of Detroit*, 712 F.3d 925, 931–32 (6th Cir. 2013). In crafting that precise scope, "the district court retains broad discretion." *Id.* at 933.

ARGUMENT

Seaboard's motion is untimely, as it was well-aware that the issue of remedy was before this Court last summer and could have made the same arguments it seeks to make now at that point. Thus, intervention under either theory is inappropriate. Should the Court conclude intervention should be granted, though, the Court should limit the scope of that intervention to pursuing an appeal, and seeking relief ancillary to that appeal.

I. Seaboard's motion should be denied as untimely.

Whether a party "moves for 'intervention of right' or for 'permissive intervention,' the motion must be timely." *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1093 (8th Cir. 2011); *see also United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 832 (8th Cir. 2010) ("The issue of the timeliness of a motion to intervene is a threshold issue."). The Eighth Circuit has identified four factors in assessing the timeliness of a motion to intervene: "(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties." *ACLU*, 643 F.3d at 1094.

Here, all four factors show that Seaboard's motion is both untimely and, to the extent it seeks to intervene for the purpose of seeking reconsideration of the

Court's order, an improper attempt to relitigate issues already addressed by this Court.

A. The litigation has substantially progressed.

The first timeliness factor tilts strongly against Seaboard. "For all practical purposes, this lawsuit is at an end." *United States v. Rsrv. Min. Co.*, 417 F. Supp. 791, 793 (D. Minn. 1976). Seaboard seeks to intervene to seek relief from this Court's decision on cross-motions for summary judgment. As the Eighth Circuit has held, as a "general rule," motions to intervene solely to seek post-judgment relief require a "strong showing of entitlement and of justification for failure to request intervention sooner."[2] *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir. 1976), *quoted in Planned Parenthood of the Heartland v. Heineman*, 664 F.3d 716, 718 (8th Cir. 2011); *see also In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, 716 F.3d 1057, 1066 (8th Cir. 2013) (affirming district court's denial of a "'ninth-inning-with-two-outs' intervention attempt); *United States v. Alisal Water Corp.*, 370 F.3d 915, 922 (9th Cir. 2004) ("A party's seeking to

[2] Seaboard suggests that the Eighth Circuit's standard as stated in 2011 is inconsistent with an earlier decision of the Supreme Court, Dkt. 130 at 19 n.61 (citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394–95 (1977)). Plaintiffs disagree but, regardless, this Court is bound by the Eighth Circuit's precedent. Notably, the Eighth Circuit is not an outlier in its "reluctance" to allow intervention for post-judgment purposes and in requiring a "strong showing" in such cases. *See* 7C Wright, Miller, and Kane, *Fed. Prac. & Proc.* § 1916 (3d ed. Apr. 2021 Update) (collecting cases).

intervene merely to attack or thwart a remedy rather than participate in the future administration of the remedy is disfavored.").

B. Seaboard has "long known" about this litigation.

Second, Seaboard concedes that it has "long known about this case." Dkt. 130 at 18. In fact, Seaboard filed a declaration in the case in August 2020. "This factor often weighs heavily in cases where the would-be intervenor was aware of the litigation for a significant period of time before attempting to intervene." *In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 767 (8th Cir. 2017). Moreover, none of the facts about Seaboard's operations as set forth in its motion—including the "vertically integrated" nature of its operations and its decision to, months after this action was filed, increase its hog supply as part of its conversion to NSIS—are newly discovered. Nonetheless, Seaboard never suggested to the Court that the appropriate remedy for the unlawful line-speed provision would be a delayed vacatur, though it certainly could have done so when the parties—and industry amici for whom Seaboard submitted a declaration—were briefing the issue of remedy. "When a party had knowledge of all the facts … and failed to raise the issue when first presented with an opportunity to do so, subsequent intervention is untimely." *Ritchie Special Credit*, 620 F.3d at 833.

C. Seaboard's excuses for delay are inadequate.

The third factor—the proffered reason for delay—also weighs against Seaboard. To begin with, Seaboard argues that its delay in seeking intervention was reasonable because of "changed circumstances" that are causing it to face "first-time uncertainty." Dkt. 130 at 19. But there has been uncertainty as to whether the line-speed provision would survive judicial review since October 2019, when Plaintiffs filed this action.[3] That uncertainty increased with this Court's April 1, 2020 Order denying USDA's motion to dismiss Plaintiffs' claim challenging the line-speed provision, and with this Court's July 22, 2020 Order expressing doubt whether remand without vacatur could be an appropriate remedy in this case. Certainly, by July 30, 2020, Seaboard should have been well-aware of the possibility that the line-speed provision would be vacated: On that date, USDA explicitly addressed that possibility in its motion papers, without requesting that the Court delay vacatur to allow a transition period. Seaboard should have anticipated that this Court could have vacated the line-speed

[3] That uncertainty will continue regardless of the outcome of this case, in light of cases pending in other courts challenging NSIS. *See Ctr. for Food Safety v. Perdue*, No. 20-cv-00256-JSW, 2021 WL 1526388 (N.D. Cal. Feb. 4, 2021) (denying motion to dismiss); *Farm Sanctuary v. U.S. Dep't of Agric.*, No. 6:19-cv-6910 (W.D.N.Y.) (notion to dismiss pending). Even if this Court "stays vacatur as to Seaboard" for a year, nothing would stop those courts from exercising their ample authority to vacate the line-speed provision as a remedy in those cases over the next year.

provision without *any* delay, requiring Seaboard to comply with the 1106-hph regulation immediately.

But when Seaboard submitted its declaration in this case in support of USDA, it did not suggest that USDA's proffered alternative remedy was not sufficient. Seaboard has no excuse for failing to do so. *Cf. Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000) (affirming finding of untimeliness were "[e]ven if the [putative intervenors'] concerns in this case were different from those of the Federal Defendants … [putative intervenors] had a full opportunity to present those concerns to the district court" as amici).

In addition, Seaboard's arguments that it will suffer financial harm from returning its lines to the speed at which they long-operated (and at which the vast majority of its competitors are operating today), and that this Court should exercise "remedial discretion," are generally similar to those that it, USDA, and industry amici made in opposing vacatur—arguments the Court specifically addressed in its March 31, 2021 Order. *See* Dkt. 89 at 30 (USDA Mem.); Dkt. 103 at 13–14 (Amicus Br.); Dkt. 104-3 at ¶¶ 12–14 (Seaboard/Summerlin Decl.); Dkt. 125 at 63–66 (Mar. 31, 2021 Order). Any additional points Seaboard seeks to raise were known to Seaboard last summer. (Additionally, as noted above, pp. 11–13 these arguments are not supported by the facts—which Plaintiffs could have explained last summer had Seaboard raised those points.) Seaboard had no reason to believe

that USDA would attempt to, or be allowed to, take a second bite of the apple on the issue of remedy, beyond the full briefing in which the parties *and Seaboard* participated. *See* L.R. 7(j) (requiring "compelling circumstances" to obtain permission to file a motion to reconsider); *Edeh v. Equifax Info. Servs., LLC*, Civ. No. 12-1301 (JNE/FLN), 2013 WL 1173920, at *1 (D. Minn. Mar. 20, 2013) (declining to allow such a motion given absence of exceptional circumstances).

Moreover, USDA's decision not to ask this Court to reconsider the remedy it ordered offers no basis for Seaboard's intervention because, as noted above, intervention is not appropriate to relitigate issues already addressed by the Court. *See Arizona,* 460 U.S. at 615; *see also Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 738 F.2d 82, 85 (8th Cir. 1984) ("Intervenors … must take the lawsuit as they find it.").

In this regard, Seaboard's request to intervene to ask this Court to modify its remedial order is similar to the situation in *Cuyahoga Valley Railway Co. v. Tracy*, 6 F.3d 389 (6th Cir. 1993), where the Sixth Circuit reversed a grant of intervention on timeliness grounds. There, three railway companies had sued the State of Ohio, and the district court granted summary judgment in favor of the plaintiffs. *Id.* at 391. Ohio did not appeal. *Id.* at 392. Five other railway companies then moved to intervene, for the purpose of asking the Court to modify the scope of its summary judgment order so that it did not impact them. *Id.* at 392–93. The district court

granted the motion and modified its order as requested. *Id.* at 393. Reversing, the Sixth Circuit held that intervention should have been denied because the intervenors had known since the case's inception that their interests were implicated but nonetheless did not seek to intervene until after the district court ruled on summary judgment. *Id.* at 396. The court explained, "The intervenors chose to rely on the Attorney General's best efforts, which they were entitled to do. They are not, however, entitled to then enter the proceedings after the case has been fully resolved, in an attempt to achieve a more satisfactory resolution." *Id.* Similarly here, Seaboard relied on USDA's best efforts on both the merits and at the remedy stage; it may not now enter the case to attempt to achieve a different resolution. *See also ACLU*, 643 F.3d at 1095 (affirming denial of intervention where parties relied on defendant "to adequately represent their interests despite their knowledge of the case and its progress").

Moreover, whether to grant individual plants exemptions from FSIS's longstanding regulation is a matter for USDA, not one for this Court to consider in a facial challenge to the line-speed provision of the NSIS Rule. The Court's March 31, 2021 Order vacates 9 C.F.R. § 310.26(c)—the regulatory provision exempting NSIS participants from otherwise applicable line-speed limits set out in 9 C.F.R. § 310.1(b)(3)(ii). The Court did not dictate to FSIS how it should enforce that preexisting provision, and Plaintiffs have not challenged FSIS's enforcement

policies as to that provision.[4] If Seaboard believes that unique circumstances warrant a temporary exemption from the 1106-hph limit, it may seek relief from FSIS—the entity that enforces that regulation—either via FSIS's petition process, 9 CFR part 392, or otherwise. If FSIS denied that request, Seaboard could then file a case challenging that separate final agency action. But *this* litigation over the NSIS Rule is not the proper forum for Seaboard to seek that exemption. And until FSIS addresses any such request in the first instance, there is good reason for this Court to abstain from doing so. *Cf. DeBruce Grain, Inc. v. Union Pac. R.R. Co.*, 149 F.3d 787, 789 (8th Cir. 1998) ("Under the doctrine of primary jurisdiction a court may leave an issue for agency determination when it involves the special expertise of the agency and would impact the uniformity of the regulated field.").

Concededly, Seaboard could not have sought a stay pending appeal last summer. But to the extent Seaboard claims that it only recently learned of the *possibility* that USDA would not appeal this Court's order to the Eighth Circuit, that does not support its request to intervene to ask *this* Court to revisit its earlier order. At most, it would support its request for leave to intervene to pursue an

[4] As such, this action will not "as a practical matter impair or impede [Seaboard]'s ability to protect its interest" by seeking any such regulatory relief from USDA, as is necessary to intervene as of right. *See* Fed. R. Civ. P. 24(a)(2). Nor does Seaboard's desire for an exemption from preexisting regulations raise "a claim or defense that shares with the main action a common question of law or fact," as is required for permissive intervention. Fed. R. Civ. P. 24(b)(1)(B).

appeal, and, if it chooses to do so, seek a stay pending appeal under the relevant standard. But Seaboard's suggestion that USDA's refusal to provide "reasonable certainty" that it will appeal this Court's decision is a "line in the sand," Dkt. 130 at 12, 18, misunderstands the practicalities of APA litigation. Federal agencies do not appeal every adverse district court decision, even those where rules are vacated. The decision whether to appeal a given decision is committed to the Solicitor General, who makes a determination based on a variety of factors. *See* 28 C.F.R. § 0.20(b). At no point in this case could Seaboard have ever assumed with "reasonable certainty" that USDA would appeal an adverse decision vacating the line-speed provision—particularly in light of USDA's representation to this Court that it did not consider the line-speed provision vital to the success of NSIS. Dkt. 89 at 33. Additionally, the fact that a government actor has decided not to continue defending an unlawful practice is not alone grounds to excuse an untimely motion to intervene. *See, e.g.*, *In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 768 (8th Cir. 2017) (affirming finding of untimeliness even though existing party failed to appeal denial of class certification); *Floyd v. City of N.Y.*, 770 F.3d 1051, 1058–59 (2d Cir. 2014) (affirming denial of intervention on timeliness grounds where change in administration led to city dropping appeal of injunction); *Cuyahoga Valley*, 6 F.3d at 396 (discussed *supra*); c*f. Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (post-judgment motion to intervene

for appeal purposes untimely where party could have sought intervention prior to judgment).

D. Seaboard's delayed entry into the case would be unduly prejudicial.

Finally, allowing Seaboard to intervene at this late juncture would significantly prejudice Plaintiffs.[5] Although Seaboard asserts that it is "not seeking, on an interlocutory basis, to reopen the Court's March 31, 2021 order," Dkt. 130 at 17, its briefing suggests otherwise. *Cf. Nw. Env't Advocs. v. EPA*, No. 3:05-CV-01876-AC, 2012 WL 13195655, at *2 (D. Or. July 2, 2012) (denying motion to intervene in analogous scenario). The entire premise of Seaboard's motion is that the Court should alter its March 31, 2021 decision, prolong this litigation, and allow Seaboard to continue to operate the lines at its Guymon plant at a higher speed notwithstanding the harm to Plaintiffs' members at that plant. Requiring Plaintiffs to relitigate this issue and how it impacts the equities of vacatur, when Seaboard had ample opportunity to present any argument and supporting evidence last summer, is unduly prejudicial. Seaboard has already filed two motions and indicates more may come. As the Eighth Circuit has held, a district

[5] Even if the Court were to find Seaboard's motion timely, this factor would provide an independent basis for denying permissive intervention. *See S. Dakota ex rel Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003) ("The principal consideration in ruling on a Rule 24(b) motion is whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights.").

court is well within its discretion to deny a motion to intervene on timeliness based on the prejudice to parties of "having to cover the same ground again." *U.S. Bank Nat'l Ass'n v. State Farm Fire & Cas. Co.*, 765 F.3d 867, 870 (8th Cir. 2014). *See also ACLU*, 643 F.3d at 1094 (requiring plaintiffs to address new theories belatedly raised by intervenors is prejudicial); *In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-MD-2090 ADM/TNL, 2015 WL 4992363, at *8 (D. Minn. Aug. 20, 2015), *aff'd in relevant part,* 849 F.3d 761 (8th Cir. 2017) (prejudice associated with relitigation of settled issue made intervention untimely).

Additionally, given that one of the motions Seaboard seeks leave to file would result in it being granted an exemption that would put it at an advantage over its competitors, Seaboard's motion poses a risk that additional parties will seek to participate in this case, either to seek their own carve-outs or to oppose Seaboard from getting one. The potential proliferation of post-judgment motions would not serve "[t]he purpose of intervention," which "is to 'promote the efficient and orderly use of judicial resources.'" *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 840 (8th Cir. 2009) (quoting *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996)). It would also be highly prejudicial to Plaintiffs, who have done everything possible to advance this case promptly and efficiently. Plaintiffs would be forced into a game of whack-a-mole against every individual regulated entity after prevailing on the merits of their facial challenge to the Rule.

It would be unfair to inflict this burden on Plaintiffs based solely on plants' choice choices to wait until after summary judgment to present their concerns to the Court.

Finally, as this Court has already recognized, each day that Seaboard operates at a higher line speed puts the health and safety of Plaintiffs' members who work there at risk. *See* Dkt. 125 at 33 (noting a range of evidence, including "several academic studies, government research conducted by NIOSH, and recommendations provided by OSHA and the GAO," shows that higher line speeds increase the risk of harm to workers). Since the administrative record for the NSIS Rule was compiled, additional risks of harm have materialized. According to a press statement by Seaboard, as of last month, more than 1,000 current and former Seaboard employees tested positive for COVID-19, and six died—one of the largest outbreaks in the meatpacking industry. *See* Sierra Pizarro, "Oklahoma meatpacking plant under OSHA investigation for 'COVID safety failures," *2 News Oklahoma* (Apr. 12, 2021) (quoting David Eaheart of Seaboard)[6]; *see also* Rosas Decl. ¶ 58. Higher line speeds have contributed to this crisis by causing workers to be packed closer together on the slaughter lines. Rosas Decl. ¶ 57; s*ee also* Charles A. Taylor, Christopher Boulos, & Douglas Armand, 117

[6] https://www.kjrh.com/news/local-news/oklahoma-meatpacking-plant-under-osha-investigation-for-covid-safety-failures.

Proceedings of the Nat'l Acad. of Scis. 31706, 31708 (Dec. 15, 2020) (based on poultry-plant data, finding a correlation between line speed and COVID-19 transmission).[7] Seaboard's only acknowledgment of the well-documented health and safety risks posed by increased line speeds is a glib parenthetical referencing the self-serving, unscientific declaration its executive submitted during the summary judgment briefing, and industry amici's accompanying argument, that disputes the connection between line speed and worker safety. Dkt. 130 at 19 (citing Dkt. 104-3 and 105 at 9–10). This Court has already noted "reason to be skeptical" of this submission. Dkt. 125 at 33 n.6.

Plaintiffs promptly brought this action within one week of USDA's Final Rule; to allow Seaboard to appear at the last minute and prolong the action, placing their health and safety at risk, simply because Seaboard seeks to avoid financial costs—essentially, the cost of overtime—would be unduly prejudicial. While forcing parties to relitigate issues is inherently prejudicial, it is particularly so here given the nature of the risk it poses to Plaintiffs' members. *Cf. Stupak-Thrall v. Glickman*, 226 F.3d 467, 478 (6th Cir. 2000) (finding delayed intervention would cause undue prejudice to the extent it created risk that challenged regulations would continue to harm plaintiffs).

[7] https://www.pnas.org/content/pnas/117/50/31706.full.pdf.

* * *

Because Seaboard's motion to intervene is untimely under all four relevant factors, the Court should deny the motion to intervene.

II. If the motion is granted, intervention should be for the limited purpose of pursuing an appeal and related relief.

Should the Court find intervention by Seaboard appropriate, the Court should allow intervention for the limited purpose of pursuing an appeal of this Court's March 31, 2021 Order and seeking relief related to any such appeal. Courts frequently limit the scope of intervention in that way. *See, e.g.*, *Ctr. for Investigative Reporting v. U.S. Dep't of Lab.*, No. 4:19-CV-01843-KAW, 2020 WL 554001, at *2 (N.D. Cal. Feb. 4, 2020); *Snell v. Allianz Life Ins. Co. of N. Am.*, No. Civ. 97-2784 RLE, 2000 WL 1336640, at *10 (D. Minn. Sept. 8, 2000); *Save Greers Ferry Lake, Inc. v. U.S. Army Corps of Eng'rs*, 111 F. Supp. 2d 1135, 1140 (E.D. Ark. 2000); *Buchet v. ITT Consumer Fin. Corp.*, 845 F. Supp. 684, 691 (D. Minn. 1994). So limiting the scope of intervention would minimize concerns of prejudice and efficiency, as it would limit relitigation of issues before *this* Court. It also would ensure Seaboard's intervention does not become an open invitation for each of its competitors to ask this Court for an individual exemption from preexisting regulations.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Seaboard Foods' motion for leave to intervene.

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Respectfully submitted,

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