**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 PARTIAL OPPOSITION TO MOTION FOR LEAVE TO INTERVENE BY QUALITY PORK PROCESSORS, INC., WHOLESTONE FARMS COOPERATIVE, INC., AND CLEMENS FOOD GROUP, LLC**

## INTRODUCTION

In this litigation, Plaintiffs challenged a specific final agency action: a Final Rule issued by Defendant U.S. Department of Agriculture (USDA) establishing the "New Swine Inspection System" (NSIS). In granting Plaintiffs' motion for summary judgment, this Court only vacated a portion of that rule: 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 limited relief

granted by the Court reflected acceptance of USDA's fallback position that such relief would be appropriate if the Court accepted Plaintiffs' challenges to the rule.

Movants Quality Pork Processors, Inc., WholeStone Farms Cooperative, Inc. (WholeStone), and Clemens Food Group, LLC (Clemens) (collectively, Waiver Recipients) now seek to intervene in this litigation to address an entirely different final agency action: namely, a hypothetical agency determination that waivers of § 310.1(b)(3)(ii) that were issued before establishment of the NSIS will not be reinstated. But neither the issuance nor the rescission of those waivers is at issue in this litigation. And if the Waiver Recipients want their waivers restored, they can either request USDA reissue them, or challenge the rescission of those waivers in a separate case. Whether the Waiver Recipients should receive new waivers, however, is a question for USDA, not this Court. The Court, moreover, has not constrained USDA's authority to issue waivers, and USDA, which has sole responsibility for enforcing its regulations, is in a better position than this Court to assess whether an exception from § 310.1(b)(3)(ii) is warranted. Indeed, the whole point of the Court's ninety-day stay is to provide USDA the opportunity to apply its expert judgment to decide how to "give regulated entities time to prepare for any operational change." Dkt. 125 at 68.

Regardless of the possible impact of the Court's vacatur ruling on the Waiver Recipients' former waivers, their request to intervene to achieve that result

is not timely. Because their line-speed waivers were terminated *before* the parties had begun to litigate the remedy question in this Court, the Waiver Recipients had ample notice that their ability to operate without line-speed limits under NSIS was at issue in this litigation. The Waiver Recipients were well aware since last summer that no party, including USDA, was arguing that the Court should order their waivers restored. Indeed, industry amici—supported by declarations from two of the three movants here—participated in summary-judgment briefing and addressed the issue of vacatur without raising this concern. The Waiver Recipients' failure to raise their concerns while the remedy question was still live in this Court is unjustifiable. Moreover, the Waiver Recipients' motion does not satisfy the other requirements for intervention—whether as of right or permissive—because the Court's decision does not limit their ability to secure line-speed waivers from USDA pursuant to regulations not challenged in this case.

## BACKGROUND

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 Final 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).

In proposing NSIS, USDA considered data from "a pilot program, the HACCP-Based Inspection Models Project ('HIMP')." Dkt. 125 at 4 (citing Modernization of Swine Slaughter Inspection, 83 Fed. Reg. 4780, 4780 (proposed Feb. 1, 2018) (NPRM)). HIMP entailed various regulatory waivers—including a waiver of line-speed limits—issued to five market hog plants to study "new approaches to slaughter inspection based on Hazard Analysis and Critical Control Point Systems (HACCP) principles." NPRM, 83 Fed. Reg. at 4780. USDA granted the waivers under 9 C.F.R. § 303.1(h), which authorizes USDA to "waive for limited periods" a regulation in order to "permit experimentation so that new procedures, equipment, and/or processing techniques may be tested to facilitate definite improvements." Despite the line-speed waivers, though, "market hog HIMP establishments [did] not operate at line speeds that are significantly faster than" 1106 hogs per hour (hph), "with an estimated average line speed of 1,099 hph." NPRM, 83 Fed. Reg. at 4796.

On October 1, 2019, USDA published a Final Rule creating NSIS, which relied heavily on the agency's experience with HIMP. *See* Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300 (Oct. 1, 2019). Under the Rule, 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 "[k]ey 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.

Under the Final Rule, hog plants were required to opt into NSIS by March 30, 2020, or be subject to traditional inspection. 84 Fed. Reg. at 52,301. The preamble to the rule stated that preexisting line-speed waivers issued under USDA's *Salmonella* Initiative Program (SIP) would end, and that "FSIS w[ould] announce new waiver criteria in a future Federal Register document." Final Rule, 84 Fed. Reg. at 52,301 (formatting altered). Nothing in the Rule specifically addressed the termination of waivers issued as part of HIMP, and the Administrative Record in this case does not contain any documents rescinding those waivers.[1]

Six days after USDA issued the Final Rule, Plaintiffs United Food and Commercial Workers Union ("UFCW") and three of its local unions filed this action under the Administrative Procedure Act (APA), arguing that the Final Rule

[1] Of the six plants operated by the Waiver Recipients, five had line-speed waivers pursuant to HIMP and one had a line-speed waiver under SIP. Dkt. 150 at 6.

was arbitrary, capricious, and contrary to law, and requesting that the entire Final Rule be vacated. Dkt. 1.

USDA moved to dismiss the action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. 14. On April 1, 2020, this Court granted USDA's motion in part and denied it in part. Dkt. 30. As relevant here, the Court held that Plaintiffs had stated a claim that the line-speed component of NSIS 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 due to the impact on their health and safety, and that vacatur would be the appropriate remedy should Plaintiffs prevail on their 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.

Summary-judgment briefing commenced in July 2020. 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, USDA disagreed, arguing that plants 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, or ask this Court to create a special exception for plants that previously had line-speed waivers. USDA further explained that "[t]here is little, if any, doubt that FSIS would have adopted the unchallenged provisions of the Final Rule without the line-speed provision." *Id.* at 33. USDA later made these same arguments in reply. Dkt. 121 at 12–13. USDA did not make any arguments about the status of the Waiver Recipients.

Several amici curiae participated in the summary-judgment briefing. *See* Dkt. 84 (Amicus Br. of Seven State Att'ys Gen.); Dkt. 105 (Amicus Br. of N. Am. Meat Inst. & Nat'l 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 amici 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." Dkt. 103 at 1. Amici asked the Court to "exercise its 'remedial discretion' concerning vacatur," and they noted that "all but one of the current NSIS facilities have operated without line speeds for many years under HIMP or a similar waiver." *Id.* at 14. They did *not*, however, suggest that the Court's remedy should address the status of waivers for former HIMP plants in advance of any consideration by the agency of that issue.

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 Eric Patton, Senior Vice President of Operations for Clemens, and Steve Weers, Chief Operating Officer at WholeStone. Mr. Patton asserted that "Clemens's Hatfield and Coldwater facilities will suffer significant consequences if the NSIS rule is vacated." Dkt. 104-1 at 3. Likewise, Mr. Weers stated that WholeStone's Fremont facility "will suffer

significant consequences if the NSIS rule is vacated." Dkt. 104-2 at 2. Neither Clemens nor WholeStone (nor Quality Pork) sought intervention, however, to argue that the Court's remedial order should address the status of their pre-NSIS line-speed waivers.

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 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. *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 Clemens' arguments "that "it would lose $63 million in investments and $42 million in profits annually," *id.* at 64 (citing Patton Decl. ¶ 15, Dkt. 104-1 at 3–4), and the industry's argument that plants "have relied upon the Final Rule and a vacatur would disrupt those settled expectations overnight," *id*. The Court was well aware that six of the seven plants that had converted to NSIS "had previously operated under HIMP or received line speed waivers." *Id*. at 13.

The Court found vacatur of the line-speed provision 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 66. 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 66–67. Thus, while no party had asked the Court to delay its vacatur, the Court invoked its "remedial discretion" to stay vacatur for ninety 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 (internal quotation marks omitted).

**LEGAL STANDARD**

The Waiver Recipients seek to intervene as defendants in this matter as of right and permissively. Dkt. 147 at 5. 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) (footnote reference omitted). 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 (6th Cir. 2013). In crafting that precise scope, "the district court retains broad discretion." *Id.* at 933.

## ARGUMENT

### I. The motion is 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 the Waiver Recipients' motion is untimely to the extent it seeks to intervene for the purpose of seeking modification of the Court's order. The Court's order reflected its resolution of the scope of the proper remedy in this case, a matter that was the subject of extensive briefing by the parties over a lengthy period of time. Although the Waiver Recipients frame the relief they intend to seek as a request for clarification, they in fact seek to intervene for the purpose of asking this Court to reconsider its decision on remedy and modify its judgment to address an entirely distinct question that is not properly part of this litigation and that no one, including the Waiver Recipients, ever suggested the Court ought to resolve: the status of waivers of former HIMP and SIP plants. The Waiver Recipients could have raised their concerns while the remedy question was still live before this Court, and they have not provided any justification for their failure to do so.

**A. The litigation has substantially progressed.**

The first timeliness factor tilts strongly against the Waiver Recipients, who do not dispute that this litigation has substantially progressed. "For all practical purposes, this lawsuit is at an end." *United States v. Rsrv. Min. Co.*, 417 F. Supp.

791, 793 (D. Minn. 1976). The Waiver Recipients move to intervene to seek relief from this Court's decision on cross-motions for summary judgment. This case thus stands in stark contrast to *National Parks Conservation Ass'n v. United States Environmental Protection Agency*, 759 F.3d 969 (8th Cir. 2014), which the Waiver Recipients portray as "control[ing]." Dkt. 150 at 4. There, the would-be intervenor filed its motion "[s]hortly after the [plaintiffs] filed their complaint." 759 F.3d at 972. As a result, "no one dispute[d] the timeliness of [the] motion to intervene." *Id.* at 975. Here, by contrast, the Waiver Recipients seek to intervene after the case has been litigated and this Court has issued a sixty-eight-page decision on the merits of Plaintiffs' APA claim and the appropriate remedy. 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." *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 intervene merely to attack or thwart a remedy rather than participate in the future administration of

the remedy is disfavored."). The Waiver Recipients have not made that showing here.

**B. The Waiver Recipients have long known about this litigation.**

Although the Waiver Recipients concede that their knowledge of the litigation is a timeliness factor, Dkt. 150 at 15, they do not address that factor in their memorandum. But the record is clear that they were fully aware at all relevant times that this lawsuit could affect their interests. Indeed, Clemens and WholeStone filed declarations in the case in August 2020. The knowledge "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 the Waiver Recipients' waivers are newly discovered. Each of them had opted into NSIS on March 30, 2020, and accepted any consequences that action had with respect to their line-speed waivers, *before* the parties commenced briefing the remedy question in this Court. And two days later, the Waiver Recipients would have learned of this Court's decision on USDA's motion to dismiss, which concluded that Plaintiffs had stated an APA claim as to USDA's failure to consider worker safety concerns in eliminating line-speed limits for NSIS plants. Moreover, in July 2020, the Waiver Recipients knew that USDA had asked this Court, if it declined to remand without vacatur, to sever the line-speed

provision of the NSIS rule based on USDA's representation that it would have adopted the Final Rule even without a line-speed provision. They also knew that USDA had not asked this Court to exempt plants with preexisting waivers from vacatur or to rule on whether the waivers were reinstated by the vacatur. Yet they still sat on their hands. "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. The Waiver Recipients' excuses for delay are inadequate.**

The third factor—the proffered reason for delay—also weighs against the Waiver Recipients. Their only argument for delay is that they "relied" on USDA "to protect their interests" because USDA's interests "aligned with [their] interests." Dkt. 150 at 15. That excuse is irreconcilable with their later observation that "[e]ven under ordinary circumstances, a government agency cannot always adequately protect the interests of the parties it regulates, which are 'narrower and more parochial' than those the agency must consider." *Id*. at 20 (quoting with alternation *Nat'l Parks Conservation Ass'n*, 759 F.3d at 977).

The Waiver Recipients' 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, the Waiver Recipients relied on USDA's best efforts on both the merits and at the remedy stage; they 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").

The Waiver Recipients' reliance (Dkt. 150 at 16) on the Sixth Circuit's unpublished decision in *Midwest Realty Management Co. v. City of Beavercreek*, 93 F. App'x 782 (6th Cir. 2004), is misplaced. There, the prospective intervenors sought

intervention after learning of the parties' conclusion of a settlement agreement that had been negotiated in secret. *Id*. at 787–88. That decision does not speak to the timeliness of intervention to alter a final judgment issued after a full and public airing of the issues. Here, the Waiver Recipients knew in July 2020 at the latest that USDA was arguing that the agency would have adopted NSIS even without the line-speed provision and was *not* arguing that this Court should deem prior waivers to be automatically reinstated if the rule were vacated. The Waiver Recipients should have anticipated that this Court could have vacated the line-speed provision without expressing a view on the reinstatement of the waivers, yet they did not seek to intervene at that time or, with respect to Clemens and WholeStone, even raise the issue in the declarations they provided in support of industry amici. *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).

The Waiver Recipients also cannot justify their delay by suggesting that the Court's decision "raised new remedial questions." Dkt. 150 at 16. The parties certainly knew that some of the NSIS participants had previously had line-speed waivers, as did the Court in deciding on the appropriate remedy. *See* Dkt. 125 at

13. The Court nonetheless addressed the remedial questions that the parties and amici had briefed: whether the Court should remand without vacatur and, if vacatur was appropriate, whether the Court should vacate the entire NSIS rule or only the line-speed component. That the Court did not specifically rule that prior waivers issued pursuant to a different regulatory provision spring back to life upon vacatur of the line-speed component of NSIS reflects the fact that no party or amici argued for that specific remedy *despite the opportunity to do so*. The Waiver Recipients' argument is "new" only in the sense that they now seek to raise an argument that they could have raised last summer but failed to do so. *See* LR 7.1(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).

The Waiver Recipients also argue that their motion is timely because, although they are "engaged in discussions with USDA" with respect to next steps, intervention "in parallel" is needed to "adequately protect[] their interests in court." Dkt. 150 at 16. They cite no authority that intervention is timely under these circumstances, much less for the proposition that this Court may alter its judgment if USDA does not prepare a transition plan to their liking. 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. Indeed, the whole point of the Court's ninety-day stay is to provide USDA the opportunity to apply its expert judgment to decide how to "give regulated entities time to prepare for any operational change." Dkt. 125 at 68.

**D. The Waiver Recipients' delayed entry into the case would be unduly prejudicial.**

Finally, allowing the Waiver Recipients to intervene at this late juncture would significantly prejudice Plaintiffs. Although they assert that they only seek to "obtain clarity on a point that is already implicit in the Court's ruling," Dkt. 150 at 1, their briefing suggests otherwise. The entire premise of their motion is that the Court should alter its March 31, 2021, decision to allow them to continue to operate the lines at a higher speed notwithstanding the harm to workers at those plants—including Plaintiffs' members at Quality Pork in Austin and WholeStone Farms in Fremont, see Dkt. 71 at ¶¶ 17–18. The Waiver Recipients suggest that, if the Court refuses to do so, they will prolong this litigation by seeking an appeal of this Court's summary-judgment decision, putting even more of Plaintiffs' members at risk of harm. Requiring Plaintiffs to litigate their claim that they retain valid waivers and how the resolution of that question impacts the equities of vacatur, when the Waiver Recipients had ample opportunity to present any argument and supporting evidence last summer, is unduly prejudicial. As the

Eighth Circuit has held, a district court is well within its discretion to deny a motion to intervene on timeliness based on the prejudice of requiring plaintiffs to address new theories belatedly raised by intervenors. *See ACLU*, 643 F.3d at 1094 (requiring plaintiffs to address new theories belatedly raised by intervenors is prejudicial); *see also 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).

There is also no merit to the Waiver Recipients' suggestion that Plaintiffs will not be prejudiced because the Court's vacatur of the line-speed component of NSIS automatically, *i.e.*, without any action by USDA, restored their waivers. *See* Dkt. 150 at 12–13.[2] USDA's waivers for the HIMP were "temporary measure[s] intended as an experiment." *Am. Fed'n of Gov't Emps., AFL-CIO v. Veneman*, 284 F.3d 125, 130 (D.C. Cir. 2002). The agency represented to this Court—and this Court found—that USDA would have adopted NSIS even without the elimination

[2] If this were the case, the Waiver Recipients would lack standing since they have no injury-in-fact. Under the Waiver Recipients' theory, whether the Court vacated the line-speed provision or not, the result would be the same: they would be exempted from the regulatory line-speed limits. *Cf. Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 441 (D.C. Cir. 1998) (standing analysis requires accepting proponent's legal theory); *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, No. 18-2473 (RC), 2020 WL 7024193, at *5 (D.D.C. Nov. 30, 2020) (same).

of line-speed limits. Dkt. 121 at 12–13; Dkt. 125 at 59. Therefore, the Waiver Recipients' assumption that USDA would have allowed the line-speed "experiment" to continue even if NSIS had retained a line-speed restriction—essentially making the temporary waivers permanent—is not supported by any record evidence. By the same token, there is no basis for their assumption that the effect of vacating the line-speed provision of NSIS—while leaving the rest of NSIS intact—"automatically" reinstates their relinquished waivers. Dkt. 150 at 13. To the contrary, this Court held that "the NSIS program can function without the elimination of line speed limits," Dkt. 125 at 59, even as it recognized that six out of seven plants that had converted to NSIS had previously operated pursuant to waivers, *id*. at 13.

As this Court has already recognized, each day that the Waiver Recipients operate 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. *See* Charles A. Taylor, Christopher Boulos, & Douglas Armand, 117 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)[3]; *see also* Outbreak Clusters, *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (updated May 11, 2021) (noting 455 cases of COVID-19 at Quality Pork)[4]; Aaron Hegarty, *One death, 138 known COVID-19 cases at WholeStone plant in Fremont*, KMTV 3 News Now Omaha (May 28, 2020) (noting, as of May 27, 2020, one death and 138 cases of COVID-19 at WholeStone).[5]

The Waiver Recipients argue that this Court "acknowledged" that their facilities are safe notwithstanding the faster line speeds at which they operate. Dkt. 150 at 6. But this Court's summary-judgment decision acknowledged no such thing—the page cited by the Waiver Recipients simply recounts injury data submitted by Clemens. Dkt. 125 at 17. The Court analyzed the risk of injury in finding that Plaintiffs have standing and concluded that "[s]everal pieces of evidence in the record suggest that line speed increases will increase the risk of harm to Plaintiffs' members." *Id*. at 27. Moreover, the Court evaluated the rulemaking record, especially USDA's failure to defend its preliminary analysis about workers' safety at HIMP plants, and industry-submitted data and found that

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

[4] https://www.nytimes.com/interactive/2021/us/covid-cases.html.

[5] https://www.3newsnow.com/news/coronavirus/one-death-138-known-covid-19-cases-at-wholestone-plant-in-fremont.

they "do not tip the weight of the evidence in favor of USDA on this issue." *Id.* at 33. The Waiver Recipients' self-serving assertions that their plants are safe does not eliminate the prejudice to Plaintiffs from their untimely intervention motion.

Finally, the Waiver Recipients assert that Plaintiffs would not be prejudiced by intervention because they "do not object to the intervention motion for the limited purpose of clarifying that the waivers may be reinstated." Dkt. 150 at 18. The use of passive voice conceals the nature of Plaintiffs' non-objection. As Plaintiffs informed counsel, "Plaintiffs do not oppose intervention for the limited purpose of clarifying that this Court's March 31, 2021 Order *does not prevent USDA* from reinstating line speed waivers for HIMP plants and restoring the status quo ex ante as to those plants. Plaintiffs oppose intervention for any other purposes." Dkt. 149 at 1–2. This Court's decision did not address—much less limit—USDA's waiver authority and, further, the Court anticipated that USDA would take steps to "give regulated entities time to prepare for any operational change." Dkt. 125 at 68. But the Waiver Recipients do not in fact seek intervention merely to make that obvious point. And nothing in Plaintiffs' commonsense acknowledgement of what this Court decided suggests that they would not be prejudiced if this Court were to grant intervention for the purpose of motion practice as to other issues and final agency actions not before the Court.

Allowing the Waiver Recipients to use this action to litigate the question of whether they are entitled to waivers from USDA 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)). Allowing such misuse of the Court's resources would be particularly inappropriate given that Plaintiffs have done everything possible to advance this case promptly and efficiently. Plaintiffs promptly brought this action within one week of USDA's Final Rule; to allow the Waiver Recipients to appear at the last minute and prolong the action, simply because they seek to avoid financial costs, would be unduly prejudicial. While forcing parties to relitigate issues is inherently prejudicial, it is particularly so here given the nature of the health and safety risk it poses to Plaintiffs' members. *Cf. Stupak-Thrall*, 226 F.3d at 478 (finding delayed intervention would cause undue prejudice to the extent it created risk that challenged regulations would continue to harm plaintiffs).

## II. The Waiver Recipients have not shown that their ability to protect their interest has been impaired or impeded under Rule 24(a)(2).

Rule 24(a)(2) permits intervention as of right only if the movant is "so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest." Had the Waiver Recipients filed a timely motion to intervene to defend NSIS, they might have satisfied this requirement, because

"[w]hen a third party files suit to compel governmental agency action that would directly harm a regulated company, the company's economic interests in the lawsuit satisfy Rule 24(a)(2)'s recognized-interest requirement." *Nat'l Parks*, 759 F.3d at 976. Perhaps recognizing that intervention for *that purpose* would be manifestly untimely, the Waiver Recipients do not seek intervention to relitigate the merits of the Court's APA decision or its remedy. Rather, they argue that they should be allowed to intervene to "because they will not otherwise be able to ask this Court or the Eighth Circuit to consider and address the issues raised by their unique situation." Dkt. 150 at 20.

This lawsuit, however, does not implicate the Waiver Recipients' "unique situation." As the Waiver Recipients concede, "Plaintiffs never challenged [their] waivers in this litigation." *Id*. at 13. To the extent those waivers ended, it was as a result of USDA actions that have not been challenged in this lawsuit.

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. If the Waiver Recipients believe that unique circumstances warrant an exemption from the 1106-hph limit, they may seek relief from FSIS—the entity that enforces that regulation—

either via the waiver process, 9 C.F.R. § 303.1(h), FSIS's petition process, 9 CFR part 392, or otherwise. If FSIS denied that request, the Waiver Recipients could then file a case challenging that separate final agency action. But *this* litigation over the NSIS Rule is not the proper forum for them 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.").

For these reasons, the Waiver Participants cannot make the requisite showing that they are entitled to intervention as of right.

## III. The Waiver Recipients have not satisfied the permissive-intervention standard of Rule 24(b).

Rule 24(b) authorizes permissive intervention only if the movant "has a claim or defense that shares with the main action a common question of law or fact," and the Court "consider[s] whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B), (3). As discussed above, intervention would unduly prejudice Plaintiffs because the gravamen of their argument is that the Court should alter its decision to allow them to continue to operate the lines at a higher speed notwithstanding the harm to workers at those plants. *See supra* pp. 20–25.

Intervention for that purpose—coming after judgment has already been rendered—necessarily has a prejudicial effect on Plaintiffs' rights. Thus, even if the Court were to find the Waiver Recipients' 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.").

The Waiver Participants, moreover, do not make a serious effort to demonstrate the existence of common questions. Dkt. 150 at 21–22. The question presented by Plaintiffs' claim is whether USDA acted arbitrarily in declining to consider worker safety concerns in adopting the NSIS line-speed provision and, if so, whether the rule is severable and should be vacated. The Waiver Recipients, by contrast, seek intervention to address USDA's actions (or potential actions) with respect to waivers issued under regulations not at issue in this litigation. Permissive intervention is not warranted in these circumstances.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny the motion for leave to intervene filed by the Waiver Recipients to the extent they seek

intervention for any purpose other than obtaining clarification that the Court's vacatur of the line-speed provision does not limit USDA's waiver authority.

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Respectfully submitted,

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* *Admitted Pro Hac Vice*