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' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO (1) QUALITY PORK PROCESSORS, WHOLESTONE FARMS COOPERATIVE, AND CLEMENS FOOD GROUP'S MOTION TO STAY PENDING APPEAL AND (2) SEABOARD FOODS LLC'S MOTION TO STAY PENDING APPEAL**

INTRODUCTION

Movants Quality Pork Processors, WholeStone Farms Cooperative, Clemens Food Group, and Seaboard Foods LLC (collectively, the Plants) ask this Court for the extraordinary relief of a partial stay of the final judgment in this case, pending their appeal of this Court's discretionary determination that their motions to intervene, sought for the purpose of raising new arguments about remedy *after* the Court issued its decision on summary judgment, were untimely. In so doing, the Plants ignore this Court's application of the correct legal standard and the

significant deference that the Court of Appeals will afford that application, this Court's recognition of the substantial evidence that increased line speeds jeopardize the health and safety of plant workers Plaintiffs represent, and the United States Department of Agriculture's conclusion that the Plants' intervention is not necessary to protect the American food supply. In light of these facts, the Plants cannot meet their high burden to establish they are entitled to stays under the governing four-factor equitable test.

The first factor—likelihood of success on the merits—is dispositive. As this Court held, the Plants could have raised their arguments about remedy earlier, failed to do so, and did not justify their failure to wait until a month after rulings on summary judgment to inject new issues into a nearly two-year-old case. These findings do not reflect not an abuse of discretion, and are thus unlikely to be disturbed on appeal. The Plants are similarly unlikely to succeed on their ultimate goal of altering the remedy ordered by this Court. They identify no error in this Court's decision that the line-speed provision of the New Swine Inspection System (NSIS) rule was arbitrary and capricious, and this Court had considerable discretion in crafting a remedy for that violation. The potential that the Plants will be granted intervenor status for the purpose of raising meritless arguments for reconsideration as to remedy does not warrant a stay pending appeal.

The Plants predominantly focus on economic harms that they assert they will suffer if they—like all other swine slaughter facilities in America—are required to operate their evisceration lines at the maximum speeds set by 9 C.F.R. § 310.1(b)(3)(ii). As explained in detail below and in the accompanying declarations, including of economist C. Robert Taylor (Ex. 1), these concerns are overblown and fail to account for either mitigating steps that the Plants can take or the true state of the industry. Moreover, any harm to the Plants is outweighed by the harms to workers who, unlike the Plants, acted diligently and promptly in bringing and pursuing this litigation. As this Court has already recognized, and as further explained in the accompanying declaration of Professor Melissa J. Perry (Ex. 2), higher line speeds increase the risks of musculoskeletal injury and lacerations to workers in swine slaughter plants. And since this case was first filed, it has become apparent that higher line speeds also increase risk of COVID-19 transmission. The Plants' workers should not be made to suffer injuries and illnesses because the Plants chose to wait until the last minute to raise their concerns about remedy, even though Plaintiffs and USDA engaged in briefing on that subject nearly a year ago—briefing in which USDA did *not* argue that a stay of vacatur was necessary and did not argue that vacatur would reinstate any previously rescinded waivers.

Regardless of whether returning to safer line speeds may lead to a relatively marginal reduction in profits for the Plants, the cost does not justify excusing the Plants' lack of diligence, placing Plaintiffs' health and safety at risk, or leaving the Plaintiffs without a remedy for USDA's arbitrary and capricious action. The equities cut particularly strongly against Seaboard, which did not increase its line speed until months after this case was filed, well aware of the possibility of vacatur, and Clemens and WholeStone, which seek to make an argument directly contradictory to one they made in declarations filed with this Court in August 2020.

The motions should be denied.

BACKGROUND

I. Procedural History

A. 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 head per hour (hph) for non-NSIS plants. *See id.* at 52,314.

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.[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

[1] Plaintiff UFCW International also represents the workers at Quality Pork's Austin, Minnesota facility, and WholeStone's Fremont, Nebraska facility. Dkt. 71 at ¶ 5; *see also* Decl. of Christopher Navarette ¶ 2 (Ex. 3); Decl. of Richard D. Morgan ¶ 2 (Ex. 4).

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, arguing that a stay would cause irreparable harm to the workers they represented—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. Neither Seaboard nor any other plant operator sought to participate in the briefing on that motion. On July 22, 2020, the Court denied USDA's request for a stay, but stated that 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 that motion for summary judgment, Plaintiffs again 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" 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, though, 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 make any representations about the impact of vacatur on plants that had had waivers to exceed the 1106 line-speed limit. USDA later made the same arguments about remedy in reply. Dkt. 121 at 12.

Three weeks after USDA filed its principal summary judgment memorandum, in which it stated its position on remedy, the North American Meat Institute and National Pork Producers Council moved to appear as amicus curiae. 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" 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 from the date of decision or for any time at all.

Along with their amicus brief, the industry trade association amici submitted declarations from three executives of three member companies whose plants were participating in NSIS—Stephen Summerlin, Senior Vice President of Operations at Seaboard Foods (Dkt. 104-3), Eric Patton, Senior Vice President of Operations for Clemens (Dkt. 104-1), and Steve Weers, Chief Operating Officer at WholeStone (Dkt. 104-2). Mr. Summerlin provided detail about Seaboard's Guymon, Oklahoma plant's operations and conversion to NSIS in March 2020 (more than five months after this action was filed), including its expenses, and asserted that, "The Guymon facility, and Seaboard in general, will suffer significant operational impacts if the NSIS rule is vacated." Dkt. 104-3 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.

Both Clemens and WholeStone, who prior to opting into NSIS in March 2020 held waivers issued pursuant to a different regulatory provision that allowed them to operate their lines above 1106 hph, recognized that vacatur would require

them to lower their line speeds. Mr. Patton pointed to the "significant consequences" that would result to Clemens's Hatfield and Coldwater facilities "if the NSIS rule is vacated" and the plants thus "forced to run with a maximum line speed of 1,106 head per hour." Dkt. 104-1 ¶¶ 14–15. Likewise, Mr. Weers stated that WholeStone's Fremont facility would "suffer significant consequences if the NSIS rule is vacated" and have to operate an additional 27 Saturdays per year. Dkt. 104-2 ¶¶ 9–10. Neither Clemens nor WholeStone (nor Quality Pork) suggested that, as former waiver recipients, they would (or should) be granted special treatment if the Court were to vacate the line-speed provision of NSIS. To the contrary, their declarations made clear that they expected that vacatur would require them to reduce their line speeds.

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," the Court "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 the plants' declarations. *Id.* at 57–68. First, 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," the Court held that the line-speed provision was severable from the rest of the NSIS Final Rule. *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 noted the plants' arguments about lost investment costs, disruption to the supply chain, reliance interests, and the costs of Saturday shifts. *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 without catastrophic consequences. *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, 71 of those 90 days have passed.

B. The Intervention Motions

A full thirty days after the Court's order, Seaboard filed a motion for leave to intervene "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, arguing it was entitled to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2), and to permissive intervention under Rule 24(b).

USDA opposed Seaboard's motion on the grounds that Seaboard failed to meet the requirements for either form of intervention. Dkt. 153. USDA argued that Seaboard was not entitled to intervene as of right because Seaboard failed to make a showing of inadequate representation. *Id.* at 5–7. As to permissive intervention, USDA argued Seaboard lacked a claim or defense that shared a common question of law or fact as required by Rule 24(b)(1)(B), and that "granting Seaboard's motion to intervene would prejudice the Government by undermining DOJ's authority to control litigation involving Federal regulations, and by hampering USDA's ability to determine food-safety policy in the wake of the Court's recent ruling." Dkt. 153 at 8 (internal citations omitted). Plaintiffs also opposed Seaboard's motion, but on different grounds: that, under either Rule 24(a)(2) or 24(b), Seaboard's motion was untimely. Dkt. 141 at 15–27. Before the Court ruled on its intervention motion,

Seaboard also filed a "Motion to Stay Judgment of Vacatur as to Seaboard." Dkt. 136.

One week later—37 days into the 90-day transition period crafted by the Court, WholeStone, Clemens, and Quality Pork, another NSIS participant that also had previously held a waiver to exceed the regulatory line speed maximum, (collectively, the Waiver Recipients) filed their own motion seeking intervention as of right or permissive intervention. Dkt. 147. These plants moved to intervene to "obtain clarity" that the Court's vacatur of the line-speed provision of the NSIS rule automatically reinstated waivers that USDA had previously issued to those plants, unrelated to NSIS, and which had been terminated by USDA. Dkt. 150 at 1.

Again, both USDA and Plaintiffs opposed. USDA argued that the Waiver Recipients were not entitled to intervene as of right because they failed to show inadequate representation and because a desire to seek "clarification" was not a basis for intervention. Dkt. 157 at 2–3. In so doing, USDA noted that the Waiver Recipients were wrong as to the impact of the Court's vacatur of a single provision of the NSIS Rule on the termination of their waivers. *Id.* at 4. USDA also argued that permissive intervention was inappropriate for the same reasons as it was inappropriate as to Seaboard. *Id.* at 5–6. Plaintiffs argued that, like Seaboard's motion, the Waiver Recipients' motion was untimely. Dkt. 156 at 12–25. In

addition, Plaintiffs argued that intervention as of right should be denied because the Waiver Recipients failed to show that the vacatur of the line-speed provision of the NSIS Rule would impair their ability to protect their interest in non-NSIS waivers. *Id.* at 25–27. Finally, like USDA, they argued that the Waiver Recipients did not meet the permissive intervention standard because they did not demonstrate the existence of questions of law or fact common to the main action, and because intervention would be unduly prejudicial to the health and safety of workers at the Waiver Recipients' plants. *Id.* at 27–28.

On May 20, 2021, the Court issued an order denying both intervention motions on timeliness grounds, based on its application of the four timeliness factors set forth by the Eighth Circuit. Dkt. 163 (applying factors set out in *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011)). Because, as the Court noted, "[t]imeliness is a threshold question that must be shown whether the intervention is permissive or of right," Dkt. 163 at 3, it did not address the parties' other arguments against intervention.

Twelve days later, the Waiver Recipients filed a notice of appeal of the Court's decision, Dkt. 164, and a motion "for a stay of the March 31, 2021 order, as to them, pending appeal," Dkt. 165 at 2. Two days after that—a full two weeks after the Court denied its motion to intervene and 65 days into the 90-day stay of the March 31, 2021 order—Seaboard filed its own notice of appeal of the denial of

the May 20, 2021 order, Dkt. 174, and moved "for a stay of the Court's March 31 order and its forthcoming June 29 judgment as to Seaboard," Dkt. 175 at 1.

LEGAL STANDARD

In assessing a motion to stay pending appeal, courts balance four factors: "(1) whether the party seeking the stay has demonstrated a strong likelihood of success on the merits; (2) whether the party seeking the stay will be irreparably injured without a stay; (3) whether a stay would substantially injure other parties; and (4) the public's interest." *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020); *see also Straights & Gays for Equality (SAGE), N.R. v. Osseo Area School Dist. No. 279*, No. Civ. 05-2100JNE/FLN, 2006 WL 890754, at *1 (D. Minn. Apr. 6, 2006). "[W]hile the stay test does not formally include a balancing of the equities, the Eighth Circuit has interpreted the test as requiring a court to consider a 'balance of equities.'" *Luminara Worldwide, LLC v. Liown Elecs. Co.*, No. 14-CV-3103 SRN/FLN, 2015 WL 3559273, at *9 (D. Minn. May 27, 2015) (citing *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 545 (8th Cir. 1982)).

ARGUMENT

Neither the Waiver Recipients nor Seaboard have established that the four factors weigh in favor of stays pending appeal. To the contrary, the equities tilt strongly against the Plants, given their own prior representations to the Court,

their lack of diligence, and the increased risk of harm to health and safety that would result from the requested stays.

I. The Plants are unlikely to succeed on the merits.

In considering whether to grant a stay pending appeal, "[t]he most important factor is likelihood of success on the merits." *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018) (citing *Brady v. NFL*, 640 F.3d 785, 789 (8th Cir. 2011)). Here, it is appropriate for the Court to consider the Plants' likelihood of success on both the appeal of their motion to intervene and the substantive motions that the Plaints intend to file if the motions to intervene are resolved in their favor. *See, e.g.*, *Dillard v. City of Foley*, 926 F. Supp. 1053, 1076 (M.D. Ala. 1995); *Harris v. Pernsley*, 654 F. Supp. 1057, 1059 (E.D. Pa. 1987); *see also* Dkt. 168 at 16–19 (Waiver Recipients arguing that they are likely to succeed on merits of motion to "clarify").

A. The Plants are unlikely to prevail on appeal of the denial of their motions to intervene.

The Plants are not likely to prevail on their appeal of this Court's denial of their motions to intervene. First, they are unlikely to establish that this Court's finding of untimeliness, based on a careful consideration of the factors identified by the Eighth Circuit, was an abuse of discretion. Second, the parties have raised meritorious alternative bases for denying the motions.

1. The Court did not abuse its discretion in finding the intervention motions untimely.

"[T]he timeliness of a motion to intervene is a decision within the district court's discretion." *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011); *see also In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 766 (8th Cir. 2017). Accordingly, this Court's denial of intervention will only be reversed if the Court "'rest[ed] its conclusion on clearly erroneous factual findings or erroneous legal conclusions.'" *In re Uponor, Inc. F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1065 (8th Cir. 2013) (quoting *Oglala Sioux Tribe v. C & W Enters., Inc.*, 542 F.3d 224, 229 (8th Cir. 2008)).[2]

This high standard is a substantial obstacle for the Plants on appeal. *See, e.g.*, *Indep. Sch. Dist. No. 720 v. C.L. by & through B.L.*, No. 18CV00936SRNDTS, 2018 WL 2108205, at *4 (D. Minn. May 7, 2018) (finding party "fail[ed] to show that it has a strong likelihood of success on the merits, in part because the merits are governed by a deferential abuse of discretion standard"). Indeed, Plaintiffs have located

[2] In arguing they are likely to succeed on the merits, neither the Waiver Recipients nor Seaboard acknowledges the abuse-of-discretion standard. The Waiver Recipients incorrectly state that "the Eighth Circuit will review de novo the denial of the motion to intervene as of right." Dkt. 168 at 10 (citing *Smith v. SEECO, Inc.*, 922 F.3d 398, 405 (8th Cir. 2019); *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992)). In *SEECO*, though, the Eighth Circuit quoted *Uponor*'s statement that "[w]hen a district court denies a motion to intervene based on untimeliness ... we review that decision for abuse of discretion," and applied that abuse of discretion standard. 922 F.3d at 405.

only one case decided in the past twenty-five years where the Eighth Circuit found that a district court abused its discretion in finding an intervention motion untimely. *See Fond du Lac Band of Chippewa Indians v. Carlson*, 104 F.3d 363, 1996 WL 686155, at *1 (8th Cir. Dec. 2, 1996) (reversing denial of motions to intervene on condition that intervenors would "not seek to 'undo' in the district court" already completed stages of litigation); *but see SEECO*, 922 F.3d at 405–06 (affirming district court's finding of untimeliness); *In re Wholesale Grocery Prod. Antitrust Litig.*, 849 F.3d 761, 768 (8th Cir. 2017) (same); *In re Living Hope Sw. Med. Servs., LLC*, 598 F. App'x 467, 2015 WL 1427343, at *1 (8th Cir. Mar. 31, 2015) (affirming bankruptcy court's finding of untimeliness); *U.S. Bank Nat. Ass'n v. State Farm Fire & Cas. Co.*, 765 F.3d 867, 870 (8th Cir. 2014) (affirming district court's finding of untimeliness); *Uponor*, 716 F.3d at 1065 (same); *Osby v. Barela*, 500 F. App'x 565, 2013 WL 1285934, at *1 (8th Cir. Apr. 1, 2013) (same); *Planned Parenthood of the Heartland v. Heineman*, 664 F.3d 716, 718 (8th Cir. 2011) (same); *United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 834 (8th Cir. 2010) (same); *Williams v. Dover Elevator Co.*, 18 F. App'x 456, 2001 WL 1042210 at *1 (8th Cir. Sept. 12, 2001) (same); *Minn. Milk Producers Ass'n v. Glickman*, 153 F.3d 632, 646 (8th Cir. 1998) (same); *Northeastern Living Ctr., Inc. v. Lake Region Development, Inc.*, 89 F.3d 841, 1996 WL 343041 (8th Cir. June 24, 1996) (same).

a. The Court properly applied the four-factor standard identified by the Eighth Circuit.

In exercising its discretion as to timeliness, the Eighth Circuit has "articulated factors that the district court should specifically consider: (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.

In their stay motion, however, the Waiver Recipients assert a new argument, which they did not make in their initial motion to intervene. Citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), they argue that motions to intervene are *de facto* timely when they are filed within the time a party could have taken an appeal from the final judgment. But that case did not establish such a rule. *See, e.g.*, *Tri-State Truck Ins.., Ltd. v. First Nat. Bank of Wamego*, No. 09-4158-SAC, 2011 WL 4688857, *4 (D. Kan. Oct. 5, 2011) (holding *McDonald* "does not establish a bright-line rule that a postjudgment motion to intervene is timely if filed within the appeal deadline."). Rather, the Eighth Circuit continues to apply the four-factor, totality of the circumstances test to post-judgment motions to intervene. *See*, *e.g.*, *Wholesale Grocery Prods.*, 849 F.3d at 766–67; *Minn. Milk Producers*, 153 F.3d at 646. *see also Clarke v. Baptist Mem'l Healthcare Corp.*, 427 F. App'x 431, 435 (6th Cir. 2011)

(explaining *McDonald* Court was simply "applying the 'reasonably should have known of one's interest in the case' standard to the facts of the case").

The specifics of *McDonald* demonstrate why that case did not establish any such bright-line rule. There, the Supreme Court held that, in "view of all the circumstances," the motion to intervene in that case was timely filed. 432 U.S. at 394. The movant had sought to intervene in an action solely to appeal the district court's denial of a motion for class certification—an appeal that could not be filed until final judgment was issued—and filed that motion eighteen days after the final judgment in favor of the named plaintiffs, who could not appeal. *Id*. at 390. It is questionable whether *McDonald* has any relevance outside the class action context at all. *See Smith v. Bayer Corp*., 564 U.S. 299, 314 n. 10 (2011) (stating that *McDonald* "demonstrate[s] only that a person not a party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding"); *S. Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966, 971 n.5 (10th Cir. 2008) (finding *McDonald* had no relevance to timeliness of motion to intervene outside class certification denial context). Even if it does, though, the Court's decision there was grounded in its recognition that earlier intervention for the limited purpose of appeal of a final judgment "would only have made the respondent a superfluous spectator in the litigation for nearly three years," 432 U.S. at 394, n. 15. That concern does not exist here.

Here, the Plants have all moved to intervene in order to raise new arguments before the *district* court, arguments that, as this Court explained, could have been raised earlier in the case.[3] Dkt. 163 at 6. This case is thus similar to *Garrity v. Gallen*, 697 F.2d 452, 457–58 (1st Cir. 1983), where the First Circuit found *McDonald* inapplicable and affirmed a district court's denial of a motion to intervene as untimely where a putative intervenor waited until after the district court entered a remedial order before moving to intervene for the purpose of asking the court to "amend and clarify" that remedial order. The First Circuit found that, like the Plants here and unlike the movant in *McDonald*, the putative intervenor "should have been aware well before judgment" that its interests were not being represented by the parties and was "free to move to intervene at any point in the proceedings." 697 F.2d at 458. *See also Floyd v. City of New York*, 770 F.3d 1051, 1059 n.23 (2d Cir. 2014) (finding *McDonald* "far afield" from the scenario where putative intervenors "should have known their interests were unprotected well before" district court issued order); *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (stating that *McDonald* is inapplicable where the putative intervenor sought to intervene "to advance a particular argument on appeal" that the government was not making and "offered no

[3] Indeed, as discussed further below, two of the Waiver Recipients *did* make arguments about the impact of vacatur—arguing that vacatur *would* impact them.

reason…why it could not have sought intervention prior to judgment"); *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 501 (3d Cir. 1982) (holding that *McDonald* did not apply in a case that did "not present the situation where intervention early in the proceedings would have been premature and possibly unnecessary"); *Planned Parenthood of the Heartland v. Heineman*, No. 4:10CV3122, 2010 WL 4609299, at *3 (D. Neb. Nov. 4, 2010), *aff'd*, 664 F.3d 716 (8th Cir. 2011) (finding *McDonald* inapplicable where putative intervenor had knowledge of claimed basis for intervention prior to judgment).

b. The Court's analysis of the four factors is well-supported by the record.

As in *ACLU*, this Court considered the relevant factors "and found that based on the circumstances, the motion[s] w[ere] not timely. The [C]ourt listed the relevant factors and acknowledged that timeliness is determined from all the circumstances." 643 F.3d at 1094; *see* Dkt. 163 at 3–7 (addressing the four factors one by one). This Court's analysis of those factors was amply supported by the record.

As to the first factor, the Court noted that its "consideration of the case on the merits has concluded," which weighed against a finding of timeliness. *Id.* at 3. Second, the Court found that each of the movants had known of the litigation well before they sought to intervene, noting that three of the four movants had submitted declarations nearly a year earlier. *Id.* at 4 (citing *U.S. Bank Nat'l Ass'n v.*

State Farm Fire & Cas. Co., 765 F.3d 867, 869–70 (8th Cir. 2014)). The Plants do not challenge these conclusions.

Both stay motions appear to challenge the Court's assessment of the third factor and the Court's rejection of the Plants' explanations for their delay. As the Court explained, the record does not support the notion that the March 31, 2021 Order introduced "first-time uncertainty" and "new remedial questions." Dkt. 163 at 4–5 (quoting Plants' briefs). Plaintiffs had been seeking vacatur since they filed the case, and USDA made its alternate argument that vacatur of the line-speed provision was an appropriate remedy in August 2020—without arguing that the Court should stay any vacatur or reinstate (or even address) waivers issued pursuant to a different regulatory provision. *Id.* at 5. That the Court ordered the relief that USDA explicitly argued would be appropriate was not unforeseen. And as the Court correctly noted, that USDA has not now raised new concerns about the relief it endorsed in August 2020 is not an "actual change of position by the government." *Id.* at 6.

The Waiver Recipients argue that their motion was nonetheless timely because "it was filed promptly after the point in the litigation where the Pilot Participants' interests diverged from the USDA." Dkt. 168 at 11. They do not state what that "point" in time was, though. USDA *never* took the position that vacatur of the line-speed provision would restore rescinded waivers or that the Court

should separately vacate such rescission. To the contrary, USDA was clear that it believed the *only* thing that the Court could appropriately vacate was "the portion of the Final Rule that revokes line-speed limits." Dkt. 89 at 30; *see also id. at* 33 (USDA arguing that FSIS would have proceeded with the rest of NSIS "without the line-speed provision"). The Waiver Recipients have not pointed to anything that could have led them to reasonably believe otherwise.

In their motion to intervene, the Waiver Recipients argued that "[t]he Court's decision raises for the first time the question whether vacating the Final Rule results in reinstatement of the HIMP and SIP programs and related waivers under which the Pilot Participants have long operated." Dkt. 150 at 14–15. That assertion is demonstrably false, as made clear by WholeStone and Clemens's own earlier representations to the Court. In attempts to persuade the Court *not* to vacate the line-speed provision, WholeStone and Clemens each submitted declarations stating that vacatur would force them to lower their line-speeds to 1106 head per hour. Dkt. 104-1 ¶ 15; Dkt. 104-2 ¶ 10. If, as they now suggest, under "basic tenets of administrative law," vacatur simply restores their preexisting waivers, Dkt. 168 at 16–17, vacatur would not have had this effect. A litigants' strategic flip-flopping is not a "divergence of interest" that excuses a delay in moving to intervene.

Seaboard's suggestion that USDA's decision not "to seek a sufficient stay on Seaboard's behalf" was an "actual change in the government's position" justifying

belated intervention, Dkt. 177 at 9–10, similarly lacks merit. But this is not a change in the government's position; the government never took the position that vacatur needed to be delayed and certainly never indicated it would seek a stay of vacatur on behalf of an individual regulated entity. *Cf. Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) (noting that "when the proposed intervenors' concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it").

Seaboard also points to the fact that USDA has not yet filed a notice of appeal and its statement that NSIS plants "should prepare" to come into compliance with 9 C.F.R. § 310.1(b)(3)(ii) as evidence of "policy shift[s]." Dkt. 177 at 11 (citing USDA, Special Alert: Constituent Update – May 26, 2021 (Dkt. 178)).[4] First, whether or not USDA accepts this Court's final judgment is irrelevant to the limited intervention that Seaboard seeks: Seaboard did not seek to intervene to appeal this Court's decision on the merits, but only to ask this Court to reconsider its remedy to add an additional 10.5 months to the 90-day stay period. *Cf.* Dkt. 177 at 12 (Seaboard acknowledgment that it did not seek intervention to ask the Court "to revise its up-or-down decision on vacatur"). That request is not something that USDA could raise on appeal because USDA never asked this Court for such a

[4] USDA has until August 30, 2021 to file a notice of appeal of this Court's forthcoming judgment. *See* Fed. R. App. P. 4(B).

remedy in the first place. *See*, *e.g.*, *Orion Fin. of S.D. v. Am. Foods Grp.*, 201 F.3d 1047, 1048 (8th Cir. 2000) (noting "the basic principle that one cannot raise issues on appeal that have not been raised before the district court"). Moreover, USDA's Constituent Update did not state anything about USDA's position as to the correctness of this Court's decision on either the merits or remedy; it simply informed regulated entities to "prepare" for the impact of this Court's vacatur—a reflection of the fundamental reality that, at that point, 56 days into the 90-day stay, no further stay applications were pending. That USDA did not ignore this Court's order or direct regulated entities to do so is not a "policy shift."

Although perhaps the Plants did not timely raise their concerns regarding remedy because they thought that USDA would prevail on the merits, this Court correctly explained that "the fact that the case was not resolved in their preferred manner does not justify an untimely intervention." Dkt. 163 at 5–6. "It would not have required unusual prescience" for the Plants to realize that if the Court vacated the line-speed provision as USDA suggested, they would be required to reduce their line speeds. *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 396 (6th Cir. 1993), *quoted in* Dkt. 163 at 5. Each of the Plants could "have asked the Court to consider their concerns [in August 2020] when they submitted affidavits through amici," and the Court would have considered those concerns — as it did the other concerns raised by amici. Dkt. 163 at 6. "They did not." *Id.* Given its knowledge of

this case and the issues presented at each stage of the litigation, the Court's rejection of the Plants' excuses for delay was not an abuse of discretion.

Finally, the Court found that the belated motions to intervene created a risk of prejudice to USDA, accepting USDA's arguments that intervention "would frustrate USDA's ability to manage a national food safety system." Dkt. 163 at 6–7; *see also* Dkt. 153 at 10–11 (USDA opposition to Seaboard's motion); Dkt. 157 at 6 (USDA opposition to Waiver Recipients' motion). While Seaboard makes a conclusory contrary assertion, Dkt. 177 at 13, given that all the Plants seek to intervene for the purpose of obtaining judicially created individual carve-outs from FSIS's longstanding line-speed regulation, 9 C.F.R. § 310.1(b)(3)(ii), it was not an abuse of discretion for the Court to defer to USDA's position as to how intervention would impact the agency.

2. The other arguments against intervention identified by USDA and Plaintiffs also demonstrate that the Plants are not likely to succeed on the merits of their appeals.

While this Court denied the Plants' motions on the threshold issue of timeliness, the Eighth Circuit may affirm the denial of intervention "on any ground supported by the record." *P.A.C.E. v. Kan. City Mo. Sch. Dist.*, 267 F. App'x 487, 2008 WL 508608, at *1 (8th Cir. Feb. 27, 2008) (citing *Saulsberry v. St. Mary's Univ. of Minn.*, 318 F.3d 862, 866 (8th Cir. 2003)). As both Plaintiffs and USDA argued in opposing intervention, in additional to being untimely, the motions to

intervene would have been properly denied on additional grounds. *See* Dkt. 141 at 22 n.4, 24 n.5 (Plaintiffs' opposition to Seaboard motion); Dkt. 153 at 5–11 (USDA opposition to Seaboard motion); Dkt. 156 at 25–28 (Plaintiffs' opposition to Waiver Recipients' motion); Dkt. 157 at 2–6 (USDA opposition to Waiver Recipients' motion). These additional arguments further show that the Plants are not likely to succeed on the merits of their appeals.

The Waiver Recipients are not entitled to intervene as of right under Rule 24(a)(2) because this Court's vacatur of 9 C.F.R. § 310.26(c) does not impair or impede their ability to protect their interest in waivers issued and rescinded under a different regulatory provision, 9 C.F.R. § 303.1(h). As this Court has recognized, "USDA's decision to end the Pilot Participants' line speed waivers was not challenged in this litigation." Dkt. 173 at 1. If the Waiver Recipients want to challenge that entirely separate final agency action, nothing in this case bars them from doing so—in a separate case. *See Jones v. Casey's Gen. Stores, Inc.*, 4:07-cv-00400, 2010 WL 11614139, at *3 (S.D. Iowa Feb. 18, 2010) (citing "numerous decisions that have rejected intervention of right where a party has another avenue available to it through which it may seek protection of its purported interest"

(citations omitted)).[5] Further, nothing in this case limits USDA's to issue new waivers if it deems them appropriate, consistent with existing law.

For similar reasons, permissive intervention is inappropriate because the Waiver Recipients' challenge to the rescission of their waivers is not a "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

Likewise, to the extent Seaboard seeks an individual exemption from the line-speed limits set out in 9 C.F.R. § 310.1(b)(3)(ii), it may formally request such an exemption from USDA and, if that exemption were denied, commence an action to challenge the denial. This action neither impairs or impedes Seaboard from following that course, nor presents any question of law or fact common to a challenge to a hypothetical future exemption request that, more than two months after this Court's decision, Seaboard has not made.

Finally, as to all of the Plants, permissive intervention would have been properly denied on the basis of the prejudice to the parties associated with being required to "relitigate the remedy in this case." Dkt. 163 at 6; *see* Fed. R. Civ. P.

[5] While the timing may be difficult now given the Waiver Recipients' delay, the Waiver Recipients could have filed a complaint challenging the rescission of their waivers in a federal district court and sought a preliminary injunction anytime in April 2021—which would likely have been resolved by June 29, 2021. That the Waiver Recipients made the strategic decision not to protect their rights in that way is not a basis for belated intervention.

24(b)(3); *see also In re Wholesale Grocery Prod. Antitrust Litig.*, No. 09-MD-2090 ADM/TNL, 2015 WL 4992363, at *8–9 (D. Minn. Aug. 20, 2015), *aff'd in relevant part*, 849 F.3d 761 (8th Cir. 2017) (denying intervention as untimely and noting prejudice associated with requiring re-litigation of settled issues).

B. Even if granted intervenor status, the Plants are not likely to obtain the relief they seek.

Even if the Court of Appeals determined this Court should have granted intervention status to the Plants, that decision would not entitle the Plants to the only relief they seek—carveouts from the remedy the Court adopted in its March 31, 2021 Order. As this Court explained, the Plants would not be allowed to "supplement the record to relitigate the remedy in this case because 'permission to intervene does not carry with it the right to relitigate matters already determined in the cause, unless those matters would otherwise be subject to reconsideration.'" Dkt. 163 at 6 (quoting *Arizona v. California*, 460 U.S. 605, 615 (1983)).[6] And should this Court decline to alter the remedy it has already

[6] Although their motions make scattered references to their desire to "appeal" orders of this Court, the Plants do not argue that this Court erred in concluding that "FSIS's elimination of line speed limits in the NSIS was arbitrary and capricious in violation of the APA." Dkt. 125 at 57. And with good reason. As the Court explained, FSIS "was silent as to its ability to consider worker safety, did not consider the comments, and did not explain a change of position." *Id.* at 52. Such errors violate bedrock principles of administrative law. *See id.* (citing *Encino*

fashioned, any such decision would be reviewed by the Eighth Circuit under an abuse of discretion standard. *See*, *e.g.*, *Dunne v. Res. Converting, LLC*, 991 F.3d 931, 940 (8th Cir. 2021) (district court's denial of equitable relief reviewed for abuse of discretion); *Nebraska Dep't of Health & Hum. Servs. v. Dep't of Health & Hum. Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) ("We review the district court's decision to vacate, as we do any decision to grant or withhold equitable relief, for abuse of discretion.").

1. The Waiver Recipients are unlikely to prevail on their request for "clarification."

The Waiver Recipients are unlikely to succeed on their arguments that this Court's vacatur of 9 C.F.R. § 310.26(c) "automatically reinstated" waivers terminated orders that USDA rescinded. To begin with, two of the three Waiver Recipients made the opposite argument earlier in this case: Clemens and WholeStone stated in sworn declarations that vacatur would require them to reduce their line speeds to 1106 hph and that the consequences they would suffer was a reason for the Court not to vacate the NSIS Rule. *See* Dkt. 104-1 at ¶¶ 14–15

Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2127 (2016); *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)); *see also id.* at 56–57 (citing *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912, 1914 (2020); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50–51 (1983)). The Plants also do not argue that the Court erred in declining to "exercise its discretion to depart from the normal APA remedy of vacatur." Dkt. 125 at 66.

(Clemens); 104-2 at ¶¶ 9–10 (WholeStone). The Court relied on those representations in deciding to grant a 90-day stay of vacatur. *See* Dkt. 125 at 67. WholeStone and Clemens now argue that vacatur does not impact them *at all*, but instead restores their non-NSIS-related waivers. Dkt. 168 at 16–17. The Court would be well-within its discretion to deny WholeStone and Clemens' requests for relief as motions to "clarify" on the basis of this unexplained (or acknowledged) reversal, whether as a matter of judicial estoppel, or as part of its inherent authority in fashioning equitable relief. *See*, *e.g.*, *United States v. Hamed*, 976 F.3d 825, 828–30 (8th Cir. 2020) (affirming district court's finding of estoppel).

In addition to being inconsistent with their position earlier in this litigation, the Waiver Recipients' position on the effects of vacatur is wrong. The cases they rattle off, Dkt. 168 at 17–18, stand for no more than the position that vacatur of an agency action undoes that agency action. They do not suggest that whenever a court vacates a rule—or, as here, a *part* of a rule—*other* agency actions are automatically undone. Indeed, it "would exceed the statutory scope of review for a court to set aside" actions that it had not held invalid and that the plaintiff had not even challenged. *Cath. Soc. Serv. v. Shalala*, 12 F.3d 1123, 1128 (D.C. Cir. 1994). Here, the Court explicitly declined to vacate the entire NSIS Rule and vacated *only* 9 C.F.R. § 310.26(c). Dkt.125 at 60, 68. That provision did not terminate the Waiver Recipients' waivers. Independent action of USDA did. The status quo that has

been restored is that, as in October 2019, absent a waiver, no pork plant may run its evisceration lines at speeds in excess of 1106 hph.

2. Seaboard is unlikely to prevail on its motion for reconsideration.

Seaboard moved "to intervene 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." Dkt. 128. While its intervention motion was pending, it filed a "stay" motion. Dkt. 138. In substance, though, the stay motion sought reconsideration of the equitable remedy that the Court already crafted in this case, as well as the Court's conclusions as to the impacts of line speed on worker safety and the disruptive effects of vacatur. Even if Seaboard obtained intervenor status and were allowed to re-file that motion, Seaboard is unlikely to meet the high burden for reconsideration.

That Seaboard seeks to relitigate issues already decided is clear from the memorandum it filed in support of its earlier "stay" motion, in which it made several arguments that are contrary to this Court's previous findings. For example, it argued that "non-anecdotal industry data in the record demonstrates the non-correlation between line speeds and safety incidents." Dkt. 138 at 8. But this Court already considered, and rejected, that argument and the purportedly "non-anecdotal" evidence submitted by Seaboard's executive. Dkt. 125 at 33. The Court determined that "the weight of the evidence clearly demonstrates that line speeds

are a risk factor that will increase the already hazardous conditions faced by workers." *Id.*; *see also* Perry Decl. (Ex. 2) ¶¶ 17, 19, 33. In its April "stay" motion, Seaboard also argued that it is entitled to relief because it "detrimentally relied" on the October 2019 rule. Dkt. 138 at 9. *See also* Dkt. 130 at 4 (citing undated, unspecified "capital expenditures"); *but see* Dkt. 142 ¶¶ 23–38 (explaining capital expenditures were unrelated to line speeds). Again, the Court already considered this argument and concluded that NSIS facilities could adapt to lower speeds and still benefit from other efficiencies allowed for by NSIS, and that a 90-day stay of its order would "give regulated entities time to prepare for any operational change." Dkt. 125 at 66–68. Seaboard's request that the Court revisit these issues is a request for reconsideration.

Correctly denominating the motion as one for reconsideration is important, because "[m]otions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (quoting *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), *as amended*, 835 F.2d 710 (7th Cir. 1987)). Seaboard has not indicated any such manifest errors or newly discovered

evidence exists. Seaboard's belief that this Court should have, as a matter of discretion, weighed equitable factors differently is not a basis for reconsideration.[7]

Further, even if the Court were writing on a clean slate, Seaboard's motion for an additional 10.5 months to revert to the pre-March 2020 status quo would be properly denied because any harm it suffers would be outweighed by the substantial injury to Plaintiffs' members and the public interest, as discussed below. *See infra* at III-IV.

II. The Plants' assertions of irreparable injury are overstated.

To meet their burden of establishing irreparable harm absent a stay, the Plants "must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996); *see also Jensen v. Minn. Dep't of Hum. Servs.*, Civ. No. 09-1775 (DWF/BRT), 2020 WL 1130671, at *3 (D. Minn. Mar. 9, 2020). As one Eighth Circuit judge expressed today, "[t]his is no small task." *Reproductive Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, Nos. 19-2282, 19-3134,

[7] Seaboard also suggests that the Court was wrong in stating that Seaboard sought to "relitigate the remedy," because it sought only to ask the Court to stay remand as to it by 10.5 months, not "to revise its up-or-down decision on vacatur." Dkt. 177 at 11–12. That Seaboard did not seek to relitigate *all* of the remedial issues this Court decided does not mean it does not seek reconsideration of issues already decided.

slip op. at 17 (8th Cir. June 9, 2021) (Stras, J., concurring in part and dissenting in part). The Plants have not met this burden.[8]

Both the Waiver Recipients and Seaboard base their claims of irreparable harm on the assertion that, should they be required to operate their line speeds at 1106 hph, they will not be able to process the same number of hogs. The Waiver Recipients argue that they will lose the value of their investment in facilities designed to process more hogs and that they will be "forced" to cancel their contracts with farmer producers who sell hogs to them. Dkt. 168 at 20. Seaboard argues that the failure to grant it a stay will result in the "irreparable loss" of "approximately 126,000 wasted animals." Dkt. 177 at 14.[9] These predictions will

[8] That the Plants waited more than 30 days to even file their motions to intervene, and then waited two weeks after the Court denied their motions to intervene, despite being well aware of the imminent vacatur, "vitiates much of the force of ... allegations of irreparable harm." *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., denying application for stay pending review of petition for writ of certiorari); *see also Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, Civ. No. 09–1091 (JNE/JSM), 2010 WL 2131007, at *1 (D. Minn. May 25, 2010) (noting a "failure to act sooner" undercuts arguments as to irreparable injury) (citing *Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 144 (2d Cir. 2005)).

[9] Seaboard also states that such a loss will cause a "loss of consumer goodwill and hits to its reputation." Dkt. 177. It has not produced any evidence to support this assertion. Given the widespread public criticism of the meatpacking industry, and Seaboard in particular, it is hardly clear that slowing its lines out of respect for this Court's decision and Seaboard's workers would harm Seaboard's

come true, though, only if the Plants slow their lines *and* fail to make any other changes. Because the harm can be mitigated, it is "not irreparable harm of the kind that could justify a stay pending appeal." *Al Otro Lado v. Wolf,* 952 F.3d 999, 1010 (9th Cir. 2020); *see also Karsjens v. Jesson*, Civ. No. 11-3659 (DWF/JJK), 2015 WL 7432333, at *6 (D. Minn. Nov. 3, 2015) ("A court may decline to grant a motion to stay based on claims of administrative and monetary harm where 'the principal irreparable injury which defendants claim that they will suffer ... is injury of their own making.'" (quoting *Long v. Robinson* 432 F.2d 977, 981 (4th Cir. 1970))); *Aurora Co-op. Elevator Co. v. Aventine Renewable Energy Holdings, Inc.*, No. 4:12–CV–3200, 2014 WL 895669, at *6 (D. Neb. Mar. 6, 2014) (noting whether a company could mitigate losses resulting from its plant being idled was relevant to a determination of irreparable harm).

Here, obvious mitigation measures can be taken to avoid the "cascade of detrimental effects" the Plants claim. Dkt. 177 at 20. Most obviously, the plants can increase the number of hours during which they operate their lines at slower

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reputation. *Cf.* Oliver Laughland & Amanda Holpuch, "'We're modern slaves': How meat plant workers became the new frontline in Covid-19 war," The Guardian, May 2, 2020, https://www.theguardian.com/world/2020/may/02/meat-plant-workers-us-coronavirus-war; Anna Casey, "Report highlights fears among workers in the meat processing industry," The Counter, Dec. 18, 2017, https://thecounter.org/report-highlights-fears-among-workers-in-the-meat-processing-industry/. The speculation of counsel does not meet Seaboard's evidentiary burden.

speeds. Indeed, three of the four plants have explicitly recognized this possibility. *See* Dkt. 171-1 ¶ 13 (Quality Pork); Dkt. 171-2 ¶ 13 (WholeStone); Dkt. 104-3 ¶ 13 (Seaboard).

Although the Plants would apparently prefer not to make any changes, they have not shown that this change is unworkable or would cause great economic harm. Only Quality Pork and WholeStone have provided an estimate of the costs associated with increasing their hours of operation: $8,889,000 and $6,200,000 annually, respectively. *See* Dkt. 171-1 ¶ 16; Dkt. 171-2 ¶ 16. How these costs were calculated is unclear, but, regardless, they are relatively minor given the Plants' total operating costs and revenues, which are in the hundreds of millions.[10] *See*, *e.g.*, Wholestone Farms, Press Release, Wholestone to Break Ground on Two-Phase, $200M Remodel This Week, Jan. 8, 2020.[11] What none of the plants have said "is that such additional expenditures will so severely impact the company's bottom line that the increased costs [associated with vacatur] threaten the

[10] The Quality Pork plant in Austin is owned by Hormel and operated by Quality Pork under a custom harvesting arrangement. *See* Morgan Decl. (Ex. 4), ¶ 3; Hormel Foods Corp. Form 10-K (2018), https://www.sec.gov/Archives/edgar/data/48465/000004846518000046/hormel_2018x10k.htm. It is unclear whether all $8,889,000 in costs would be the responsibility of Quality Pork.

[11] https://www.wholestonefarms.com/2020/01/08/wholestone-to-break-ground-on-two-phase-200m-remodel-this-week/

company's very existence." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 78 (D.D.C. 2013), *aff'd on other grounds*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

Second, the Plants' contention that longer, extra, or weekend shifts will have "detrimental worker effects" and lead to turnover is both disingenuous and unsupported. *See* Dkt. 168 at 21; *see also* Dkt. 131-1 ¶ 23 (stating that "the toll of working continuous six-day work weeks is difficult for plant employees"). As the legally recognized representative of the workers at Seaboard's Guymon plant told management:

> As you must know, workers would prefer to work more hours safely, even an additional shift, than suffer speed-up that puts them at risk. Any assertions that the workers have rejected Saturday shifts to address line speed up is false.

Third Declaration of Martin Rosas (Ex. 5) ¶ 5, Ex. A at 3. In fact, workers at Guymon are eager and willing to work Saturday shifts and have repeatedly said so. Dkt. 142 ¶¶ 13, 52–54. The workers at WholeStone and Quality Pork feel similarly, and there is no reason to think the workers at Clemens would have a different view. *See* Navarette Decl. (Ex. 3) ¶ 14; Morgan Decl. (Ex. 4) ¶ 20.

That increased hours of operations will not have devastating effects is shown by the recent experience at Seaboard, which until March 2020 operated under the 1106 hph limit. *See* Dkt. 142 ¶¶ 14–15; *see also* Dkt. 104-3 ¶ 4. Throughout that time, Seaboard scheduled kill-floor workers on two 10-hour shifts, which were scheduled Monday through Friday. Dkt. 142 ¶¶ 16–17. It also frequently

scheduled Saturday shifts—approximately 26 to 30 per year. *Id.* ¶ 18. Seaboard's business was able to thrive in this environment.

The Waiver Recipients also make several arguments as to what would happen if they "were to stop using NSIS and instead elected to operate under the traditional inspection model." Dkt. 171-1 ¶ 17 (Quality Pork); *see also* Dkt. 171-2 ¶ 17 (WholeStone); Dkt. 171-4 ¶11 (Clemens). The Court's vacatur of the line-speed provision, however, does not require the Waiver Recipients to stop using NSIS and revert to the traditional inspection model. As this Court previously stated, agreeing with the position that USDA took in July 2020, "the NSIS program can function without the elimination of line speed limits." Dkt. 125 at 59; *see also* Dkt. 89 at 33 (USDA principal summary-judgment memorandum).[12] If the Waiver Recipients no longer want to participate in NSIS for other reasons, that is their "choice alone, not the Court's, and any harm resulting from such a choice would be self-inflicted." *Portz v. St. Cloud State Univ.*, Civ. No. 16-1115 (JRT/LIB). 2019 WL 6727122, at *5 (D. Minn. Dec. 11, 2019) (citing *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011)); *see also Salt Lake Trib. Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) ("We will not consider a self-inflicted harm to be irreparable…."); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d

[12] Neither Clemens nor WholeStone's summary judgment declarations indicated they disagreed with USDA's position.

828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.").

Finally, even if the Plants chose to reduce their capacity rather than increase the number of hours in which they operate, and chose to revert to the traditional inspection model rather than remain in NSIS, their predictions of devastating industry-wide impact would lack merit. As economist and Professor C. Robert Taylor, an expert on the pork processing industry, explains in his concurrently filed declaration, "line speed limitations are not a regulatory factor that would affect or address the lack of competition in the pork industry, or survivability of small hog producers." Taylor Decl. (Ex. 1) ¶ 48. To the extent the Plants choose to process less hogs and forego that profit opportunity, any excess market hogs can easily be absorbed by the industry. *Id.* at ¶¶ 50–59. The conclusions in the report by Dr. Dermot Hayes belatedly filed with the Court on June 2, 2021 (the day after the Waiver Recipients filed their motion) suggesting this Court's ruling will destroy the industry is "fundamentally wrong." *Id.* ¶ 9.

III. The stays sought would substantially injure plaintiffs' members and other workers.

Any irreparable harm to the Plants must be balanced against the harm that the requested stays would cause to others. Here, that balance tips decidedly against the Plants' requests, because the stays would put the health and safety of

workers Plaintiffs represent at Seaboard, Quality Pork, and WholeStone's facilities and the workers at Clemens' facilities at risk.

As this Court has already recognized, operation of slaughter lines at higher speeds puts the workers on those lines at increased risk of musculoskeletal injuries and lacerations. Dkt. 125 at 27–33. Noting a range of evidence, including "several academic studies, government research conducted by NIOSH, and recommendations provided by OSHA and the GAO," this Court has held that "the weight of the evidence clearly demonstrates that line speeds are a risk factor that will increase the already hazardous conditions faced by workers," Dkt. 125 at 33. This conclusion is bolstered by Professor Perry's expert declaration, in which she states and explains her "expert opinion that increased line speeds increase the risks of injury to workers, including laceration injuries." *See* Perry Decl. (Ex. 2) ¶ 16; *see also id.* at ¶¶ 17–26 (explaining relationship).

Despite this Court's findings, the Plants barely address the harms to human health and safety the relief they seek would bring. Instead, Seaboard points to the anecdotal, non-scientific, self-interested declarations that this Court already rejected, Dkt. 177 at 16, and which Professor Perry explains are "not scientifically credible" for a variety of reasons, Perry Decl. (Ex. 2) ¶ 19. What Seaboard does not acknowledge is that injuries at the Guymon plant reached a three-year high in 2020, after it converted to NSIS. *See* Tom Polansek & P.J. Huffstutter, *As U.S. pork*

plant speeds up slaughtering, workers report more injuries, Reuters, Feb. 19, 2021.[13] And Seaboard has recently conceded that it has not conducted any studies on the relationship between line speeds and worker safety, and has not conducted any ergonomic analyses of its line at all since February 2017. Third Rosas Decl. (Ex. 5) ¶ 6, Ex. B at 2.

The Waiver Recipients misleadingly state "this Court acknowledged" that worker safety at their plants "has not been adversely affected by the increased evisceration line speeds," citing to the Court's description of submissions by amici curiae. Dkt. 168 at 5 (citing Dkt. 125 at 17). But they ignore the Court's ultimate conclusion, as well as its recognition that "there is some reason to be skeptical of the data by amici." Dkt. 125 at 33 n.6. The Plants' cursory assertions do not stand up against the scientific data that this Court has already noted or to the information in Dr. Perry's declaration.

Moreover, since this case was filed, a new line-speed-related menace has emerged: COVID-19. Meatpacking facilities like those operated by the Plants have been hotbeds for the transmission of COVID-19. One recent study estimated *334,000* COVID-19 infections in the United States are attributable to meatpacking plants. Tina L. Saitone, K. Aleks Schaefer, & Daniel P. Scheitrum, *COVID-19*

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13 https://www.reuters.com/article/us-usa-pork-insight/as-u-s-pork-plant-speeds-up-slaughtering-workers-report-more-injuries-idUSKBN2AJ179.

morbidity and mortality in U.S. meatpacking counties, 101 Food Policy 102072 (2021).[14] As explained by Professor Perry, higher line speeds have contributed to this crisis by causing workers to be packed closer together on the slaughter lines. Perry Decl. (Ex. 2) ¶¶ 29–31; *see also* Dkt. 142 at ¶ 57 (providing information about COVID-19 transmission at Seaboard in Guymon); Charles A. Taylor, Christopher Boulos, & Douglas Almond, *Livestock plants and COVID-19 transmission*, 117 Proceedings of the Nat'l Acad. of Scis. 31706, 31708 (2020) (based on poultry-plant data, finding a correlation between line speed and COVID-19 transmission)[15]; John Middleton, Ralf Reintjes, & Henrique Lopes, *Meat plants—a new front line in the covid-19 pandemic*, 370 British Med. J. 2716 (2020) (recommending reduction of processing rates to minimize COVID-19 infection).[16]

The Plants have been part of the industry-wide trend. For example, as of April 2021, 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

[14] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8026277/.

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

[16] https://www.bmj.com/content/370/bmj.m2716.

David Eaheart of Seaboard)[17]; Dkt. 142 at ¶ 58. While data is difficult to obtain, workers at each of the other Plants have been impacted. *See* Navarette Decl. (Ex. 3) ¶ 22 (noting one death and 300 cases at WholeStone); *Coronavirus in the U.S.: Latest Map and Case Count – Outbreak Clusters*, N.Y. Times (noting 455 cases at joint Quality Pork-Hormel Austin facility)[18]; Don Reid, *Clemens brings in screeners for COVID-19*, May 2, 2020.[19] Although rates of COVID-19 transmission are falling, outbreaks in meatpacking facilities continue.[20]

Because the stays sought would put workers at increased risk of musculoskeletal injuries, lacerations, and COVID-19, the harm to workers weighs strongly against a stay.

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

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

[19] https://www.thedailyreporter.com/news/20200502/clemens-brings-in-screeners-for-covid-19.

[20] *See* Madison McVan, et al., "Thousands of meatpacking workers have been vaccinated, but the industry's crisis continues," USA Today (Apr. 8, 2021), https://www.usatoday.com/in-depth/news/investigations/2021/04/08/meatpacking-workers-still-face-risks-one-year-after-coronavirus/4842584001/; Leah Douglas, "A year later, food workers still experience waves of Covid-19," Food & Environment Reporting Network (Apr. 6, 2021), https://thefern.org/2021/04/a-year-later-food-workers-still-experience-waves-of-covid-19/.

IV. Stays would be contrary to the public interest.

Finally, the fourth factor—the public interest—weighs against granting the stays sought. In assessing this factor, "foremost consideration must be given to any demonstrable danger to the public health." *Rsrv. Mining Co. v. United States*, 498 F.2d 1073, 1077 (8th Cir. 1974). As discussed above, allowing plants to continue to operate at increased line speeds is such a demonstrable danger.

Additionally, "the public interest in expeditious resolution of litigation" weighs in favor of allowing the Court's final judgment to go effect in its entirety—particularly because the Plants make no argument as to the validity of the line-speed provision. *Boyle v. Am. Auto Serv., Inc.*, 571 F.3d 734, 741 (8th Cir. 2009); *see also Smith v. SEECO, Inc.*, NO. 4:14CV00435 BSM, 2016 WL 10587124, at *1 (E.D. Ark. Aug. 3, 2016) (denying stay pending appeal of denial of intervention, citing public interest in expeditious resolution of case). Although the Waiver Recipients minimize this Court's holding as based on "procedural deficiencies," Dkt. 168 at 3, the Administrative Procedure Act's requirement of reasoned decisionmaking is more than a mere technicality; it is a fundamental principle that "undergirds all of our administrative law." *Home Box Office, Inc. v. FCC*, 567 F.3d 9, 56 (D.C. Cir. 1977). Given the public interest in ensuring that federal agencies "turn square corners in dealing with the people," the public has an interest in seeing violations of this principle remedied—and remedied promptly. *Dep't of Homeland Sec. v. Regents of*

the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

In their motions, the Plants ignore these considerations. The Waiver Recipients do not argue that the public interest affirmatively counsels in favor of a stay, focusing exclusively on their own profit-based, private interests. And while Seaboard asserts that the "public interest lies in a steady supply of safe pork products," it cites no evidence that requiring the Guymon plant to revert to the rates at which it operated until March 2020 would endanger the American food supply. Dkt. 177 at 16. As Professor Taylor explains, despite the COVID-19 pandemic, the pork industry has seen significant growth over the past year, delivering record sales. Taylor Decl. (Ex. 1) ¶¶ 55–58. And U.S. pork exports are at record high levels. *See* U.S. Meat Export Federation, Press Release, *Record-Breaking Performance for U.S. Beef and Pork Exports in March* (May 5, 2021)[21]; U.S. Meat Export. Federation, Press Release, *2020 Pork Exports Shatter Previous Records; December Beef Exports Outstanding* (Feb. 8, 2021).[22] Further, USDA has tools to address any legitimate concerns about the food supply. USDA has made clear that it will utilize those tools to "minimize disruptions to the supply chain," without

[21] https://www.usmef.org/news-statistics/press-releases/record-breaking-performance-for-u-s-beef-and-pork-exports-in-march/.

[22] https://www.usmef.org/news-statistics/press-releases/2020-pork-exports-shatter-previous-records-december-beef-exports-outstanding/.

indicating any stay of this Court's order is necessary to do so. *See* Dkt. 178 (USDA May 26, 2021 Constituent Update). The Court should not conclude otherwise based on Seaboard's unsupported assertion. *Cf. City of Dallas v. FCC*, 165 F.3d 341, 354 (5th Cir. 1999) ("Judicial deference to agency judgments is near its zenith where issues of the public interest are involved."); *Ofosu v. McElroy*, 98 F.3d 694, 702 (2d Cir. 1996) (in determining whether to grant stays, "courts give significant weight to the public interest served by the proper operation of the regulatory scheme").

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"'A stay is not a matter of right, even if irreparable injury might otherwise result.' It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). The circumstances here, including the Plants' lack of diligence, the lack of merit to their arguments, and the potential harm to human health and safety, do not warrant such an exercise of discretion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny the motions to stay.

Dated: June 9, 2021

Respectfully submitted,

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