

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MISSOURI COALITION FOR THE
ENVIRONMENT FOUNDATION,

Plaintiff,

v.

ANDREW R. WHEELER, in his official
capacity as the Administrator of the United
States Environmental Protection Agency,

Defendant.

Civil Action No.
2:19-cv-4215-NKL

SUGGESTION IN SUPPORT OF
ASSOCIATION OF MISSOURI CLEANWATER AGENCIES
ASSOCIATION OF OHIO METROPOLITAN WASTEWATER AGENCIES
CALIFORNIA ASSOCIATION OF SANITATION AGENCIES
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
NORTH CAROLINA WATER QUALITY ASSOCIATION
SOUTH CAROLINA WATER QUALITY ASSOCIATION
VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES
WEST VIRGINIA WATER QUALITY ASSOCIATION
MOTION TO INTERVENE

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This Suggestion is in support of the Motion of the Association of Missouri Cleanwater Agencies (“AMCA”), Association of Ohio Metropolitan Wastewater Agencies (“AOMWA”), California Association of Sanitation Agencies, National Association of Clean Water Agencies (“NACWA”), North Carolina Water Quality Association, South Carolina Water Quality Association, Virginia Association of Municipal Wastewater Agencies, and the West Virginia Municipal Water Quality Association (the “Water Quality Associations” or the “Associations”) to intervene as defendants in this action pursuant to Rule 24(a) of the Rules of Civil Procedure.

I. BACKGROUND

A. Proposed Intervenor Water Quality Associations

AMCA is an association of owners and operators of public water, sewer, and stormwater utilities in Missouri. Its primary purpose is to ensure that federal and Missouri water quality programs are based on sound science and regulatory policy, so that its members can protect public health and the environment in the most cost-effective manner possible. The other state Associations have comparable membership purposes. The vast majority of the Associations’ public agency members hold Clean Water Act (“CWA”) National Pollutant Discharge Elimination System (“NPDES”) permits to discharge wastewater, stormwater, or both. A membership list for each of the Associations is attached hereto. Exhibit 1.

Among the Associations’ priorities is the enhancement of the interests of their members, citizens and ratepayers. Principal among such interests are water quality standards, which establish the basis for certain requirements in NPDES permits and may necessitate the imposition of certain design, construction and operational obligations at wastewater treatment facilities.

AMCA has participated in the Missouri Department of Natural Resources (“DNR”)

development of the nutrients standards. To the extent that proper nutrient standards are adopted, AMCA, its members and the citizens are benefited by high quality surface waters, protection of aquatic life and other beneficial uses. If such standards are ineffective, impose unnecessary obligations, or otherwise do not economically address water quality, they are harmed. The other Associations, their members and citizens are similarly affected because their states and U.S. Environmental Protection Agency (“EPA”) Regional Offices must also develop and approve nutrient standards, and this Court’s ruling on the process employed by Missouri could impact those tasks.

The Associations’ members are managed and staffed by environmental professionals who make engineering and scientific determinations and take actions to address the application of standards and the protection of water quality. The members’ technical expertise in executing NPDES permit requirements allows them to provide input on standards implementation, NPDES permit compliance, and funding which is distinct from DNR’s and EPA’s perspective as regulators. If the Court grants the Motion, the Associations will therefore provide an important perspective that none of the current parties will provide. In particular, the Associations are uniquely situated to outline to the Court the benefits of DNR’s “screening criteria” approach to nutrient standards, including how such an approach provides the flexibility necessary to ensure that the NPDES permit requirements derived from state standards are stringent enough to protect water quality, but not so overly proscriptive as to have unintended impacts.

Unlike most pollutant parameters for which states adopt standards, nutrients do not exhibit a specific, consistent toxicity threshold; and the complex nature of nutrient standards development requires a high level of expertise concerning the impacts of nutrients on local watersheds. The Associations are also uniquely able to address the importance of preserving the

states' CWA role in the development and adoption of water quality standards that protect local waterways.

B. *Plaintiff's Claim for Relief*

1. *Contrary to Assertions, the DNR-Adopted Nutrient Standards Are Proper*

a. *How the Missouri DNR Standards Work*

The standards at issue are simpler than they appear, and more logically achieve the intent of CWA section 303 standards (protection of waters) than the Missouri Coalition for the Environment (“MCE”) would have the Court believe. They include a set of numeric chlorophyll concentrations, above which the waters are deemed to be impaired. These “Impairment Thresholds” are analogous to the traditional toxicity thresholds noted in section I.A for pollutants that display a consistent threshold. But because of the complexities of nutrient biology and toxicity, it is not possible to define such generic, broadly applicable numbers for nutrients without being severely overly inclusive. “There is no clear point [of] algal biomass, measured as chlorophyll-a, where adverse ecological effects would occur universally for all waters.” EPA Region 7 letter to DNR, Decision Document Enclosure (Dec. 14, 2018). Exhibit 2. So, rather than try to define such numbers with an “off ramp” for the many cases in which the numbers will not produce accurate assessments, DNR has chosen (and EPA has approved) a procedure wherein DNR will perform a site-specific assessment of aquatic life and other relevant impacts for waters below the set Impairment Threshold and above the conservatively set “Screening Threshold.” Although this increases the DNR workload, it is necessary to properly assess and protect water quality. At least 22 states have come to this scientific conclusion and taken comparable approaches, with EPA Regional Office approval. *See infra* section I.B.1.b.

Simply put, a single numeric standard such as MCE wants would necessarily be either under-inclusive (missing waters that are impaired), or over-inclusive (classifying high quality waters as impaired). The DNR standards at issue avoid both of these undesirable outcomes. DNR has properly exercised its state CWA authority in evaluating these matters of priorities and resources.

b. The DNR Standards Are Consistent With Law and Similar to Standards Adopted By Many Other States

MCE argues that EPA acted arbitrarily and capriciously in approving DNR's aquatic life water quality standards for nutrients for lakes and asserts that those standards fail to protect other instream beneficial uses besides aquatic life. It requests that this Court set aside EPA's approval of the Missouri standards, thereby negating their use for NPDES permitting and addressing water quality impairments. Such a holding would frustrate the significant progress made by DNR and stakeholders in implementing proper nutrient standards. And because similar progress has been made in other states using similar methodologies, MCE's legally and factually incorrect allegations of legal error threaten to unjustifiably frustrate similar progress nationwide.

The states have developed and adopted water quality standards under the federal CWA since the 1970s. Although the standards process is highly technical, for some pollutant parameters EPA publishes water quality criteria "guidance" for the states to consider under CWA section 304(a), 33 U.S.C. § 1314(a). Some EPA criteria are accepted by some states as identifying appropriate numeric pollutant thresholds, for e.g. with respect to toxicity to aquatic life, and are therefore adopted by the states as their standards. However, much of this low-hanging environmental fruit has been harvested, and many of the more easily-defined criteria have been adopted, leaving states and EPA to now have to develop the more technically difficult criteria. For example, EPA's nutrient (nitrogen and phosphorus) criteria guidance, rather than

being discrete nationwide numbers calculated on a scientific toxicity basis, are geographical region-based “reference criteria” based on ambient concentrations in high quality streams. *See* <https://www.epa.gov/nutrient-policy-data/numeric-nutrient-water-quality-criteria>.

Because of the imprecise nature of EPA’s guidance, states have been reluctant to use EPA’s reference criteria for nutrients. Many have instead used an effects-based approach like the DNR chlorophyll standards. In fact, at least 22 states have adopted one or more standards based on chlorophyll, and at least 21 have adopted lake chlorophyll standards. <https://www.epa.gov/nutrient-policy-data/state-progress-toward-developing-numeric-nutrient-water-quality-criteria#tb3> In doing so, a number of states, like Missouri, have used a “screening criteria” approach akin to the one objected to here. EPA has on a national level concluded that such chlorophyll-based nutrient standards – including those utilizing a “screening criteria” approach – are fully protective of water quality. *Id.*

[C]hlorophyll-a criteria can be used to determine if waters are impaired due to nitrogen and phosphorus pollution. Chlorophyll-a is a response variable that measures biotic productivity and activity . . . Chlorophyll-a concentrations are a direct response to causal variables - total nitrogen and total phosphorus.

Indeed, EPA’s “Guiding Principles” on nutrient criteria support screening criteria, chlorophyll-based standards. EPA-820-F-039 (2013). <https://www.epa.gov/sites/production/files/2013-09/documents/guiding-principles.pdf>

c. The DNR Standards Are Now Helping Achieve Water Quality Goals

Any concerns about the effectiveness of the new DNR standards are undercut by the fact that DNR’s 2020 proposed CWA section 303(d) listing of nutrient impaired waters includes a number of lakes. <https://dnr.mo.gov/env/wpp/waterquality/303d/303d.htm>. Such impairment listings result in the development of Total Maximum Daily Loads and other regulatory actions leading to the correction of the impairment.

Nitrogen and phosphorus are essential nutrients for the development and growth of single-cell plant life that serve as food for lower level aquatic life. Without those nutrients plant life, fish, and other aquatic life will not develop. Moreover, the effect of nutrients on a waterbody is a function of multiple waterbody-specific variables, including geology, land use, climate, water chemistry, hydrology, ecosystem, and lake age. *See EPA, Nutrient Criteria Technical Guidance Manual* at 1-1, 2-2 to 2-8 (EPA 822-B-00-001, Apr. 2000). In light of these site-specific factors, EPA recommends a unique five-step process for developing numeric nutrient standards for lakes: (1) evaluate historical information on the lake and watershed; (2) determine the optimal reference condition of the lake; (3) employ modeling to project nutrient levels in the lake; (4) evaluate all gathered data with a team of experts of various disciplines to develop draft standards; and (5) predict the impact of the draft standards on downstream waters. *Id.* at 7-1-7-2.

Because of these factors, states cannot apply a one-size-fits-all approach to nutrient standards development. Rather, developing scientifically defensible lake nutrient standards is a complex task that can involve years of data collection, modeling, and evaluation. *See generally Fla. Wildlife Fed'n Inc. v. McCarthy*, 2014 U.S. Dist. LEXIS 1343 (N.D. Fla. 2014) (13-years).

DNR and key stakeholders worked for several years to develop numeric standards that account for the unique conditions of waters, where there are no uniform, discrete toxicity levels for nutrients applicable to all Missouri lakes. While MCE is suing for such discrete numbers, DNR properly determined that such numbers do not exist, and EPA agreed that DNR's adopted standards are protective. The standards should stand.

2. *It is Critical That the States' Standards Authority be Preserved*

The CWA provides EPA with substantial authority to oversee state NPDES programs in those cases where states (including those represented by the state Associations) have been

delegated authority to implement the program. However, CWA section 303, 33 U.S.C. § 1313, gives states the clear authority to adopt water quality standards. States are free to depart from EPA's suggested criteria as long as the state's standards are scientifically defensible. 80 Fed. Reg. 51020, 51028-29 (Aug. 21, 2015) (rulemaking). A state's standards may address specific situations and may involve consideration of priorities and resources. *Id.* at 51029.

Importantly, states are in a better position than EPA to know the needs of their waters; and where there is a need for balancing interests and the impacts of standards options, Congress kept that authority in the states. As noted by EPA Region 3 in approving chlorophyll-based nutrient standards for specified Virginia waters, "states have the primary responsibility for reviewing, establishing, and revising water quality standards." EPA Region 3 letter & Enclosure Action Rationale (Jan. 6, 2020) at p.1. Exhibit 3.

These factors are nowhere more at issue than in situations where the science is not exact, such as is the case with nutrient standards. In this case, EPA properly reviewed DNR actions and allowed Missouri to have the last say with respect to the most appropriate way to ensure the protection of its local waterways consistent with well-developed scientific evidence. It is important for CWA implementation and water quality protection that state authority is preserved. However, at times EPA's Regional Offices have been reticent to afford the states the full water quality standards authority that the CWA specifies.

The Associations will explain to the Court why these standards are proper and effective, and why site-specific expertise brought to bear by the states is critical to their development and implementation.

II. THE ASSOCIATIONS ARE ENTITLED TO INTERVENE AS OF RIGHT

Pursuant to Rule of Civil Procedure 24(a), the Water Quality Associations are entitled to intervene as of right in this matter. The Court of Appeals has noted three necessary criteria under Rule 24(a). A timely application must demonstrate that the intervenor “(1) ha[s] a recognized interest in the subject matter . . . that (2) might be impaired by the disposition . . . and that (3) will not be adequately protected by the existing parties.” *North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015) (internal quotations omitted). An intervenor must also show Article III standing. *Id.* at 920. Courts are directed to “construe Rule 24 liberally and resolve any doubts in favor of the proposed intervenors.” *United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 831 (8th Cir. 2010) (internal quotations omitted).

A. *This Motion Is Timely*

Timeliness of a motion is based on a consideration of all the circumstances. *Id.* at 832. The relevant factors to be considered include how far the litigation has progressed and whether intervention at this point of the litigation will prejudice any of the parties to the action. *Id.*

Here, there are no circumstances that would make the Associations’ Motion untimely. The Motion is filed shortly after the February 3 responsive pleading of EPA. At this preliminary stage, no party could be prejudiced by intervention. *See, e.g., Akiachak Native Cmty. V. U.S. Dept. of Interior*, 584 F. Supp. 2d 1, 5–6 (D.D.C. 2008).

B. *The Associations Have Legally Recognized Interests in the Subject Matter of this Litigation that Will Be Impaired by an Unfavorable Outcome*

1. *The Associations and Their Members Are Particularly Affected*

The Water Quality Associations’ members operate publicly owned wastewater treatment plants (“POTWs”) discharging nutrient-containing wastewater. Many AMCA members discharge to lakes that are subject to the DNR standards, and many of the other Associations’ members discharge to lakes that are or will be subject to state nutrient standards. There is no

doubt that the single-number standards MCE seeks would unjustifiably compel AMCA and the other Associations' members to make significant investments in upgrading facilities to reduce their nutrient discharges.

The sources of nutrients in waters are divided into two general categories: (1) nonpoint sources (*e.g.* agricultural runoff, non-municipal stormwater), and (2) point sources from municipal storm sewers, animal feeding operations, industrial operations, and POTWs. Although the first category generally contributes the majority of nutrients to most waters, the standards MCE seeks will not result in reductions from such sources because nonpoint sources are not regulated by the NPDES permitting program, *see e.g.*, 33 U.S.C. § 1342(l) Among the latter category, municipal storm sewers and animal feeding operations, 40 C.F.R. § 122.42(e), do not typically receive numeric limits in their NPDES permits. That leaves a relatively small class of industrial dischargers and the POTWs to bear the primary burden of MCE's unjustifiable standard. Indeed, if MCE's success in this action would not compel nutrient reductions from AMCA and the Associations' members, MCE's claimed injury (nutrient levels in lakes) would not be redressable and MCE would not have standing.

2. *This Case Seeks to Compel a Specific Standard*

The Associations' interests in the EPA-approved nutrient standards here are greater than the prior interests of AMCA and its members that this Court found speculative in the 2016 MCE challenge of EPA action on prior DNR standards. *See Missouri Coalition for the Env't Found. v. McCarthy*, 2016 U.S. Dist. LEXIS 82936. Here MCE makes it clear that its principal complaint is that the nutrient standards do not consist of a single set of numeric instream concentrations for total nitrogen and total phosphorus. Complaint ¶ 5 (not a "numeric criterion for nutrient pollutants"). Its argument focuses on what it calls a "gray zone," in which DNR must evaluate

any impacts and defined “Assessment Endpoints.” Rather than this expert assessment by DNR, MCE wants hard-and-fast TN and TP concentrations, above which water quality is deemed unacceptable and below which it is deemed acceptable. *See Id.* at ¶¶ 74-77. Unlike the prior case where the Court noted that “MCE’s complaint does not ask the Court to enforce any particular nutrient criteria,” *Missouri Coalition for the Env’t* at 9, MCE’s consistent intent is single number TN and TP standards. DNR’s Regulatory Impact Report cost estimates, *infra* section II.B.3, illustrate the severe adverse cost impacts this would entail for the Associations’ members. POTWs would bear the brunt of any costly compliance measures which would include increased capital (treatment plant upgrades), operations and maintenance costs.

Therefore, a holding in favor of MCE will directly impact the Associations’ members. The majority of POTWs in Missouri are not currently designed to remove nutrients because they have not historically been subject to NPDES permit limits for nutrients. However, the CWA requires that NPDES permit limits be imposed whenever necessary to comply with water quality standards, 33 U.S.C. § 1311(b)(1)(C), and the threshold to trigger permit limits is low: a facility’s discharge need only have a “reasonable potential to cause” pollutant levels that exceed the standards. 40 C.F.R. § 122.44(d)(1). Member POTWs discharging to lakes predictably will be found to contribute to any nutrient levels above those specified in the numeric standards, which will trigger permit limits requiring costly upgrades.

3. *The Relief Sought by MCE Would Unjustifiably Require Costly POTW Upgrades*

Under the DNR-approved standards, many AMCA members will already have to upgrade their POTWs. These are major capital projects costing millions or tens of millions of dollars

depending on the size of the facility and the type of upgrades required.¹ These costs would increase significantly if POTWs were required to meet the standards sought by MCE.

Upgrade costs are highly sensitive to the level of nutrient reductions that must be achieved. For example a study by the Utah Water Quality Board estimated the cost of upgrading POTWs if they were required to comply with numeric nutrient limits. CH2Mhill, *Statewide Nutrient Removal Cost Impact Study* (2010).² Because potential limits were unknown, the study looked at a reasonable range of POTW nutrient reduction levels. For 30 POTWs, the capital and additional operation costs ranged from nearly \$3.8 million to over \$45 million per facility. *Id.* at 4-2. As the Utah study demonstrates, nutrient removal upgrade costs can vary by *more than an order of magnitude* based on the level of reductions. Consequently, it is vitally important that nutrient reduction targets be set at levels no more stringent than necessary to protect water quality. Illustrating this point, DNR compared the costs of compliance with its standards at issue here and more stringent standards. The substantial financial impacts of nutrient standards are illustrated for different scenarios. Draft Regulatory Impact Report, 10 CSR 20-7.031 Water Quality Standards (DNR 2017) (“RIR”). <https://dnr.mo.gov/env/wpp/rules/docs/draft-wqs-rir-9-25-17.pdf>. One scenario shows impacts to POTWs in all lake watersheds using the more stringent standards that MCE seeks. Capital costs are estimated to be between approximately \$476 and \$833 million, and annual operations and maintenance costs between \$39 and \$65 million *Id.* Table 3.9 at p. 28.

¹ For example, the District of Columbia’s Blue Plains wastewater treatment plant completed a biological nutrient removal upgrade in 2015 costing nearly \$1 billion. DC Water, Board of Directors Meeting Minutes 8 (July 16, 2015), *available at* <https://www.dwater.com/news/publications/Environmental%20Quality%20and%20Sewerage%20Service%2007-16-15.pdf>.

² *Available at* <http://www.deq.utah.gov/Pollutants/N/nutrients/docs/2010/10Oct/StatewideNutrientRemovalCostImpactStudyRptFINAL.pdf>.

The stringency of the DNR standards will determine which facilities need to be upgraded and to what extent. While MCE’s broad brush and overly stringent approach would make permitting, compliance monitoring and enforcement easier on DNR, for the aforementioned reasons DNR has not taken that route.

4. *All of the Associations Are Impacted*

A large number of states have adopted EPA-approved nutrient standards for lakes and reservoirs based at least in part on chlorophyll, some using elements of a “screening criteria” approach such as the approach of the Missouri DNR nutrient standards. <https://www.epa.gov/nutrient-policy-data/state-progress-toward-developing-numeric-nutrient-water-quality-criteria#tb3>. Similarly, many states—such as Ohio—are in the process of developing nutrient criteria based on the same science-based approach underlying Missouri’s approved nutrient criteria. Any holding that brings into question the legality of standards based on chlorophyll or a screening criteria approach, and any holding that might impair the states’ unique CWA section 303 responsibilities, therefore would have effects on the Associations and their members comparable to the effects noted on AMCA. Accordingly, the Associations and their members will be impacted by the results of this litigation challenging the legality of such approaches, and they have operational and financial interests in ensuring that the standards that form the basis of permitting requirements are tailored and appropriate for the designated uses and physical characteristics of the lakes and reservoirs in question. In *National Parks Conservation Association v. EPA*, 759 F.3d 969 (8th Cir. 2014), the Eighth Circuit stated that if the plaintiff groups obtained the relief they sought, the proposed intervenor “may” be required to install additional pollution control equipment at great expense. *Id.* This case is no different. The Associations and their members have protectable financial interests in the outcome, their

interests will be impaired if the relief sought by MCE is granted; therefore intervention under Rule 24(a) is warranted.

C. *EPA Does Not Adequately Represent the Associations' Interests*

EPA does not adequately represent AMCA's, the other Associations' or regulated NPDES permittees' interests in ensuring that numeric nutrient standards are adopted and maintained in a manner that will result in appropriately tailored permitting requirements which can be achieved in a cost-effective manner. EPA has a general interest in ensuring that the requirements of the CWA are satisfied, 40 C.F.R. § 131.11(a)(1), while the Associations and their members, as the entities that will be directly affected by these and other comparable state standards, have a direct interest in ensuring that nutrient standards are narrowly tailored and no more stringent than necessary. The Associations have moved to intervene to protect their and their members' particularized interests in standards that are tailored to the highly varied designated uses and physical characteristics of lakes across Missouri and the other states, and which are cost-effective. As regulators, EPA does not and cannot adequately represent the regulated NPDES-permittees' interests in this matter. *See Nat'l Parks Conservation Ass'n v. 759 F.3d at 977.*

D. *The Associations Have Standing to Be a Party to this Action*

1. *The Associations' Members Would Have Standing*

In order to have standing, a party must demonstrate that (1) it will suffer an actual or imminent injury; (2) there is a causal connection between the injury and the case; and (3) there is a likelihood that the injury may be redressed by the court. *Sierra Club v. Kimbell*, 623 F.3d 549, 556 (8th Cir. 2010). AMCA and the other Associations have members that satisfy the Article III standing requirements.

As discussed above, nutrient standards other than those adopted by DNR would likely be financially disastrous for AMCA members that operate POTWs discharging to lakes, as such standards may well trigger unnecessary nutrient permit limits and costly facility upgrades. *See South Dakota v. Ubbelohde*, 330 F.3d 1014, 1024–25 (8th Cir. 2003) (holding that a “threatened injury” is sufficient if it is highly likely to result from an adverse decision of the court).

AMCA members’ threatened injuries are directly traceable to this action. DNR would be compelled to base the limitations of NPDES permits on any alternate standards, which would in turn mandate additional POTW nutrient removal upgrades. MCE has long sought for the Court to require EPA to issue nutrient standards for Missouri. Any EPA-issued numeric nutrient standards would trigger nutrient permit limits based on those standards by operation of law. *See* 40 C.F.R. § 122.44(d)(1). Because any such alternate numeric nutrient standards would have a determinative effect on DNR’s actions, the injury to AMCA’s members is fairly traceable to this action. *See Bennett v. Spear*, 520 U.S. 154, 169 (1997). Likewise, science-based nutrient criteria subject to U.S. EPA approval in other states would be called into question were MCE were successful in its bid to overturn U.S. EPA’s approval of Missouri’s nutrient screening approach. This action therefore directly threatens the interests of the Associations.

AMCA and the Associations’ injuries would be redressed by a favorable decision of this Court upholding EPA’s approval of the DNR nutrient standards.

2. *Associations Have Standing to Bring This Action on Behalf of Members*

The Associations may intervene in this matter on behalf of their members because (1) their members would be able to maintain the action on their own behalf; (2) the interests are germane to the Associations’ purposes; and (3) the participation of individual members is not required. *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1022 (8th Cir. 2012). As

noted, the Associations' members could individually intervene. As described, AMCA represents the interests of its members in environmental regulatory matters that impact them. The other Associations represent the interests of their members in environmental regulatory matters impacting their local governments and public utilities. None of AMCA's or the other Associations' members are necessary parties individually because the issues before the Court are generic factual issues and questions of law involving the interpretation of the CWA.

III. IN THE ALTERNATIVE, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION

If the Court determines that the Associations are not entitled to intervention as of right, it should grant permissive intervention. The rule provides "the court may permit anyone to intervene who: . . . (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). "A decision on this question is wholly discretionary, [based on] whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights." *Stenehjem*, 787 F.3d at 923 (internal quotations omitted).

There is no risk of undue delay or prejudice if the Associations are permitted to intervene at this preliminary stage. No other party to this action represents the interests and experience of public utility permittees that are subject to the regulatory action at issue here. *See Nat'l Parks Conservation Ass'n v*, 759 F.3d at 977 (expertise a factor in granting intervention).

IV. CONCLUSION

For the reasons set forth, the Associations respectfully request that the Court enter an Order granting their request to intervene as defendants in this action.

Respectfully submitted,

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Dated: February 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February 2020, I electronically filed the foregoing Suggestion in Support with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorney of record listed below:

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