

NO. 21-2220

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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-Appellees,

v.

United States Department of Agriculture,

Defendant-Appellee.

Quality Pork Processors, Inc., WholeStone Farms Cooperative, Inc., and Clemens Food Group, LLC,

Putative Intervenors-Appellants.

Appeal from the United States District Court
for the District of Minnesota
The Honorable Joan N. Ericksen
No. 19-cv-2660 (JNE/TNL)

APPELLANTS' MOTION FOR STAY PENDING APPEAL

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Appellants Quality Pork Processors, Inc. (“QPP”), WholeStone Farms Cooperative, Inc. (“WholeStone”), and Clemens Food Group, LLC (“Clemens”) respectfully move under Fed. R. App. P. 8(a)(1)(A) for a partial stay of the judgment pending their appeal from the denial of their motion to intervene in this suit.

INTRODUCTION

In less than two weeks, on June 29, the district court’s judgment vacating the line-speed portions of the 2019 New Swine Inspection System regulation (the “Final NSIS Rule”) will take effect. When that happens, the current parties to this litigation—the union Plaintiffs and the defendant United States Department of Agriculture (“USDA”)—contend that all pork processing plants nationwide must revert to a previous, inspector-based limit on how many hogs can be processed per hour. It is undisputed, however, that Appellants’ plants were not subject to that limit. Instead, they were validly exempted from it for two decades *before* the Final NSIS Rule extended that option to other plants. *See Am. Fed’n of Gov’t Emps. v. Veneman*, 284 F.3d 125, 127 (D.C. Cir. 2002).

After the district court’s order, Appellants moved to intervene to clarify that, under settled administrative law principles, vacating the

Final NSIS Rule automatically reinstates the prior regulations, pending new rulemaking (avoiding a lawless period). For Appellants, that means reinstating their prior, valid exemption.

The district court never addressed the merits of Appellants' position because it denied their motion to intervene. It never doubted Appellants' need to be heard—they have direct interests at stake, those interests may be impaired, and the existing parties are not adequately representing them. Instead, it ruled that Appellants should have tried to intervene when the Government (before the change in presidential administration) was still protecting their interests, and that by waiting until their interests diverged, they lost their chance to intervene. That ruling is incorrect under *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), among other cases.

After being denied leave to intervene, Appellants promptly appealed to this Court. Under Fed. R. App. P. 8, Appellants asked the district court to stay its judgment *just as to them* pending this appeal. They demonstrated that, if the line speeds they have lawfully used for two decades are reduced, not only will they suffer irreparable harm with no legal recourse, but the nation's consumer pork supply will be materially constrained. The Government "t[ook] no position" on this

stay request. (Dkt. 187.)

Yesterday, the district court denied Appellants' motion to stay. (Dkt. 189, attached as Ex. A.) It did not doubt Appellants' showing of irreparable harm. (*Id.* at 3.) Instead, it held that Appellants had not shown they would likely prevail on appeal on intervention, because of the timeliness ruling. Out of deference to this Court's jurisdiction, it expressly did not consider either *McDonald* or circuit authority under which Appellants' motion was timely. (*Id.* at 2 n.1.) It also reasoned that the public interest did not support delaying entry of judgment. (*Id.* at 3.) But Appellants did not ask to delay entry of judgment; they asked for judgment to be stayed as to them pending appeal after its entry. The public interest favors *that* relief.

Appellants are on the verge of having to upend their decades-long operations on the basis of vacatur of the new NSIS regulation, even though their operations were undisputedly allowed by the prior, lawful regulations—with no court having addressed that issue. This should not happen. To prevent irreparable harm to Appellants and to preserve this Court's ability to rule on intervention and afford effective relief, the Court should stay the district court's judgment as to Appellants pending appeal.

BACKGROUND

At issue are federal regulations promulgated under the Federal Meat Inspection Act that govern how many hogs can be inspected per hour at pork processing plants.

The traditional inspection approach “assigned federal inspectors to processing lines where they conducted ‘organoleptic’ inspections of carcasses, relying on sight, touch and smell in examining the head, viscera, and exterior of the carcasses to detect signs of adulteration, such as tumors, parasites and other diseases.” *Am. Fed’n of Gov’t Emps.*, 284 F.3d at 127. The speed of the evisceration part of the processing line was limited by how many animals the inspectors could review per hour.¹

More than twenty years ago, however, the USDA’s Food Safety and Inspection Service (“FSIS”) commenced a regulatory pilot program to study a new, more efficient inspection model. The pilot program was called “HIMP” (“HACCP-Based Inspection Models Project”). *See* 83 Fed. Reg. 4780. HACCP (“Hazard Analysis Critical Control Points”) is “a systematic and preventative system developed in the 1960s by NASA

¹ *See* 9 CFR § 310.1(b), Table 4 (specifying “maximum inspection rates” up to 1,106 head per hour depending on number of inspectors).

and a group of food safety specialists.”² Under the HACCP-based approach, the task of “separat[ing] normal from abnormal carcasses and parts” was given to industry personnel, freeing the federal inspectors to perform “oversight and verification”: “Oversight inspectors observed establishment personnel as they processed carcasses and removed unacceptable products from the food supply; verification inspectors randomly sampled carcasses to determine if the plant was complying with relevant performance standards.” *Am. Fed’n of Gov’t Emps.*, 284 F.3d at 127.

Under HIMP, federal inspection became more efficient, and evisceration line-speed limits, imposed to accommodate inspectors, became obsolete. FSIS therefore waived the line-speed limits at HIMP-participating plants. *See* 83 Fed. Reg. 4780-81; 9 C.F.R. §303.1(h) (FSIS’s authority to grant waivers); 9 C.F.R. §310.1(b)(3)(ii) (line-speed limits subject to waivers).

Nationwide, five processing plants participated in the HIMP pilot

² <https://www.foodsafety.ca/blog/everything-you-need-know-about-haccp>. HACCP is “a process control system that identifies where hazards might occur in the food production process” and devises measures “to prevent the hazards from occurring.” <http://haccpalliance.org/alliance/haccpqa.html>.

beginning in 1999, including the Hatfield plant (Clemens), the Fremont plant (WholeStone), and the Austin plant (QPP).³ Later, another Clemens plant (Coldwater) was added to the pilot under the related SIP program.⁴ (Appellants were referred to below as the “Pilot Participants,” and are here too.)

In 2019, the USDA gave *all* pork processing plants the ability to opt into the HIMP inspection model, through a regulation adopting the New Swine Inspection System. *See* Modernization of Swine Slaughter Inspection, 83 Fed. Reg. 4780 (Feb. 1, 2018) (proposed rulemaking); 84 Fed. Reg. 52,300 (Oct. 1, 2019) (Final NSIS Rule).

The district court recognized that the rulemaking and litigation record showed no adverse effect on worker safety at Appellants’ plants under HIMP. (Dkt. 125 at 17.) Indeed, worker safety *improved* under the HIMP protocols. (*Id.*; Dkt. 171-1 at ¶ 7; Dkt 171-2 at ¶ 7; Dkt. 171-4 at ¶¶ 7-8.) As the court further recognized, the Final NSIS Rule

³ *See* <https://www.fsis.usda.gov/inspection/compliance-guidance/haacp/haccp-based-inspection-models-project/list-himp-participating>.

⁴ *See* https://www.fsis.usda.gov/sites/default/files/media_file/2021-04/waiver_table.pdf (detailing SIP program/regulations, and listing HIMP and SIP waivers).

involved no “change” in operations for the six plants—including Appellants’—that “had previously operated under HIMP or received line speed waivers.” (Dkt. 125 at 13.)

Plaintiffs argued, however, that USDA failed to properly consider safety issues in making the HIMP model available to all processors. On March 31, 2021, the district court ruled that the portion of the Final NSIS Rule lifting evisceration line-speed limits was not validly adopted as a rulemaking matter. (Dkt. 125 at 60.) While noting that “FSIS’s authority to eliminate line speed limits is undisputed,” the court stated that FSIS had not sufficiently considered safety issues. (Dkt. 125 at 62, 57.)

The district court vacated the line-speed portion of the Final NSIS Rule and remanded it for further consideration by USDA, but stayed entry of judgment for 90 days (until June 29, 2021) 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.” (Dkt. 125 at 68.)

Promptly afterwards, the Pilot Participants moved to intervene. They sought clarification that the automatic effect of vacating the new regulation was to reinstate the old, validly promulgated regulations, or otherwise to seek a stay or appeal. As they noted, a “basic tenet[] of

administrative law” is that “the effect of invalidating an agency rule is to reinstate the rules previously in force” rather than leave a lawless void. *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987), *aff’d*, 488 U.S. 204 (1988). Thus, when “the District Court vacated the [at-issue] rule, it necessarily reinstated the [pre-existing] rule.” *Id.* (cleaned up). The Pilot Participants cited case after case applying this rule,⁵ and USDA never disputed it.

The USDA also never disputed that, for the Pilot Participants, the regulation preceding the Final Rule was the HIMP program, under which they had operated at the higher speeds for 20 years. (*See* Dkt. 147 at ECF Page 5 ¶ 11; Dkt. 150 at ECF Pages 14, 20, 24; Dkt. 157 at 3 (USDA agreeing).)

The USDA also agreed that the Final Rule displaced the prior line-speed regulations, saying that “the Court noted that these pre-

⁵ *See, e.g., CropLife Am. v. EPA*, 329 F.3d 876, 884-85 (D.C. Cir. 2003) (upon vacatur, “[t]he consequence is that the agency’s previous practice ... is reinstated and remains in effect unless and until it is replaced by a lawfully promulgated regulation”); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987) (same); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam) (same); *Am. Great Lakes Ports Ass’n v. Zukunft*, 301 F. Supp. 3d 99, 103 (D.D.C. 2018) (same), *aff’d sub nom. Am. Great Lakes Ports Ass’n v. Schultz*, 962 F.3d 510 (D.C. Cir. 2020)); *Sierra Club v. U.S.E.P.A.*, 850 F. Supp. 2d 300, 303 (D.D.C. 2012) (same).

existing waivers ended when the relevant establishments transitioned to [NSIS] on March 30, 2020.” (Dkt. 157 at 4; *see* Dkt. 125 at 68.)⁶

Under settled law, vacating the Final Rule’s line-speed provisions therefore “necessarily reinstated the [pre-existing line-speed] rule.” *Georgetown Univ. Hosp.*, 821 F.2d at 757.

On May 20, 2021, the district court denied leave to intervene. It did not allow a reply brief, hold a hearing, or address the merits of the motion to clarify. It denied intervention only because it thought Appellants’ motion to intervene was untimely. (Dkt. 163 at 2, 3-6.)

On June 1, 2021, Appellants filed their notice of appeal. (Dkt. 164.) *See U.S. ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 931 n.2 (2009) (“denials of [motions to intervene] are, of course, appealable”).

The Pilot Participants also asked the district court to stay its judgment as to them pending appeal (Dkt. 165; *see* Fed. R. App. P. 8(a)(1)(A) (“A party must ordinarily move first in the district court for ...

⁶ The USDA’s only argument against reinstating the prior line-speed regulations was that the district court, while vacating the Final Rule’s line-speed provisions, supposedly left “in place the provisions of the Final Rule that ended the Pilot Participants’ line-speed waivers.” (Dkt. 157 at 4.) This has no support in the court’s opinion, which preserved *non*-line-speed portions of the Final Rule (e.g., regarding inspections), but expressly vacated its line-speed provisions. (Dkt. 125 at 68.)

a stay of the judgment or order of a district court pending appeal.”.)

The district court denied the motion for stay on June 16, 2021.

(Ex. A.) The Pilot Participants filed this motion the next day.

ARGUMENT

This Court should stay the district court’s judgment as to the Pilot Participants pending their appeal. A stay is the only way to avoid the irreparable harm and injustice of them being forced to alter their decades-long operations before any court addresses whether the prior, valid HIMP program—under which their operations were allowed for two decades—is automatically reinstated pending new rulemaking.

I. The Pilot Participants satisfy the standards for a stay pending appeal.

Both the rules of appellate procedure and this Court’s own inherent authority allow it to grant a stay pending appeal. *See* Fed. R. App. P. 8; *Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 237 n.6 (8th Cir. 1979). A stay is more readily granted than an injunction, since a stay simply “allows an appellate court to act responsibly” when its duty to “bring considered judgment to bear” cannot otherwise “be done quickly enough to afford relief to the party aggrieved by the order under review.” *Nken v. Holder*, 556 U.S. 418, 427

(2009).

The context of this case is a putative intervenor seeking a stay of a merits judgment, so that if it wins the right to intervene on appeal, the court will be able to award it effective relief. Courts have often granted a stay precisely in this context. *See, e.g., Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa.*, 701 F.3d 938, 947, 958 (3d Cir. 2012); *Abbott Labs. v. Diamedix Corp.*, No. 94-1345, 1994 WL 782247, at *2 (Fed. Cir. July 26, 1994); *United States v. AT&T*, 642 F.2d 1285, 1294-95 (D.C. Cir. 1980).

A court considering a stay pending appeal weighs four factors:

“(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”

Brady v. NFL, 640 F.3d 785, 789 (8th Cir. 2011) (per curiam; granting stay; quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). These factors are considered in the aggregate, and on balance. *Id.* “Clear evidence of irreparable injury should result in a less stringent requirement of certainty of victory; greater certainty of victory should result in a less stringent requirement of proof of irreparable injury.” *Id.*

Here, the balance of factors strongly supports a stay.

A. The Pilot Participants have a substantial case for intervening as a matter of right, so the likelihood-of-success factor favors a stay.

First, the Pilot Participants are likely to succeed on this appeal because they meet all the criteria for intervening as of right. No party disputes that Appellants' interests may be impaired by this litigation. Likewise, no party to this litigation is representing Appellants' interests. The district court denied the motion to intervene for being untimely, but this is contrary to precedent, given the Pilot Participants' filing immediately after it became apparent that the USDA would no longer adequately represent their interests.

Likelihood of success is often “[t]he most important factor” in determining whether to grant a stay. *Brady*, 640 F.3d at 789. This factor does not require the Court to conclude that the district court's decision was incorrect. Even in the preliminary injunction context, this Court has “rejected” the view “that the [movant must] prove a greater than fifty per cent likelihood that he will prevail on the merits.” *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). Even more so in the context of a stay pending appeal, it is enough that appellants raise “serious and substantial legal issues.” *Ark.*

Peace Ctr. v. Ark. Dep't of Pollution Control, 992 F.2d 145, 147 (8th Cir. 1993) (granting stay); *see also James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 545 (8th Cir. 1982).

Here, the Pilot Participants have a substantial case for intervening as of right under Fed. R. Civ. P. 24(a). As this Court has ruled, motions to intervene must be “liberally” construed “in favor of the proposed intervenor, accepting all material allegations as true,” and “with all doubts resolved in favor of the proposed intervenor.” *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1092 (8th Cir. 2011) (intervention denied only for untimeliness); *S. Dakota ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 785 (8th Cir. 2003); *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999) (reversing denial of intervention).

A motion to intervene as of right “should be granted where three conditions are met: 1) the proposed intervenor has an interest in the subject matter of the action; 2) the interest may be impaired; and 3) the interest is not adequately represented by an existing party to the action.” *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992). In addition, the motion must be timely. *Id.*

The district court’s denial of intervention is generally reviewed de

novo. *Sierra Club*, 960 F.2d at 85. A finding of untimeliness is reviewed for abuse of discretion, but if it is based on a legal error, that is an abuse. *Smith v. SEECO, Inc.*, 922 F.3d 398, 405 (8th Cir. 2019);

1. The motion to intervene was timely.

The district court denied the Pilot Participants' motion as untimely, but this Court is likely to reverse that ruling because the district court failed to consider two critical factors.

First, the USDA has not indicated that it will appeal, and the Supreme Court has held that even “post-**judgment** intervention for the purpose of appeal” is permissible, and a motion to intervene for that purpose is timely if it is filed “within the time period in which the named [party] could have taken an appeal.” *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977) (emphasis added).

Here, the Pilot Participants moved to intervene **before** judgment was entered. The Government's time to appeal extends until August 28, 2021, sixty days after the district court's judgment will become effective on June 29, 2021. *See* Fed. R. App. P. 4(a)(1)(B). The Pilot Participants moved to intervene well in advance of that deadline. They could not wait until the end of the Government's appeal period to intervene, because their harm will start immediately on June 29 when the line-

speed limits are imposed. Thus, their motion to intervene was neither too early nor too late. *See Ross v. Marshall*, 426 F.3d 745, 755 (5th Cir. 2005).

Second, the district court failed to credit the “relationship between the adequacy of representation and the timeliness of an intervention motion” in a case involving the Government. *United States v. AT&T*, 642 F.2d at 1294. When a district court ruling reveals that the Government’s and a private party’s interests diverge, a motion to intervene “at this point [is] entirely timely.” *Id.* (granting intervenor’s motion for a stay pending appeal, and reversing denial of intervention). Here, while the interests of the Pilot Participants and the USDA “were possibly aligned prior to the District Court’s summary judgment decision,” that decision revealed a divergence in interests (as explained below), making a motion to intervene timely. *Benjamin ex rel. Yock*, 701 F.3d at 958 (granting a stay pending appeal and reversing denial of motion to intervene).

This Court has previously recognized that agency policies can shift. *See Nat’l Parks Conservation Assoc. v. U.S.E.P.A.*, 759 F.3d 969, 977 (8th Cir. 2014). And “a change in presidential administration raises the possibility of divergence of interest or a shift during litigation.”

Kane Cty., Utah v. United States, 928 F.3d 877, 895 (10th Cir. 2019) (cleaned up). See also *Franconia Minerals (US) LLC v. United States*, 319 F.R.D. 261, 269 (D. Minn. 2017) (same). The Pilot Participants responded promptly after the first apparent shift by the USDA.

The district court cited *Cuyahoga Valley R. Co. v. Tracy*, 6 F.3d 389 (6th Cir. 1993), in its discussion of the reasons for delay. But there, the State of Ohio had not changed positions, and the private plaintiff sought to intervene **four months after** final judgment had been entered. *Id.* at 394-96.

The district court also cited *Minn. Milk Producers Ass'n v. Glickman*, 153 F.3d 632, 646-57 (8th Cir. 1998) in support of denying intervention. (Ex. A at 2.) But that case also did not involve a shift in the Government's position. Indeed, the Government not only continued to defend the regulation, but sought **and was granted a stay pending appeal**. *Id.* at 636. Here, in contrast, the USDA has neither sought a stay nor indicated it will appeal at all. The Pilot Participants were forced to move to intervene when USDA stopped supporting their right to continue operating with line-speed waivers.

The denial of intervention as untimely is therefore likely to be reversed because it rested on an erroneous legal premise.

2. The Pilot Participants have protectable interests that may be impaired by this litigation.

The next two criteria for intervention as of right are undisputed.

First, the Pilot Participants have a clear interest in preserving their ability to continue operating their plants without inspector-based line-speed limits, as they have done for decades. (Dkt. 150 at ECF Pages 11-16, 18-20.) This is unquestionably “an interest in the subject matter of the action.” *Nat’l Parks Conservation Assoc.* 759 F.3d at 976. USDA never disputed this point below. (Dkt. 157.) Plaintiffs argued only that, if the Pilot Participants won the clarification they sought, they would be uninjured (Dkt. 156 at 21 n.2)—implicitly conceding the Pilot Participants’ interests, and expressly conceding those interests are judicially protectable.

The impairment criterion is also undisputed. As this Court stresses, this criterion requires only that the movant’s interests “may” be impaired, not that they “will” be. *Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger*, 60 F.3d 1304, 1307-08 (8th Cir. 1995) (reversing denial of intervention). Here, the Pilot Participants’ interest “may” be impaired absent intervention because they will be unable to obtain a ruling that vacating the Final NSIS Rule reinstates their regulatory

status quo.⁷

The Pilot Participants' protectable interests that may be impaired fundamentally give them a right to be heard.

3. The USDA is no longer adequately representing the Pilot Participants' interests.

The Pilot Participants also meet the final criterion for intervening because no existing party adequately represents their interests.

Plaintiffs certainly are not representing them, and while USDA previously advanced their interests by defending the Final NSIS Rule, it expressly advocated *against* their requested clarification after summary judgment was granted and the administration changed.

USDA emphasized below how it had adequately represented the Pilot Participants' interests *earlier* in this litigation. (Dkt. 157 at 3.) But it carefully avoided making any commitment to continue to represent those interests. First, it never said it would appeal the district court's order. Second, although Plaintiffs and USDA both agree that USDA has the power to grant new line-speed waivers (Dkt. 156 at

⁷ In opposing intervention, USDA argued that no cited authority allowed a party to intervene to seek clarification of a ruling. *But see Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, No. CIV. 13-2262 JRT/LIB, 2015 WL 4136160, at *1 (D. Minn. July 8, 2015) (granting motion to intervene as defendant to seek clarification).

2, 19-20; Dkt. 157 at 4), it has not said it will grant them. Instead, on May 26, 2021, it issued an alert stating that “establishments operating under NSIS should prepare to revert to a maximum line speed of 1,106 head per hour on June 30, 2021.”⁸

Third, while agreeing with the Pilot Participants on what the pre-NSIS regulatory status quo was, the USDA disagreed that the status quo would be reinstated. “To the extent that the Pilot Participants believe [that] partial vacatur of the Final Rule automatically ‘restores’ their line-speed waivers,” USDA argued, “they are mistaken.” (*Id.*)

USDA thus has made it clear that it will not adequately represent the Pilot Participants’ interests in this litigation. Those interests are not “subsumed” within USDA’s interests because they diverge from them. *See S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003). Consequently, the Pilot Participants are entitled to intervene. *Id.*; *see Mausolf v. Babbitt*, 85 F.3d 1295, 1303-04 (8th Cir. 1996) (environmental group, whose interests diverged from government-represented public interests, entitled to intervene); *Chiglo v. City of Preston*, 104 F.3d 185,

⁸ <https://www.fsis.usda.gov/news-events/news-press-releases/special-alert-constituent-update-may-26-2021>. *See Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (judicial notice of government website).

188 (8th Cir. 1997) (“If the citizen stands to gain or lose from the litigation in a way different from the public at large, the [government] would not be expected to represent him.”).

Finally, both Plaintiffs and USDA have argued in passing that the Pilot Participants’ interests in the litigation are represented by amici. (Dkt. 156 at 7-8; Dkt. 157 at 5.) Under Rule 24, however, only representation by a “party” to the litigation can be sufficient. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (amici do not adequately protect a proposed intervenor’s rights because “amici cannot introduce issues not raised by the parties” and cannot raise substantive legal challenges) (collecting cases).⁹ Earlier, when the USDA was defending the Final NSIS Rule’s line-speed waiver, it was sufficient for the Pilot Participants to support an amicus filing. But now that the Rule is vacated and USDA is not protecting their interests, they need to participate as parties.

In sum, since the Pilot Participants are likely to be awarded the right to intervene, the first factor of likelihood of success strongly favors

⁹ *See also Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007); *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002).

a stay.

B. A stay is necessary to avert irreparable harm.

The second factor—“whether the applicant will be irreparably injured absent a stay”—also supports granting a stay.

“The key word in this consideration is irreparable.” *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (cleaned up). Unless “adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation,” the harm is not “reparable.” *Id.* Here, the Pilot Participants will never be compensated for the harm they will suffer without a stay, because no damages action is available against the Government.

Irreparable harm justifying a stay exists when the ruling at issue would have deep financial impact on a business. *See Reserve Mining Co. v. United States*, 498 F.2d 1073, 1077 (8th Cir. 1974) (ruling’s “enormous economic impact” on a business favored granting stay pending appeal); *Jake’s Ltd., Inc. v. City of Coates*, 169 F. Supp. 2d 1014, 1018 (D. Minn. 2001) (granting a stay pending appeal), *aff’d on other grounds*, 284 F.3d 884 (8th Cir. 2002). *Cf. Humane Soc’y of U.S. v. Cavel Int’l, Inc.*, No. 07-5120, 2007 WL 4723381, at *1 (D.C. Cir. May 1, 2007) (granting stay pending appeal to intervenor slaughterhouse

whose business is threatened by invalidation of USDA rule).

Here, harm is “both certain and great” and “actual and not theoretical,” as required. *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986). Absent a stay, the Pilot Participants will be subject to line-speed limits that have not applied to them for decades, with a cascade of detrimental effects. The Pilot Participants themselves will suffer serious financial loss because of their deep investment in their facilities, designed for a higher flow of animals. *See* Dkt. 171-1 at ¶¶ 11-17; Dkt. 171-2 at ¶¶ 11-18; Dkt. 171-4 at ¶¶ 10-13. The farmer producers who sell hogs to them will also be injured. They have already bred and begun raising hogs based on contractual expectations of how many could be processed. If the Pilot Participants are forced to invoke *force majeure* because they cannot process the contracted quantity, the farmer producers will not be able to sell their excess stock at the same price, or possibly at all, and some may go out of business. *See* Dkt. 171-2 at ¶¶ 22-27; Dkt. 171-3; Dkt. 171-4 at ¶¶ 12-19. Some Pilot Participants will also be unable to satisfy obligations to contracted customers and have to invoke *force majeure*, leaving the customers’ expectation of meat supply unmet and unsatisfiable elsewhere in the market. *See* Dkt. 171-2 at ¶¶ 20-21. The Pilot Participants may not even be able to elect the

traditional inspection model instead of NSIS, because it requires a more inspectors, who FSIS advises may not be available. *See* Dkt. 171-1 at ¶ 17; Dkt. 171-2 at ¶ 17; Dkt. 171-4 at ¶ 11.

These harms will be irreparable, because of the lack of recourse in damages against the Government. The only effective remedy is a stay to prevent the harm from occurring while this Court considers the merits.

C. A stay limited to the Pilot Participants will not substantially harm other parties.

The third factor—“whether issuance of the stay will substantially injure the other parties interested in the proceeding”—also favors a stay because other interested parties face no substantial harm.

The stay sought here is narrowly limited to Appellants’ four processing plants. When a regulatory ruling affects some regulated entities differently than others, it is appropriate to stay the regulatory ruling only as to them. *See, e.g., NAACP v. Trump*, 321 F. Supp. 3d 143, 145-46 (D.D.C. 2018) (granting partial stay pending appeal); *Western Watersheds Project v. Zinke*, No. 1:18-CV-00187-REB, 2020 WL 2462817, at *3, 5 (D. Idaho May 12, 2020) (same). Here, the Pilot Participants are affected differently because they operated for decades under the judicially-validated HIMP/SIP pilot programs that preceded

the Final NSIS Rule. *See Am. Fed'n of Gov't Emps.*, 284 F.3d at 130.

Moreover, as the district court recognized, the safety concerns Plaintiffs voiced about non-pilot plants transitioning into NSIS did not apply to the Pilot Participants, whose own past HIMP safety records were established. (Dkt. 125 at 17.) The short declaration from a safety professor submitted by Plaintiffs (Dkt. 186-1) was generic, resting on no specific experience with the Pilot Participants. Thus, granting a stay limited to the Pilot Participants cannot inflict substantial harm on others.

D. A stay will not harm the public interest.

The final factor—“where the public interest lies”—does not counsel against a stay. When the party seeking a stay will be injured without it, and others will not be harmed, there is no public interest in denying a stay. *Cf. Reserve Mining Co.*, 498 F.2d at 1077-84.

The district court’s concern that intervention “would frustrate USDA’s ability to manage a national food safety system” (Dkt. 163 at 6-7) was misplaced. For decades, USDA simultaneously managed some plants under HIMP and others under traditional inspection procedures. A stay will simply preserve that status quo. Moreover, USDA can choose to modify the HIMP program or adopt new regulations in the

future, provided it complies with the APA. *See, e.g., Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1910-15 (2020) (vacating rescission of prior agency program as arbitrary and capricious).

E. The balance of factors requires a stay.

The balance of factors weighs decisively in favor of a stay as to the Pilot Participants. The Pilot Participants are likely to succeed on appeal in winning the right to intervene: their direct interests may be impaired, USDA no longer adequately represents those interests, and the district court erred as a matter of law regarding timeliness. The Pilot Participants will also suffer irreparable harm without a stay, with no recourse against the Government, and a stay will not substantially harm other parties or the public.

CONCLUSION

Before the district court's judgment vacating the line-speed portions of the Final NSIS Rule takes effect on June 29, 2021, this Court should issue an order staying that judgment, limited to the Pilot Participants, pending this Court's resolution of the Pilot Participants' appeal from the order denying them leave to intervene.

Dated: June 17, 2021

Respectfully submitted,

s/Aaron D. Van Oort

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the exempted parts of the document, this document contains 5197 words, including headings, footnotes, and quotations.

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s/Aaron D. Van Oort
Aaron D. Van Oort

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

<p>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,</p> <p style="text-align: center;">Plaintiffs-Appellees,</p> <p style="text-align: center;">v.</p> <p>United States Department of Agriculture,</p> <p style="text-align: center;">Defendant-Appellee.</p> <p>Quality Pork Processors, Inc.; WholeStone Farms Cooperative, Inc.; and Clemens Food Group, LLC,</p> <p style="text-align: center;">Putative Intervenors-Appellants.</p>	<p>Case No. 21-2220</p>
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**INDEX OF EXHIBITS TO APPELLANTS' MOTION
FOR STAY PENDING APPEAL**

Appellants' Motion for Stay Pending Appeal, filed by Quality Pork Processors, Inc., WholeStone Farms Cooperative, Inc., and Clemens Food Group, LLC, is supported by the following exhibit:

- *Exhibit A* – Order Denying Motion to Stay (Dkt. 189).

Dated: June 17, 2021

Respectfully submitted,

s/Aaron D. Van Oort

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EXHIBIT A

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.

Case No. 19-cv-2660 (JNE/TNL)
ORDER

United States Department of Agriculture,

Defendant.

On March 31, 2021, the Court granted summary judgment to Plaintiffs and vacated part of a challenged USDA action that eliminated line speed limits in certain pork plants. The Court stayed entry of judgment for 90 days. Four pork plant operators moved to intervene. Seaboard Foods moved to intervene to extend the stay. Clemens Food Group, Quality Pork Processors, and WholeStone Farms Cooperative (“Pilot Participants”) moved to intervene to seek clarification from the Court. The Court denied both motions as untimely. Seaboard and the Pilot Participants appealed. Now, they seek a stay of the Court’s March 31 order, pending appeal of the intervention order.

“[A]s part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.”

Scripps-Howard Radio v. FCC, [316 U.S. 4, 9–10](#) (1942); *see Nken v. Holder*, [556 U.S. 418, 426](#) (2009); [Fed. R. App. P. 8\(a\)](#). The Eighth Circuit considers four factors when

determining whether to issue a stay pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). “The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required.” *Id.*

The first factor, likelihood of success on the merits, may be satisfied by demonstrating “serious and substantial legal issues” on appeal. *Ark. Peace Ctr. v. Ark. Dep’t of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993). Neither Seaboard nor the Pilot Participants have made a strong showing of a likelihood of success on appeal or raised difficult legal issues. Based on Seaboard’s and the Pilot Participants’ arguments on their original intervention motions,¹ they are unlikely to succeed on the merits of their appeals for the reasons already stated by this Court. *See Minn. Milk Producers Ass’n v. Glickman*, 153 F.3d 632, 646–47 (8th Cir. 1998) (upholding denial of intervention on timeliness grounds where regulated parties sought to intervene after entry of judgment).

The second and third factors weigh the relative harms “likely to arise from this court’s grant or denial of the motion for a stay.” *See Brady v. NFL*, 640 F.3d 785, 792

¹ Mindful that it lacks jurisdiction over issues on appeal, the Court will not address new arguments related to timeliness. *See State ex rel. Nixon v. Coeur D’Alene Tribe*, 164 F.3d 1102, 1106 (8th Cir. 1999) (“[T]he district court may not reexamine or supplement the order being appealed.”).

(8th Cir. 2011). Seaboard and the Pilot Participants claim they will suffer economic and reputational harms without a stay. Plaintiffs dispute the extent of those harms and claim that their members will suffer injuries. The Court’s summary judgment order left these policy considerations for USDA to weigh because USDA “is in a better position than the Court to assess the disruptive effect” of a vacatur. *Chamber of Com. v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006). Accordingly, the Court will assume without deciding that Seaboard and the Pilot Participants will suffer irreparable injury absent a stay.

Fourth, the public interest is not served by staying entry of judgment because it would simply delay any appeal. USDA may choose to pursue its policy prerogatives by appealing the summary judgment order or by other means. The longer the Court delays entry of judgment, the longer USDA and other parties must wait to pursue that option.

Balancing the four factors, and giving the most weight to the first, the Court finds that a stay pending appeal is not warranted for either Seaboard or the Pilot Participants.

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Seaboard Foods, LLC’s Motion to Stay Pending Appeal [ECF No. 175] is DENIED.
2. Quality Pork Processors, Inc., WholeStone Farms Cooperative, Inc., and Clemens Food Group, LLC’s Motion to Stay Pending Appeal [ECF No. 165] is DENIED.

Dated: June 16, 2021

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge