IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

AMERICAN FARM BUREAU FEDERATION, *et al.*, *Plaintiffs*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Defendants*.	No. 3:15-cv-165

PLAINTIFFS' MOTION FOR A NATIONWIDE PRELIMINARY INJUNCTION

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Pursuant to Civil Rule 65 and the Court's oral order of February 6, 2018, Plaintiffs the American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Leading Builders of America, Matagorda County Farm Bureau, National Alliance of Forest Owners, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, Public Lands Council, and Texas Farm Bureau[1] respectfully move for a nationwide preliminary injunction prohibiting the Defendants from enforcing, implementing, applying, or otherwise giving effect to the so-called WOTUS Rule, 80 Fed. Reg. 37,054 (June 29, 2015).

INTRODUCTION & SUMMARY OF ARGUMENT

This case presents a challenge to the WOTUS Rule, a sprawling regulation of sweeping importance that defines the extent of the Environmental Protection Agency's and Army Corps of Engineers' (the "Agencies") regulatory jurisdiction under the Clean Water Act (CWA). Although it was first promulgated in July 2015, the WOTUS Rule has been stayed virtually since its inception because two courts—the Sixth Circuit and the U.S. District Court for the District of North Dakota—held that the Rule was more likely than not illegal and that allowing it to come into force and effect would cause irreparable injury to regulated entities throughout the country. As a result, the status quo ante has prevailed for nearly the past three years.

[1] Since filing their initial complaint, Plaintiffs have been joined in their coalition by the American Forest & Paper Association; the National Stone, Sand, and Gravel Association; and the U.S. Poultry & Egg Association. These three organizations joined Plaintiffs in the petitions for review in the Sixth Circuit and intend to join this litigation as plaintiffs in an amended complaint at the appropriate time.

Plaintiffs represent virtually every element of the national economy in every corner of the United States. They and their members have been planning and laboring under the reasonable expectation that the status quo would continue to govern, at least until the ultimate fate of the WOTUS Rule is decided.

Although two courts already have declared that the WOTUS Rule is probably unlawful, full merits litigation has yet to progress beyond initial briefing in the U.S. Court of Appeals for the Sixth Circuit. That is because—as this Court knows well—the parties initially disagreed over whether the challenges belonged in the district courts (as the challengers argued) or in the courts of appeals (as the Agencies argued). The merits litigation ground to halt after the Supreme Court agreed to resolve the dispute over jurisdiction. Two weeks ago, the Supreme Court issued a decision confirming that the challenges belong in *this* Court and in the other district courts around the country where challenges have been brought. As a consequence, if the WOTUS Rule were to go into effect, its legality would have to be litigated from the ground up in the district courts and would not be resolved for many months, and probably longer than a year.

Meanwhile, there has been a change in administration, and the Agencies have stated their intent to repeal and replace the WOTUS Rule. To accomplish this end, the Agencies have commenced a complex three-step process. It begins with a regulation that amends the WOTUS Rule by adding an "applicability date" commencing in two years (the "Applicability Date Rule"). *See* Appendix Tab 1-C. From there, the Agencies intend to rescind the WOTUS Rule in a stand-alone regulation that would codify the status quo ante (the "Repeal Rule"). Finally, the process will conclude with a replacement rule that will supplant the status quo ante with a new regulation altogether.

Yet every step in this three-stage process is certain to the be the subject of multiple, fiercely-fought legal challenges. Already, coalitions of States and environmental groups have file suit against the Applicability Date Rule, and other environmental groups have indicated an intent to do the same. *See* Appendix Tabs 1-D through 1-H. Because the Supreme Court has now made clear that these challenges belong in the district courts, it is very likely that these forthcoming lawsuits will proceed in multiple jurisdictions, over multiple years, possibly producing conflicting results. Every district court decision will be appealed, and it is not difficult to envision one or more of these challenges reaching the Supreme Court once again.

The upshot of these exceptional circumstances is a paralyzing uncertainty among both regulators and regulated under the Clean Water Act. To sustain their businesses (and by extension the national economy), Plaintiffs and their members must be able to plan their operations often years in advance of beginning projects and putting employees to work. Such planning requires, first and foremost, stable and predictable legal rules—and that much-needed stability and predictability will undeniably be absent if the definition of "waters of the United States" is constantly changing with every court decision on every challenge to every intervening rulemaking. It is no exaggeration to say that billions of dollars and many thousands of jobs hang in the balance. *See* Appendix Tabs 2-4.

Against this backdrop, a nationwide preliminary injunction is imperative. The risk that the WOTUS Rule might come in and out of effect repeatedly over the coming years as new regulations are promulgated and new lawsuits are brought represents a manifest irreparable harm not only to the States and their sovereign interests, but also to private landowners and business owners, who will both be deprived of the predictable regulatory environment that is essential to their ongoing operations and also face heavy civil and

potentially *criminal* penalties if they are caught on the wrong side of the Agencies' ever-changing regulatory jurisdiction. And this harm is not within the control of the Agencies; the CWA allows, and environmental and neighborhood groups commonly bring, citizen enforcement actions. This harm will have ripple effects large and small on rural farming communities and densely-populated cities alike. Only an immediate, nationwide preliminary injunction is capable of restoring much-needed certainty and national uniformity to the Agencies' implementation of the Clean Water Act. The motion accordingly should be granted.

NATURE AND STAGE OF THE PROCEEDINGS

1. On June 29, 2015, the Agencies published the WOTUS Rule, which purports to "clarify" the definition of "waters of the United States" within the meaning of the Clean Water Act. Because the Agencies' regulatory jurisdiction extends to "waters of the United States" and no more, the WOTUS Rule establishes the scope of the Agencies' regulatory jurisdiction under the CWA. On July 2, 2015, Plaintiffs filed a complaint for declaratory and injunctive relief in this Court, alleging that the Agencies' promulgation of the WOTUS Rule violated the Administrative Procedure Act; exceeded their authority under Article I, Section 8 of the Constitution; and offended the Due Process Clause of the Fifth Amendment. *See generally* Dkt. 1. In parallel with the States in No. 3:15-cv-162, Plaintiffs sought a declaration that the WOTUS Rule is unlawful and an injunction against its implementation or application.

2. As the two cases initially came to this Court, they presented the threshold question of whether jurisdiction fell to this Court under 28 U.S.C. § 1331 or instead to the courts of appeals under 33 U.S.C. § 1369(b). Section 1369(b) establishes a special scheme of judicial review for certain agency decisions and rules promulgated under the

CWA. In that section, Congress conferred original jurisdiction on the courts of appeals to review challenges to seven categories of final agency actions—including, the Agencies argued, the WOTUS Rule. At the same time, the Administrative Procedure Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. Thus, when judicial review of a final agency action under the Clean Water Act is *not* available in the courts of appeals under Section 1369(b), the APA provides a cause of action in district court under 28 U.S.C. § 1331.

In light of the Agencies' assertion that review of the WOTUS Rule belonged in the courts of appeals, numerous parties (including Plaintiffs) either filed protective petitions for review in various courts of appeal under Section 1369(b) or intervened in the petitions. Those petitions, which were consolidated in the U.S. Court of Appeals for the Sixth Circuit, initiated original actions that were entirely separate from the two lawsuits pending before this Court.

3. Shortly after the petitions were consolidated, several petitioners moved for, and the Sixth Circuit granted, a nationwide stay of the Rule pending the court's consideration of the merits. *See In re EPA & Dept. of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). The court held, in particular, that "petitioners have demonstrated a substantial possibility of success on the merits of their claims," describing the Rule's promulgation as "facially suspect." *Id*. at 807. Indeed, "it is far from clear that the new Rule's distance limitations are harmonious" with even the most generous reading of the prevailing Supreme Court precedents. *Id*.

Acknowledging "the pervasive nationwide impact of the [WOTUS] Rule on state and federal regulation of the nation's waters" and the risk of injury "visited nationwide on governmental bodies, state and federal, as well as private parties," the Court concluded that "the sheer breadth of the ripple effects caused by the [WOTUS] Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being." *Id.* at 806, 808. The Sixth Circuit thus enjoined the Agencies from enforcing the WOTUS Rule nationwide. *Id.* at 808-809.

4. Even before the Sixth Circuit entered its stay of the WOTUS Rule, a number of States challenging the WOTUS Rule in the U.S. District Court for the District of North Dakota moved for, and that court granted, a preliminary injunction. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). Like the Sixth Circuit, the North Dakota court held that the moving States were "likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the [WOTUS] Rule." *Id.* at 1055. Indeed, that court found that the WOTUS Rule suffered from numerous "fatal defect[s]," including that is inconsistent with any plausible reading of Supreme Court precedent; it is arbitrary and capricious; the Agencies failed to seek additional public comment after making major, unforeseeable changes to the proposed version of the WOTUS Rule; and the Agencies failed to prepare an environmental impact statement as required by the National Environmental Policy Act (NEPA). *See id.* at 1055-1058.

The North Dakota court further concluded that the moving States had "demonstrated that they will face irreparable harm in the absence of a preliminary injunction." *Id.* at 1059. It held, in particular, that the WOTUS Rule would "irreparably diminish the States' power over their waters" and inflict "irreparable harm in the form of unrecoverable monetary harm." *Id.* Finding that those harms outweighed any asserted injury to the

public interest, the Court granted the preliminary injunction, but only within the geographic limits of Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. *Id*. at 1051 n.1, 1059-1060.

5. After the Sixth Circuit stayed the WOTUS Rule nationwide, National Association of Manufacturers—which is a plaintiff here but did not join the petitions for review in the courts of appeals—intervened in the petitions for review and moved to dismiss each for lack of jurisdiction. The Sixth Circuit denied the motions to dismiss, holding in a splintered decision that jurisdiction belongs in the court of appeals, not the district courts. *See In re EPA*, 817 F.3d 261 (6th Cir. 2016).

The National Association of Manufacturers then filed a petition for a writ of certiorari. The Supreme Court granted the petition and, on January 22, 2018, issued a decision reversing the Sixth Circuit. The Supreme Court held, in short, that "any challenges to the [WOTUS] Rule … must be filed in federal district courts." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 2018 WL 491526, at *4 (U.S. Jan. 22, 2018).

We expect the Supreme Court to issue a certified judgment returning the petitions for review to the Sixth Circuit on or before February 23, 2018. Once the case is returned to the Sixth Circuit near the end of next month, the Sixth Circuit will immediately dismiss the pending petitions for review, dissolving its nationwide stay of the WOTUS Rule.

6. While the litigation over jurisdiction was ongoing, the Agencies published a notice of proposed rulemaking in the *Federal Register*, proposing to repeal and replace the WOTUS Rule in a "comprehensive, two-step process" process. *See* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg.

34,899 (July 27, 2017). The first step of this comprehensive process—what we refer to as the Proposed Rescind Rule—would "rescind" the 2015 WOTUS Rule, restoring the status quo ante by regulation. 82 Fed. Reg. 34,899. "In a second step," according to the Agencies, the government "will conduct a substantive reevaluation of the definition of 'waters of the United States.'" *Id.*

The Proposed Repeal Rule was published on July 27, 2017, and the comment period ended two months later, on September 27, 2017. The Agencies received thousands of comments, many of which were lengthy and substantive. Perhaps for that reason, the Agencies have not yet issued a final Rescind Rule.

In light of the delay in issuing a final Rescind Rule, and anticipating that the Supreme Court would reverse the Sixth Circuit's jurisdictional holding and that the Sixth Circuit's stay would soon dissolve, the Agencies set out "to maintain the *status quo*" while they continued to consider comments on the Proposed Rescind Rule and work on the replacement rule. *See* Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542 (Nov. 22, 2017). The Agencies thus proposed to amend the WOTUS Rule with "an applicability date" to commence in two years, to provide "continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the public while the agencies continue to work to consider possible revisions." *Id.*

A notice of proposed rulemaking for the Applicability Date Rule was published on November 22, 2017 (*see id.*), and the final rule was signed by the EPA Administrator on January 31, 2017 and published in the *Federal Register* on February 6, 2018. *See* Appendix Tab 1-C. A consortium of States and environmental groups have already filed suit challenging the Applicability Date Rule in the Southern District of New York (*see*

Appendix Tab 1-G) and the District of South Carolina (Appendix Tab 1-H). Other environmental groups have vowed to do the same. *See* Appendix Tabs 1-D through 1-F.

ISSUE & STANDARD OF DECISION

The issue to be decided is whether the Court should enter a nationwide preliminary injunction of the WOTUS Rule. "To be entitled to a preliminary injunction, the applicants must show (1) a substantial likelihood that they will prevail on the merits, (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted, (3) their substantial injury outweighs the threatened harm to the party whom they seek to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012) (quoting *Bluefield Water Ass'n Inc. v. City of Starkville*, 577 F.3d 250, 252-253 (5th Cir. 2009)).

"None of these factors possess a fixed quantitative value" and instead "are applied on a case-by-case, sliding-scale basis." *Knights of Ku Klux Klan v. E. Baton Rouge Par. Sch. Bd.*, 578 F.2d 1122, 1125 (5th Cir. 1978). Thus, "[w]here one or more of the factors is very strongly established, this will ordinarily be seen as compensating for a weaker showing as to another or others." *Id.*; *see also PIU Mgmt., LLC v. Inflatable Zone Inc.*, 2010 WL 681914, at *7 (S.D. Tex. Feb. 25, 2010) ("[T]he showing of irreparable harm is subject to a sliding scale analysis.").

ARGUMENT

Each of the four preliminary injunction factors is readily satisfied in this case.

A. As two courts already have held, the WOTUS Rule is likely unlawful

As the Sixth Circuit and the U.S. District Court for North Dakota both have found, there is a strong likelihood that both Plaintiffs here and the States in No. 3:15-cv-162 will

prevail on the merits of their challenges. Plaintiffs' Sixth Circuit brief was filed on November 1, 2016, and details the myriad fatal flaws with the WOTUS Rule. We have appended the brief for the Court's reference. *See* Appendix Tab 1-A.[2] Briefly described, the Rule's flaws are as follows.

1. The Agencies violated basic requirements of the APA

The Agencies violated the basic requirements of the Administrative Procedure Act in at least four distinct respects.

First, the Agencies failed to reopen the comment period after making substantial, unanticipated changes to the WOTUS Rule. Under the APA, the public must be able to anticipate the requirements the final rule may impose based upon the content of the notice of proposed rulemaking. But the *proposed* WOTUS Rule included no hard-and-fast distance limits (100, 1,500 and 4,000 feet) or reference points for measuring those limits (100-year floodplains and ordinary high watermarks), which are central to the implementation of the final WOTUS Rule. The regulated public had no opportunity to comment on those arbitrary standards. *See* Appendix Tab 1-A, at 26-28.

Second, the Agencies denied the public the opportunity to comment on the scientific report that was the key scientific underpinning of the WOTUS Rule. Courts have explained that an agency commits a serious procedural error when it fails to make the evidentiary basis for a regulation available for public comment, as the Agencies did

[2] The Intervenors in No. 3:15-cv-162 complain that our reference to the Sixth Circuit briefing violates this Court's rule on page limitations. *See* No. 162, Dkt. 81. Not so. We have attached our briefing before the Sixth Circuit because it more fully develops our merits arguments, which (in light of the WOTUS Rule's convolutions) are complex. It is, of course, up to the Court whether it would like to review that briefing. It also is up to the Intervenors to determine whether they would like to attach their own Sixth Circuit brief to their opposition papers. Either way, it is telling that the Intervenors would prefer that the Court not fully understand the parties' merits arguments.

here. Only a draft of the key scientific report was furnished during the comment period, and the draft report differed substantially from the final report. If the final report had been made available during the comment period, commenters—including Plaintiffs—would have expressed serious concerns about its contents. In denying them that opportunity, the Agencies violated the APA. *See* Appendix Tab 1-A, at 28-31.

Third, the Agencies declined to respond to many important comments. Though an agency need not respond to every comment, it must adequately respond to significant comments that cast doubt on the reasonableness of an agency position. Here, major substantive concerns went unanswered. In fact, not only did the Agencies refrain from answering serious comments, they publicly denigrated the comments as "silly" and "ludicrous" during the comment period, demonstrating unwillingness to consider critical comments. *See* Appendix Tab 1-A, at 31-34.

Fourth, the Agencies, using social media, engaged in unlawful propaganda and lobbying campaigns to drum up superficial support for the WOTUS Rule and to defeat legislation intended to prevent it from coming into effect. This conduct, too, demonstrates the Agencies' disregard for the notice-and-comment process, which was not an open-minded invitation for comments from the public, but an advocacy campaign by Agencies with a predetermined agenda. The Court need not take our word for it: The nonpartisan Government Accountability Office concluded that the Agencies' advocacy campaigns violated anti-propaganda and anti-lobbying laws. These violations are anathema to the APA. *See* Appendix Tab 1-A, at 17-18, 34-38.

Finally, the Agencies failed to comply with the Regulatory Flexibility Act (RFA) and NEPA. Under the RFA, the Agencies were required to justify the impact of the WOTUS Rule on small businesses. Basing their RFA analysis on a comparison of the

WOTUS Rule against the regulatory landscape as it existed in 1986, the Agencies arbitrarily certified that the WOTUS Rule would have no significant economic impact upon a substantial number of small entities. That conclusion ignores the facts. Likewise, the Agencies failed to undertake the required environmental impact analysis under NEPA. *See* Appendix Tab 1-A, at 38-43.

2. The WOTUS Rule is arbitrary and capricious

The WOTUS Rule is inconsistent with the statutory language, Supreme Court precedent, and the scientific evidence that was before the Agencies. In its most recent CWA cases, the Supreme Court could not have been more clear that the word "navigable" continues to have meaning under the CWA; and yet the WOTUS Rule asserts jurisdiction over countless isolated waters and desiccated land features that bear no resemblance to "navigable" waters. *See* Appendix Tab 1-A, at 50-56.

Many specific elements of the WOTUS Rule are also out of step with precedent and the evidence. The definition of "tributary" covers millions of previously unregulated features. The Rule assumes that such features have a "significant nexus" with the traditional navigable waters to which they contribute some flow. But that simply is not true—many largely dry ditches or gullies that qualify as tributaries under the WOTUS Rule (including those that fill only occasionally, after heavy rain) have no meaningful effect on far-distant navigable waters. *See* Appendix Tab 1-A, at 56-64.

The Rule's definition of "adjacent" is likewise inconsistent with precedent and the evidence. It depends on made-up limits like the 100-year floodplain and 1,500-foot distances from an "ordinary high water mark" without any explanation of how or why the Agencies selected those thresholds. The same is true of the "significant nexus" test, the

application of which depends on arbitrary distances and tenuous connections. *See* Appendix Tab 1-A, at 64-77.

3. The WOTUS Rule violates the Constitution in two distinct ways

First, the WOTUS Rule is unconstitutionally vague. The vagueness doctrine addresses two due process concerns: ensuring fair notice to citizens, and defining standards that prevent those enforcing the law from acting in an arbitrary or discriminatory way. The WOTUS Rule implicates both concerns. The definition of "ordinary high water mark," for example, turns on factors like "changes in the character of soil" and "presence of litter and debris" and allows bureaucrats to rely on whatever "other . . . means" they deem "appropriate" in deciding when a high water mark is present and where it lies, including by relying solely on historical data. Similarly, the definition of a "significant nexus" turns on nebulous considerations like "more than speculative or insubstantial," "in the region," and water "integrity." The definitions give the public no meaningful guidance as to when covered features are present on their property, and they virtually guarantee arbitrary enforcement. *See* Appendix Tab 1-A, at 77-88.

Second, the WOTUS Rule violates the Commerce Clause and federalism principles. The Supreme Court has read the Commerce Clause to mean, as relevant here, that Congress may regulate "the channels of interstate commerce" and "those activities that substantially affect interstate commerce." Yet the WOTUS Rule sweeps in countless features that are not channels of, and have no meaningful effect on, interstate commerce. Under the canon of constitutional avoidance, these concerns are at minimum a basis for construing the statutory text narrowly. *See* Appendix Tab 1-A, at 88-93.

* * *

It is against this backdrop that both the U.S. Court of Appeals for the Sixth Circuit and the U.S. District Court for the District of North Dakota concluded that the challenges to the WOTUS Rule are likely to succeed. According to the Sixth Circuit, the challengers "have demonstrated a substantial possibility of success on the merits of their claims," because the Rule's promulgation was "facially suspect." *In re EPA*, 803 F. 3d at 807. And according to the District of North Dakota, the challengers are "likely to succeed on the merits of their claim[s]" because the WOTUS Rule suffers from numerous "fatal defect[s]," including those that we have just described. *North Dakota*, 127 F. Supp. 3d at 1055-1058. No court anywhere has disagreed.

B. The threat of irreparable harm calls for maintenance of the status quo notwithstanding the Applicability Date Rule

1. As we discussed in the Introduction, the threat of irreparable harm here is equally clear. The Agencies have proposed a complicated, multi-stage regulatory process for repealing and replacing the WOTUS Rule, beginning with the Applicability Date Rule. Various States and environmental groups have vowed to challenge this proposed regulatory process at every step, and two groups of States and environmental associations have already filed suit to enjoin the Applicability Date Rule. *See* Appendix Tabs 1-D through 1-J. Although we are confident that the Agencies are pursuing sound and lawful objectives, there is no telling whether the district courts in which the challengers bring their forthcoming lawsuits will agree.

The upshot is an even more unclear and uncertain regulatory environment than Plaintiffs faced in 2015. The original WOTUS Rule may come into effect if the Applicability Date Rule is enjoined or invalidated; but it then may fall out of effect when the

Rescind Rule is finalized; but it may then come back into effect if the Rescind Rule is enjoined or invalidated; but it may then may fall out of effect when the Replacement Rule is finalized; but it then may come back into effect if the Replacement Rule is enjoined or invalidated. This threat of a constantly flip-flopping regulatory environment with respect to a regulation of such fundamental importance is simply untenable.

Consider some concrete examples. The question of whether ephemeral drainage ditches are regulated as "waters of the United States" under the WOTUS Rule has significant implications for the ability of mining and energy companies to utilize their property to extract resources that are essential to the American economy. *See* Appendix Tab 1-B at 6a-8a, 46a-49a. Mining and oil companies will be limited in their ability to engage in important new extraction projects if the projects' legality is in doubt, and in certain cases, may be outright prevented from proceeding with projects. This will come at the cost not just of dollars, but of jobs. *See, e.g., id.* at 143a-149a; Appendix Tabs 2-4. Several declarants in the Sixth Circuit litigation provided concrete examples of just these concerns. *E.g.*, Appendix Tab 1-B at 86a-104a, 138a-142a.

The question of how drainage ditches, too, are treated has enormous implications for agricultural interests. In light of the current uncertainty surrounding the WOTUS Rule, farmers and ranchers cannot tell which parts of their lands can be put to use, and which must be kept free of farming equipment, dirt and gravel, seed, and fertilizer. *See id.* at 9a-12a, 50a-53a; Appendix Tab 4. Because of the enormous risk associated with liability under the CWA, many of them will either (1) leave their lands fallow for fear of incurring liability under vague regulations that may or may not be in effect at any given point in time over the coming years (Appendix Tab 1-B at 9a-12a, 50a-53a 74a-79a,

122a-124a, 127a-129a), or otherwise (2) seek unnecessary permits at a cost of tens of thousands of dollars (*id*. at 16a-19a, 82a-83a, 173a-175a; Appendix Tab 4).

Foresters face similarly untenable choices. Appendix Tab 1-B at 31a-32a, 56a-57a, 84a-85a. Indeed, these concerns cut across all aspects of nearly every industry in the country, including not only energy and agriculture, but also infrastructure and transportation development, and homebuilding and construction. *Id*. at 61a-69a, 105a-106a, 135a-137a, 204a-208a.

2. Courts have found injuries far less serious than these sufficient to satisfy the irreparable injury prong of the preliminary injunction test. To be sure, "[t]he irreparable harm must be more than an unfounded fear, but [it] need not be an existing injury—a strong threat of injury is sufficient." *TransPerfect Translations, Inc. v. Leslie*, 594 F. Supp. 2d 742, 757 (S.D. Tex. 2009) (citing *United States v. Emerson*, 270 F.3d 203 (5th Cir.2001)). Applying just that standard, the Fifth Circuit has recently issued stays against EPA regulations in circumstances like these. In *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016), for example, it found a serious threat of irreparable harm where the challenged regulation threatened "tremendous costs" and other "threatened harms—including unemployment and the permanent closure of plants." *Id*. at 433-434. Reasoning that such harms "are great in magnitude" and would not be compensable with mere awards of money damages, the Fifth Circuit held that the harm would be irreparable and stayed implementation of the regulation in that case. *Id*.

The same outcome is warranted here, especially given the strength of Plaintiffs and the State's arguments on the merits of their claims. Because the likelihood of success on the merits is "very strongly established," the burden for establishing irreparable harm

is lessened. *E. Baton Rouge*, 578 F.2d at 1125; *accord PIU Mgmt.*, 2010 WL 681914, at *7. This makes Plaintiffs' showing on this score beyond reasonable dispute.

C. The balance of harms and public interest favors an injunction

On the other side of the ledger, there is precious little counseling against a nation-wide preliminary injunction. As the Sixth Circuit explained, there is no "indication that the integrity of the nation's waters will suffer imminent injury if the new scheme is not immediately implemented and enforced." *In re EPA*, 803 F.3d at 808. A preliminary injunction would lead to no regulatory gap: The pre-2015 regulatory regime, which had been in place for at least a decade before the WOTUS Rule and also has governed since the WOTUS Rule was stayed by the Sixth Circuit, would continue in place. "What is of greater concern . . . in balancing the harms, is the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters." *Id.*

Although the Sixth Circuit's reasoning is alone enough to satisfy the third and fourth prongs of the PI test, it also bears emphasis that "[t]he Government 'cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns,'" as would an injunction here. *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)). *Accord La Union del Pueblo Entero v. FEMA*, 2009 WL 1346030, at *10 (S.D. Tex. May 13, 2009) ("This Court shall not find that requiring FEMA to comply with its congressional mandate would disserve the public interest."), *vacated on other grounds*, 608 F.3d 217 (5th Cir. 2010).

Thus, here again the strength of the challengers' merits arguments tip the scales in their favor: The Agencies cannot claim that enjoining an unlawful regulation will harm them or the general public interest. On the contrary, it would be "enforcing the APA strictly [that would better] serve the public interest." *Texas Food Indus. Ass'n v. U.S. Dep't of Agriculture*, 842 F. Supp. 254, 261 (W.D. Tex. 1993); *accord N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) ("The public interest is served when administrative agencies comply with their obligations under the APA.").

Because "[t]he general public has an interest in seeing that laws are administered reasonably, in accordance with law and not arbitrarily" (*Michigan Citizens for an Indep. Press v. Thornburgh*, 1988 WL 90388, at *7 (D.D.C. 1988)), these considerations favor a preliminary injunction in this case.

D. The injunction should be nationwide in scope

This Court has the authority to enter, and *should* enter, a nationwide injunction. Plaintiffs have members throughout the country, and only a nationwide injunction can spare them from the arresting regulatory uncertainty we have just described.

1. A three-State injunction covering Texas, Louisiana, and Mississippi will not protect the interests of Plaintiffs, whose members operate both within and outside those States. And the Court's authority to enter a nationwide injunction against an important regulation that itself applies nationwide is beyond cavil. That much is demonstrated by the Supreme Court's recent decision in *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (per curiam). In that case, district courts in Hawaii and Maryland preliminarily enjoined the enforcement of Executive Order No. 13780, popularly known as the "international travel ban," and the Ninth and Fourth Circuits affirmed the injunctions. On the United States' application for a stay of the injunctions

pending review on certiorari, the Supreme Court modified the substance of the injunctions, but not their nationwide scope. Three Justices dissented from the proposition that the injunction could reach beyond the "[plaintiffs] themselves" to apply nationally (*id*. at 2090), but the majority affirmed the injunction's broad scope so that it would benefit all of those who are "similarly situated," not just the particular plaintiffs. *Id*. at 2087.

Indeed, this Court itself has entered a nationwide injunction against federal action even where it found that only a single State among 26 State plaintiffs had standing. *See Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd* by equally divided court, 136 S. Ct. 2271 (2016).

The approaches in these two cases made sense: National regulations should not apply differently depending on the happenstance of location. As the Supreme Court has said, "the scope of injunctive relief is dictated by the extent of the violation established," not by "geographical extent" of the parties. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, the violation inherent in the WOTUS Rule, as well as the irreparable harm shown to Plaintiffs, is undeniably national in scope. Plaintiffs have members and affiliates in every State, and the additional declarations filed here by certain *amici* establish that they and their members will be irreparably harmed if no nationwide injunction is entered. *See* Appendix Tabs 2-4. The terms of the injunction should match the harm.

District courts also enjoin federal action nationwide when plaintiffs show they are likely to prevail on claims that an agency violated the procedural requirements of the APA. See Am. Lands All. v. Norton, 2004 WL 3246687 (D.D.C. June 2, 2004) (enjoining U.S. Fish & Wildlife Service from violating APA notice and comment requirements). Here, the Plaintiffs have made the necessary preliminary showing that the Agencies violated APA procedures in a number of ways when they promulgated the

WOTUS Rule and for this reason too are entitled to a nationwide injunction. See Appendix Tab 1-A, at 10-14, 24-43.

2. As the Supreme Court emphasized in *International Refugee Assistance Project*, moreover, "[c]rafting a preliminary injunction is an exercise in discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues." 137 S. Ct. at 2087. Here, the equities and law point clearly to a nationwide injunction that will prevent enforcement of the WOTUS Rule across the country while the regulatory process and associated litigation continues to play out. It would be singularly inequitable if the defective WOTUS Rule sprang back to life in the midst of the Agencies' efforts to delay, withdraw, and rewrite it—and after it had been stayed nationwide by the Sixth Circuit virtually since its inception.

If anything, an injunction limited to the Texas's, Louisiana's, and Mississippi's geographic boundaries would deepen the inequities. That is because the North Dakota court's injunction remains in place, and as a consequence the WOTUS Rule will not come into force and effect under any circumstance within the boundaries of Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. Thus, if the Court enters an injunction within Texas, Louisiana, and Mississippi only, and the WOTUS Rule comes into effect in fits and spurts over the next few years, Plaintiffs' members will be required to comply with an unlawful regulation in a patchwork of States, but not all.

This kind of piecemeal approach to a national regulation of such immense importance would be manifestly inequitable, especially for national organizations and businesses that must operate in multiple States at once.

It was for precisely this reason that the Sixth Circuit issued a nationwide stay to begin with, and not just within the geographic limits of the challenging States—it was to "restore uniformity of regulation" where fragmented enforcement of the Rule would cause "uncertainty" and "confusion." *In re EPA*, 803 F.3d at 808. With the Sixth Circuit's stay about to dissolve, this Court should enter a nationwide preliminary injunction to maintain the status quo and guarantee that the WOTUS Rule cannot be enforced while its ultimate fate plays out in multiple regulatory and judicial proceedings.

CONCLUSION

The Court should enter an order preliminarily enjoining the Agencies from enforcing the WOTUS Rule on a nationwide basis.

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Respectfully Submitted,

/s/ *Timothy S. Bishop*

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will cause copies of each to be served upon all counsel of record.

/s/ *Michael B. Kimberly*

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with counsel for the Defendants and Intervenors via email, and both oppose the motion.

/s/ *Michael B. Kimberly*