IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, AMERICAN FARM BUREAU FEDERATION, *et al.*, *Intervenor-Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

BUSINESS INTERVENOR-PLAINTIFFS' MOTION TO AMEND THE COURT'S PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

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INTRODUCTION AND SUMMARY OF THE NATURE OF THE CASE

The Business Intervenor-Plaintiffs respectfully move this Court for an order expanding its preliminary injunction (Dkt. 174) to apply nationwide, or alternatively to the 22 additional States and the District of Columbia not currently covered by this Court's or any other court's preliminary injunction against enforcement of the WOTUS Rule. Those States, in addition to the District of Columbia, are California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Washington.

As the Court is aware, the WOTUS Rule defines the EPA's and Army Corps of Engineers' regulatory jurisdiction under the Clean Water Act (CWA). A subsequent regulation (the Applicability Date Rule) amended the WOTUS Rule with an applicability date of February 6, 2020. The Applicability Date Rule prevented the WOTUS Rule from taking effect while the agencies were working to repeal it. But the Applicability Date Rule has now been invalidated by the District of South Carolina. *See South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018). As a consequence, the WOTUS Rule came into effect for the first time in nearly three years in a patchwork of 26 States across the country. After the entry of additional orders in North Dakota and Texas, that number has now been reduced to 22 States and the District of Columbia.

This is a deeply troubling state of affairs. A rule this fundamental to the CWA's regulatory scheme should not apply in a patchwork manner. Nor, indeed, should it apply *at all*: As this Court and three other federal courts now have concluded, the WOTUS Rule is almost certainly unlawful. *See Georgia v. Pruitt*, 2018 WL 2766877, at *9 (S.D. Ga. 2018) (likelihood of success on the merits "overwhelmingly" favors preliminary relief); *see also In re EPA*, 803 F.3d 804, 806, 808 (6th Cir. 2015); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015); Order, *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165, Dkt. 87 (S.D. Tex. Sept. 12, 2018) (Ex. A). And as the district court

in Texas recently added, the public interest weighs in favor of enjoining its enforcement "to an overwhelming degree." Ex. A at 2.

Recognizing that all of the elements of the preliminary injunction framework are manifestly satisfied, this Court has already entered an order enjoining the WOTUS Rule within the boundaries of the 11 plaintiff States. But circumstances have changed since this Court's entry of relief on June 8, 2018, warranting reconsideration and an expansion of the initial relief entered.

First, the Applicability Date Rule has been enjoined on a nationwide basis. Accordingly, the WOTUS Rule has come into force and effect in what can only be called a jumbled manner. Regional preliminary injunctions are preventing the WOTUS Rule's enforcement in 28 States, while the Rule is operative in the remaining 22 States and the District of Columbia.

Second, the agencies themselves have now expressed their own doubt concerning the Rule's legality, and they have clarified their intent to permanently repeal it. *See Definition of "Waters of the United States"—Recodification of Preexisting Rule*, 83 Fed. Reg. 32,227, 32,248 (July 12, 2018) ("Supplemental Notice").

Third, the Business Intervenors are now parties to this litigation. *See* Dkt. 187. The Business Intervenors are trade groups with members in every State, and they represent vast segments of the national economy, including the nation's construction, real estate, mining, manufacturing, forestry, agriculture, and energy industries. The ability of their members to plan projects and organize their affairs is highly sensitive to the scope of the agencies' regulatory jurisdiction under the Clean Water Act, and their operations are being directly and irreparably disrupted by the WOTUS Rule and its patchwork application. That is especially true with respect to those companies that operate on a nationwide or multistate basis. Those members, in particular, find themselves straddling two conflicting legal regimes and unable to plan for their multistate operations. The injuries they are incurring as a result are significant and irremediable.

The same harms that this Court's original preliminary injunction was designed to forestall are now coming to pass for the Business Intervenors and their members in the District of Columbia and the 22 States not presently covered by a regional preliminary injunction. In light of these changed circumstances, an expansion of the preliminary injunction to apply nationwide, or at least to cover those additional jurisdictions, is warranted.

BACKGROUND

A. The WOTUS Rule and the ensuing litigation

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. *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015). 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.

Shortly after its promulgation, the WOTUS Rule was subject to dozens of legal attacks from all sides. Challenges to the WOTUS Rule were consolidated before the U.S. Court of Appeals for the Sixth Circuit. Several petitioners moved for, and the Sixth Circuit granted, a nationwide stay of the WOTUS Rule pending that court's consideration of the merits. *See In re EPA*, 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," and described 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 new 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 Rule's definitional changes counsels strongly in favor of maintaining the status

quo for the time being." *In re EPA*, 803 F.3d at 806, 808. The Sixth Circuit thus enjoined the Agencies from enforcing the WOTUS Rule nationwide. *Id.* at 808-09.

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 1055-58.

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." *North Dakota*, 127 F. Supp. 3d 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, Iowa, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. *Id*. at 1051 n.1, 1059-60. *See also* Order, *North Dakota v. EPA*, 3:15-cv-00059, Dkt. 250 (D.N.D. Sept. 18, 2018) (Ex. B).

After the Sixth Circuit stayed the WOTUS Rule nationwide, the National Association of Manufacturers—which is one of the Business Intervenor-Plaintiffs 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 that jurisdiction belongs in the court of appeals, not the district courts. *See In re Dep't of Def. & EPA Final Rule*, 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.*, 138 S. Ct. 617, 624 (2018). Soon thereafter, the Sixth Circuit dismissed the pending petitions for review and dissolved its nationwide stay of the WOTUS Rule.

While the litigation was ongoing, the agencies published a proposal to repeal and replace the WOTUS Rule in a "comprehensive, two-step process." *See Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34,899, 34,899 (July 27, 2017). The first step of this process—what we refer to as the " Repeal Rule"—would "rescind" the 2015 WOTUS Rule, restoring the status quo ante. *Id.* "In a second step," the government "will conduct a substantive re-evaluation of the definition of 'waters of the United States.'" *Id*.

The time necessary to finalize the Repeal Rule has been lengthy, and the rule has not yet been promulgated. In light of the delay, and anticipating that the Supreme Court would reverse the Sixth Circuit's jurisdictional holding and that the Sixth Circuit's stay would dissolve, the agencies set out "to maintain the status quo" while they continued to consider comments on the Repeal Rule and work on the substance of a replacement rule. *Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule*, 82 Fed. Reg. 55,542, 55,542 (Nov. 22, 2017). To that end, the agencies amended the WOTUS Rule with "an applicability date" to provide "continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the

public while the agencies continue to consider possible revisions." *Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule*, 83 Fed. Reg. 5,200, 5,200 (Feb. 6, 2018).

On August 16, 2018, the United States District Court for the District of South Carolina issued an order enjoining the Applicability Date Rule on a nationwide basis. *S.C. Coastal Conservation League*, 318 F. Supp. 3d at 969-70. In entering its order, however, the South Carolina court declined to consider the illegality of the WOTUS Rule and its significant harmful effects, even though the practical impact of its order was to bring the WOTUS Rule into effect throughout nearly half the Nation. *Id*. at 963 n.1. The South Carolina court's injunction against the Applicability Date Rule thus created a patchwork regulatory regime, bringing the WOTUS Rule to life for the first time in nearly three years, but only in the 26 States where it was not enjoined. Subsequently, the Southern District of Texas entered a preliminary injunction covering three additional States (Ex. A), and the District of North Dakota clarified that its injunction covers the State of Iowa (Ex. B). As a consequence, the WOTUS Rule is now enjoined in 28 States and in force in 22 (and the District of Columbia).

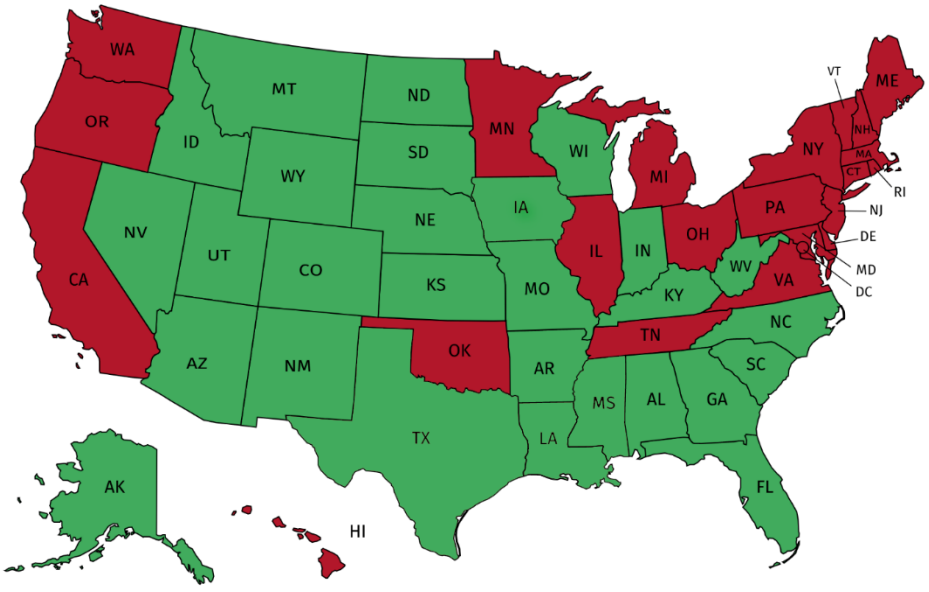

Figure 1: The regulatory patchwork following this Court's injunction: in green states, the 2015 WOTUS Rule is enjoined; in red states, it is now in effect.

Meanwhile, the agencies themselves have come to doubt the WOTUS Rule's legality. First, they issued the Supplemental Notice clarifying their intent to "permanently repeal the [WOTUS] Rule in its entirety." Supplemental Notice at 32,227-28, 32,249. In that notice, they explained that "rather than achieving its stated objectives of increasing predictability and consistency under the CWA, the 2015 Rule is creating significant confusion and uncertainty for agency staff, regulated entities, states, tribes, local governments, and the public." *Id*. at 32,228 (citation omitted). And, they concluded, "the interpretation of the statute adopted in the 2015 Rule is not compelled and raises significant legal questions." *Id*.

More recently, in the litigation pending before the Southern District of Texas, the agencies took the position that "clarity, certainty, and consistency nationwide are best served by the 2015 WOTUS Rule remaining inapplicable during the Agencies' active and ongoing rulemaking to reconsider that Rule.'" Resp. to Pls.' Notices, *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165, Dkt. No. 83, at 3 (S.D. Tex. August 22, 2018) (quotation marks omitted) (Ex. C).

B. The Court's original preliminary injunction opinion

In June 2018—before the Applicability Date Rule was invalidated—this Court granted preliminary injunctive relief against application of the 2015 WOTUS Rule within the boundaries of the 11 plaintiff States, holding: "Plaintiffs have clearly met the burden of persuasion on each of the four factors entitling them to a preliminary injunction." *Georgia*, 2018 WL 2766877, at *9.

The Court found that likelihood of success on the merits, the balance of the harms, and the public interest "overwhelmingly" weighed in plaintiffs' favor. *Georgia*, 2018 WL 2766877, at *9.

First, the Court determined that plaintiffs "have demonstrated a likelihood of success on their claims that the WOTUS Rule was promulgated in violation of the CWA and the APA." *Georgia*, 2018 WL 2766877, at *3. In particular, the Court found the WOTUS Rule "plague[d]" by the "same fatal defect" that doomed the regulation in *Rapanos v. United States*, 547 U.S. 715 (2006), because it

reaches drains, ditches, and streams "'remote from any navigable-in-fact'" water. *Id*. at * 4 (quoting *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment)). It also found the WOTUS Rule contrary to *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), another Supreme Court precedent invalidating a CWA regulation that impermissibly expanded the agencies' authority to "'nonnavigable, isolated, intrastate waters'" in a manner that would upset the federal-state balance. *Id*. (quoting *SWANCC*, 531 U.S. at 171). The WOTUS Rule is likely to be held arbitrary and capricious, the Court continued, because it asserts jurisdiction over "remote and intermittent waters" lacking a "nexus with any navigable-in-fact waters," and the final rule is not a "logical outgrowth" of the proposed rule. *Id*. at *5.

Next, the Court found that if the WOTUS Rule were allowed to come into effect, it would trigger "immediate" irreparable injury. It would lead to unrecoverable monetary costs and deprive States of their sovereignty. *Georgia*, 2018 WL 2766877, at *7-8. Although the Court noted that, at the time, the Applicability Date Rule had delayed application of the WOTUS Rule, it found this harm "sufficiently imminent." *Id.* At bottom, it held that the alleged harm to the agencies from having to comply with an injunction during the course of the litigation "pales" in comparison to harm faced by the plaintiffs. *Id*. Thus, the balance of the equities favored issuing an injunction. *Id*. at *8.

Finally, this Court determined an injunction served the public interest, because the public *has* no interest in the enforcement of an illegal rule. *Georgia*, 2018 WL 2766877, at *9. Should the WOTUS Rule become effective, the Court reasoned, "farmers, homeowners, and small businesses will need to devote time and expense to obtaining federal permits—all to comply with a rule that is likely to be invalidated." *Id*. The Court also noted the value of national consistency, observing that "enjoining the WOTUS Rule will put the eleven States in this case in the same position as the thirteen [S]tates granted preliminary injunctive relief by the District of North Dakota, thereby adding

consistency of judicial determination as well as of the Rule's applicability." *Id*. Accordingly, the Court issued injunctive relief against enforcement of the WOTUS Rule in the 11 Plaintiff-States before it. *Id*. The Business Intervenor-Plaintiffs now ask this Court to expand that injunction to protect them nationwide from what is a nationwide irreparable harm.

LEGAL STANDARD

To obtain a preliminary injunction, a plaintiff must establish "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the potential harm to the defendant; and (4) that the injunction will not disserve the public interest." *Palmer v. Braun*, 287 F.3d 1325, 1329 (11th Cir. 2002). "In shaping equity decrees, the trial court is vested with broad discretionary power." *Lemon v. Kurtzman*, 411 U.S. 192, 201 (1973); *see also Gore v. Turner*, 563 F.2d 159, 165 (5th Cir. 1977) ("[F]raming an injunction appropriate to the facts of a particular case is a matter peculiarly within the discretion of the district judge"). To fashion equitable relief, "courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved." *Lemon*, 411 U.S. at 201.

"The scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). A nationwide preliminary injunction against an unlawful administrative regulation is appropriate where, as here, "a patchwork system would 'detract[] from the integrated scheme of regulation' created by Congress." *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015) (alteration in original).

ARGUMENT

A. Like the plaintiff States, the Business Intervenor-Plaintiffs are likely to succeed on the merits of their claims

This Court has already held that plaintiffs' likelihood of success on their claims that the WOTUS Rule is unlawful "overwhelmingly" favors a preliminary injunction. *Georgia*, 2018 WL

2766877, at *9.

First, the WOTUS Rule is substantively unlawful. It has "[t]he same fatal defect" that doomed the regulation in *Rapanos*, because it regulates "'drains, ditches, and streams remote from any navigable-in-fact water." *Georgia*, 2018 WL 2766877, at *4 (quoting *Rapanos*, 547 U.S. at 781 (Kennedy, J.)). It also "will likely fail for the same reason that the rule in *SWANCC* failed," because it reaches "'nonnavigable, isolated intrastate waters' such as seasonal ponds'" *Id*. at * 4-5 (quoting *SWANCC*, 531 U.S. at 171). And the Rule "asserts jurisdiction over remote and intermittent waters without evidence that they have a nexus with any navigable-in-fact waters." *Id.* at *5.

Second, the WOTUS Rule is procedurally defective: The final Rule was not a logical outgrowth of the proposed rule "in significant ways." *Georgia*, 2018 WL 2766877, at * 5. Given the strength of these arguments, the Court did not reach plaintiffs' additional claims that the WOTUS Rule violates the Commerce Clause and the Tenth Amendment.

As we have demonstrated in our motion for summary judgment, the WOTUS Rule is infected by numerous other legal flaws, including that it is unconstitutionally vague in its reliance on broad, amorphous definitions to identify "waters of the United States." *See* Dkt. 199, at 11-22.

B. The Business Intervenors and their members are suffering irreparable harm outside the geographic boundaries of the plaintiff States

This Court has already determined that enforcement of the WOTUS Rule is "trigger[ing] immediate irreparable harm." *Georgia*, 2018 WL 2766877, at *7, *9. Among other things, the plaintiffs are certain to incur significant "monetary losses" that are "unrecoverable" because "no avenue exists to recoup [them]." *Id*. at *6 (citing *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable.")).

Judge Erickson of the District of North Dakota reached the same conclusion, emphasizing

that allowing the WOTUS Rule to come into effect would result in "unrecoverable monetary harm," among other injuries. *North Dakota*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015).

When this Court entered its injunction, the Applicability Date Rule prevented immediate application of the WOTUS Rule in *any* State. But because the Applicability Date Rule has been enjoined nationwide, reinstating the WOTUS Rule on a piecemeal basis, irreparable harm is now occurring.

1. The Business Intervenors' members operate nationwide. *See, e.g.*, Ex. D at A-1, A-5. They own and work on real property that includes land areas that contain numerous dry and wet land features that qualify as "waters of the United States" under the WOTUS Rule. *Id*. Because the WOTUS Rule unlawfully expands the agencies' jurisdiction under the CWA, each member is required to comply with the CWA's prohibition against unauthorized "discharges" into any such areas. In many cases, this entails obtaining costly permits, which must be planned for and sought years in advance. These increased costs and delays will significantly and irreparably disrupt the Business Intervenors' members' operations. Energy exploration and production companies expect the number of permits required for projects to double. Ex. D at A-6. Many members will delay or simply abandon projects, such as the construction of new facilities, to avoid the extra costs. Ex. D at A-3, A-6, A-23.

The unlawful expansion of CWA jurisdiction under the 2015 WOTUS Rule also obstructs members' ability to operate under less costly general permits. Under the CWA, the Corps of Engineers issues both individual and nationwide (or general) permits. Individual permits are site specific, and in the experience of one declarant, take over two years and cost over $250,000 to obtain. Ex. D at A-23. In contrast, nationwide permits can be obtained in less than a year, and cost on average around $30,000; however, only landowners who impact a limited area may qualify. *Id*. While many industry members currently operate under the less costly and easier-to-obtain general

permits, companies anticipate that they may no longer qualify for nationwide permits because of jurisdictional expansion of the 2015 WOTUS Rule under the CWA. *Id*.

Costs are compounded by the vague and uncertain scope of the WOTUS Rule. Ex. D at A-3, A-11, A-13, A-22-23; *see also* Excerpts of Addendum to the Opening Br. of Municipal Pet'rs at 31a-32a, 56a-57a, 84a-85a, *In Re EPA*, No. 15-3751 (6th Cir. Nov. 1, 2016) (Dkt. 129-2) (Ex. E). For example, the question of whether dry ephemeral drains or ditches that may eventually feed into some other water feature offsite from a landowner's property are "waters of the United States" has significant implications for the ability of a forestry company to plan its operations. To ensure that it engages in best-management practices under the 2015 WOTUS Rule, the company will have to establish additional buffering around land features that potentially qualify "as waters of the United States," irreparably taking that land out of production. Ex. D at A-12-14. The vague nature of the Rule will also render it incredibly difficult for the company to identify and quantify features on their lands that qualify as jurisdictional to demonstrate that they qualify for pesticide application general permits. *See id*.

The agricultural industry faces similar concerns. Farmers may be required to take land out of production to comply with the 2015 WOTUS Rule. *See* Ex. D at A-12-14, A-15-16, A-18-20; Excerpts of App. to Pls.' Mot. for a Nationwide Prelim. Inj., *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165, at 3-5, 13-15 (S.D. Tex. Feb. 7, 2018) (Ex. F). Because of the enormous risk associated with liability under the CWA, many farmers—who cannot tell which parts of their land can be put to use and which must be kept free of farming equipment, dirt and gravel, seed, and fertilizer—will either (1) alter their agricultural operations to avoid discharges into certain features 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 or otherwise (2) expend irrecoverable resources attempting to determine whether a feature is jurisdictional. *See* Ex. D at A-9-11; Ex. E at 9a-12a, 16a-19a, 74a-79a, 82a-83a,

127a-129a, 173a-175a.

The question of whether certain features qualify as "waters of the United States" under the 2015 WOTUS Rule also has enormous implications for National Stone, Sand and Gravel Association member companies, which are responsible for essential raw minerals in construction projects. The vagueness surrounding the 2015 WOTUS Rule will require member companies to spend more time and money hiring consultants and evaluating the Rule's effect on their operations. Ex. D at A-1-4. It will also impose significant permitting and mitigation costs and time delays in mining activities, which may lead companies to hold off on permitting new facilities or expansions. *Id*. Similar concerns cut across all aspects of nearly every industry in the country, and adjustments to members' operations may come at the cost of jobs. *See id.* at A-5-6, A-9-10; Ex. E at 61a-69a, 105a-106a, 135a-149a, 204a-208a; Ex. F at 3-5, 10-15.

The geographic inconsistency in the current regulatory scheme magnifies these irreparable harms. The WOTUS Rule has come into effect in 22 States and the District of Columbia, but it remains preliminarily enjoined in the remaining 28 States. The resulting complications are significant. The operation of two, fundamentally incompatible definitions of "waters of the United States" generates significant confusion in planning business operations. *See* Ex. D at A-2-3, A-21-23. Many members engage in projects that cross state lines. *See, e.g.*, *id.* at A-2-3, A-12-14. These areas are now subject to conflicting permitting obligations. *Id*. As just one example, because the WOTUS Rule defines isolated interstate waters as "waters of the United States," a small seasonal wetland on the North Carolina-Virginia border will be subject to incompatible laws. It is almost impossible to sort out which regulatory regime applies to which activities under which circumstances. As a result of this confusion, the Business Intervenor-Plaintiffs' members may hold off on new projects. *See, e.g.*, *id.* at A-3, A-6, A-9-11. Thus, as the agencies admitted before the Southern District of Texas, "[h]aving different regulatory regimes in effect throughout the country

[is] complicated and inefficient for both the public and the agencies." Ex. C at 4.

2. Courts have found injuries less serious than these sufficient to satisfy the irreparable injury prong of a preliminary injunction analysis. First, the costs that the Business Intervenors must expend to comply with the unlawful 2015 WOTUS Rule are not recoverable. "In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." *Odebrecht Constr.*, 715 F.3d 1268, 1289.

Additionally, the loss of business opportunities alone is a valid ground for finding irreparable harm. *See Advantus, Corp. v. T2 Int'l, LLC*, 2013 WL 12122313, at *10 (M.D. Fla. 2013) ("Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm.") (quoting *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012)); *see also Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 (5th Cir. 1981) (finding irreparable harm where business faced substantial losses if it refrained from sales, but the threat of criminal prosecutions under a potentially unlawful ordinance if it continued sales).

In *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016), the Fifth Circuit found a serious threat of irreparable harm in a similar situation 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 court held that the harm would be irreparable and stayed implementation of the regulation. *Id*. at 434-36. The chaotic regulatory scheme directly impeding the Business Intervenors' members' abilities to sort out which regime applies to which activities is not a mere matter of uncertainty as to whether an agency may reverse its position. *Cf. N.E. Power Generators Ass'n, Inc., v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) (economic harm not alleged for

purposes of standing where plaintiff relied on "the possibility an agency may one day reverse its position" absent any factual support). The harm for which the Business Intervenor-Plaintiffs will never be compensated is occurring *right now*.

Further, we have shown in our summary judgment briefing that the 2015 WOTUS Rule is unconstitutionally vague. *See* Dkt. 199, at 19-22. Deprivation of constitutional rights "for even minimal periods of time" constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Enormously consequential national regulations like the WOTUS Rule—which subject commonplace activities involved in building, farming, and pest management to a complex and burdensome federal permitting and enforcement scheme, including criminal penalties—should not apply differently depending on whether the activity happens to be located on one side of a state line or the other. Against this backdrop, the presence of irreparable harm on a nationwide basis is undeniable.

C. The balance of harms and public interest favors a nationwide injunction

The public is undeniably harmed absent an injunction that covers the District of Columbia and the 22 States in which the WOTUS Rule is being applied. As this Court previously found—even before injunction of the Applicability Date Rule introduced a chaotic patchwork regime—the balance of the equities weighs "heavily" and "overwhelmingly" in favor of the plaintiffs. *Georgia*, 2018 WL 2766877, at *8-9. As the Sixth Circuit summed it up, while 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 . . . , the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo." *In re EPA*, 803 F.3d at 808.

Now that the Applicability Date Rule is no longer in effect, enjoining the WOTUS Rule in every State is in the public interest. The CWA regulatory scheme is trapped in chaos. Otherwise piecemeal implementation of the Rule will continue to disrupt the operations of nationwide

industries and impose difficulties on regulator-States and federal agencies in enforcing the CWA. These injuries outweigh any interest in enforcement of a vague, unconstitutional regulation during the pendency of the litigation. Indeed, "'[t]he public has no interest in the enforcement of what is very likely' an unenforceable rule." *Georgia*, 2018 WL 2766877, at *9 (quoting *Odebrecht Constr.*, 715 F.3d at 1290). On the other hand, the WOTUS Rule imposes heavy costs on States, the agencies, and regulated parties.

We have already outlined the significant and irreparable harms now faced by the Business Intervenor-Plaintiffs and their industry members absent a preliminary injunction of nationwide scope. *Supra*, pages 12-14. And, as this Court already determined, the States and municipal bodies face loss of sovereignty and unrecoverable monetary harms. *Georgia*, 2018 WL 2766877, at *6.

The agencies themselves are also harmed. As the agencies recognized in promulgating the Applicability Date Rule in the first place, enforcing the CWA under an uncertain, patchwork regime is inefficient and complex. As just one example, what are the agencies to do when a multistate project implicates earth-moving activities in small, isolated features characterized as wetlands across portions of Illinois and Kentucky? That single project will now be subject to two fundamentally different regulatory regimes—with only the portion in Illinois likely to demand federal permitting (at great expense and delay). The problem would be multiplied many times over throughout the country in similar cases.

And even for single state projects, the current patchwork requires the agencies—as well as national organizations like the Business Intervenor-Plaintiffs and their members—to navigate different federal regulatory regimes in different States, increasing the complexity and cost of regulation, enforcement, and compliance. EPA's geographic regions cut across states where the 2015 WOTUS Rule is enjoined and those in which it is in effect, compounding the administrative headache the agencies face.

Against this background, the agencies themselves have expressly acknowledged that "a regulatory patchwork does not serve the public interest; as the Agencies have explained, it would be 'complicated and inefficient for both the public and the agencies.'" Ex. C at 3 (quoting 83 Fed. Reg. at 5,202). And they stated before the Southern District of Texas that "they and their policies would not be harmed from—and the public interest is advanced by—'a framework for an interim period of time that avoids these inconsistencies, uncertainty, and confusion, pending further rulemaking action by the agencies.'" *Id*. at 5 (quoting 83 Fed. Reg. at 5,202).

In issuing its preliminary injunction, this Court previously recognized the benefit to the public interest from "adding consistency of judicial determination as well as of the Rule's applicability." *Georgia*, 2018 WL 2766877, at *9. Consistency in preventing harmful enforcement of the WOTUS Rule is now only possible if this Court's preliminary injunction is modified to match the national parties who are plaintiffs before it. The Court should therefore enjoin enforcement of the WOTUS Rule on a nationwide basis, or at minimum in the jurisdictions not already covered by the Court's or another court's preliminary injunction.

CONCLUSION

The motion to expand the scope of the preliminary injunction to apply nationwide—or alternatively to include the territorial limits of the District of Columbia, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Washington—should be granted.

Dated: September 26, 2018

Respectfully submitted,

/s/ *Mark D. Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that, on September 26, 2018, I filed and thereby caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of Georgia on all parties registered for CM/ECF in the above-captioned matter.

/s/ *Mark D. Johnson*