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

STATE OF TEXAS, *et al*.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants.

No. 3:15-cv-162, consolidated with Nos. 3:15-cv-165, 3:15-cv-266, and 3:18-cv-176

MOTION FOR RECONSIDERATION OF PLAINTIFFS IN NUMBERS 3:15-CV-165 AND 3:15-CV-266

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INTRODUCTION

The Private Party Plaintiffs[1] join with the Plaintiff States in seeking reconsideration of this Court's Memorandum Opinion and Order (Dkt. 193), which remanded the Clean Water Rule: Definition of "Waters of the United States" ("Final Rule"), 80 Fed. Reg. 37,054 (June 29, 2015), without vacating it and declined to address the Plaintiffs' substantive challenges to the Rule. The Private Party Plaintiffs respectfully request that this Court vacate the Final Rule as part of its remand order or, in the alternative, address the substantive arguments against the Rule. Without either vacatur or resolution of the substantive claims, the Private Party Plaintiffs will be left in an untenable position that requires them to comply with the Final Rule in the half of the country where it is not enjoined but also comply with the previous regulatory regime in the other half of the country.

NATURE AND STAGE OF PROCEEDINGS

In its Memorandum Opinion and Order, this Court explained that the notice-and-comment requirements of the Administrative Procedure Act ("APA") play an essential role in administrative rulemaking because they ensure that agency regulations are tested; ensure fairness to affected parties; give affected parties the chance to develop evidence in the record and thereby enhance judicial review; and assist in the substantive formation of a rule. Dkt. No. 193 at 8-9. The Court concluded that the Final Rule violated the notice-and-comment requirements because it deviated from the Proposed Rule "in a way that interested

[1] The term "Private Party Plaintiffs" excludes Plaintiff in 3:18-cv-176, Texas Alliance for Responsible Growth, Environment and Transportation, which does not join in this motion.

parties could not have reasonably anticipated." *Id*. at 9. That is because the Proposed Rule "use[d] ecologic and hydrologic criteria to define 'adjacent waters,'" but the Final Rule "abandoned this approach and switched to the use of distance-based criteria." *Id*. at 9-10. Thus, the Final Rule "was different in kind and degree from the concept announced in the Proposed Rule." *Id*. at 10.

Because of this change, which "alter[ed] the jurisdictional scope of the [Environmental Protection Act]," the agencies did not have the benefit "of comment by those most interested and perhaps best informed on the subject of the rulemaking at hand." *Id*. (internal quotation marks omitted). The Court pointed out that if the agencies had provided notice of this fundamental change, "the comments and evidence presented to the agencies would have been significantly and substantively different." *Id*. Further, and "[p]erhaps more importantly, those governed by the rule were deprived of notice of a substantial change to our nation's environmental regulation scheme." *Id*. at 10-11.

This Court also described the agencies' failure to permit interested parties to comment on the studies that served as the technical basis for the Final Rule as a "serious procedural error." *Id*. at 11 (internal quotation marks omitted). Indeed, the agencies "failed to give commentators an opportunity to refute the most critical factual material used to support the Final Rule—the Final Connectivity Report." *Id*. at 12. As the agencies admitted, they "'made scientifically and technically informed judgments'" based on that Report. *Id*. (quoting 80 Fed. Reg. at 37,065). Because affected parties were not given the opportunity to marshal and present evidence to "possibly deconstruct" the "scientific[] and technical[]" basis for the Final Rule, they suffered prejudice that was "especially severe

given the substantive changes made between the Draft and Final Connectivity Reports." *Id*. at 12-13 (internal quotation marks and citations omitted).

The Court remanded the matter to the agencies for further rulemaking but declined to vacate the Final Rule. *Id*. at 13-14. The Court determined that vacatur would be disruptive and the agencies may be able to resolve the defects. *Id*. at 13. The Court also held that, in light of the APA violations, it would be "premature to address Plaintiffs' substantive challenges to the Final Rule." *Id*. at 14 n.8.

The Private Party Plaintiffs respectfully submit that the Court misapplied the legal standard to determine whether a rule should be vacated when the matter is remanded to an agency and that the Court should revise its order to vacate the Final Rule. In the alternative, the Court should address the substantive challenges to the Final Rule.

ISSUES TO BE RULED UPON BY THE COURT

1. Whether the Final Rule should be vacated, not remanded without vacatur.

2. Whether the Court should reach the Plaintiffs' substantive challenges to the Final Rule.

LEGAL STANDARD

Federal Rule of Civil Procedure 54(b) "allows parties to seek reconsideration of interlocutory orders and authorizes the district court to 'revise[] at any time' 'any order or other decision . . . [that] does not end the action.'" *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (quoting Fed. R. Civ. P. 54(b)). Under Rule 54(b), the court may reconsider its decision "for any reason it deems sufficient, even in the absence of new

evidence or an intervening change in or clarification of the substantive law." *Id*. (internal quotation marks omitted). This standard applies to both issues raised in this brief.

SUMMARY OF THE ARGUMENT

This Court should vacate the Final Rule. Under the APA, a rule deemed invalid should ordinarily be set aside. Remand without vacatur is proper only when there is a serious likelihood that the agency will be able to cure any defects on remand and if vacatur would be disruptive. Under this standard, remand without vacatur may be appropriate when an agency has failed to sufficiently articulate its reasons for the final agency action and the reviewing court remands the matter to the agency to explain its reasoning on the basis of an *already-complete* record. That is not this case. As this Court has already explained, the most interested parties have not yet had a chance to deconstruct the scientific and technical basis for the Final Rule, and the agencies themselves have initiated new rulemaking to constrain the scope of the Rule. Thus, there is no likelihood that the agencies will be able to cure the severe notice-and-comment defect that plagues the Final Rule and still issue a substantively similar rule.

Additionally, vacatur would not be disruptive. Instead, the opposite is true. Disruption will be caused by leaving the Final Rule in place pending remand because that Rule is enjoined in 27 States, so approximately half of the country will be operating under the Final Rule (which the agencies are already seeking to change) and the other half under the prior regulatory scheme. The hardship to the regulated community caused by the uncertainty and difficulty of conforming its conduct to such a patchwork regulatory regime is the very type of disruption that should be avoided, as this Court acknowledged when it

enjoined operation of the Final Rule in Texas, Louisiana, and Mississippi. Only vacatur prevents that disruption on a nationwide level.

In the alternative, the Court should reach the substantive challenges to the Final Rule. The Court has jurisdiction over those claims, and the APA instructs courts to consider all legal questions presented on judicial review. Furthermore, addressing the substantive challenges to the Final Rule will minimize disruption and provide the agencies with important guidance as their new rulemaking proceeds.

ARGUMENT

I. THIS COURT SHOULD VACATE THE FINAL RULE.

When an agency decision, like the Final Rule here, is invalid under the APA, the "'practice of the court is ordinarily to vacate the rule.'" *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700, 724 (W.D. Tex. 2015) ("*Permian Basin I*") (quoting *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997)); *see* 5 U.S.C. § 706(2) (unlawful agency action shall be "set aside"). Remand without vacatur is appropriate only when the balance of the equities requires that result. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015) ("In deciding whether an agency's action should be remanded without vacatur, a court must balance the equities.").

In balancing the equities, the court may determine that remand without vacatur is appropriate if (1) there is a "serious possibility that the agency will be able to substantiate its decision given an opportunity to do so" and (2) vacatur would be "disruptive." *Cent. & S.W. Servs., Inc. v. U.S. E.P.A.*, 220 F.3d 683, 692 (5th Cir. 2000) (internal brackets and

quotation marks omitted); *see Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 2016 WL 4411550, at *2 (W.D. Tex. Feb. 29, 2016) ("*Permian Basin II*"). "Both prongs must be satisfied to warrant remand [without vacatur]." *Permian Basin II*, 2016 WL 4411550, at *2. And "[f]ailure to provide the required notice and to invite public comment"—the defect this Court found here—"is a fundamental flaw that normally requires vacatur of the rule." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) (internal quotation marks omitted).

With regard to the first prong, "[t]he relevant inquiry is the seriousness of the order's deficiencies." *Permian Basin II*, 2016 WL 4411550, at *2. Remand without vacatur is proper "where the court f[inds] that the agency's only error was an inadequate explanation for the basis of its action." *Id*., at *3. In that case, remand without vacatur may be justified because there is a significant likelihood that the agency will be able to more fully articulate its reasoning based on the record before it, thus curing the defect. But where the agency's reasoning is invalid "because material information was not considered in reaching the decision," vacatur is appropriate. *Id*. In that case, there is not a significant likelihood that the agency will be able to cure the defect and arrive at the same rule previously determined to be defective.

Here, the problem with the Final Rule is not that the agencies failed to adequately explain their reasoning after compiling a complete record. Rather, the Final Rule suffers from a "serious procedural error" that prevented consideration of highly material information in the first place. Dkt. 193 at 11. This Court explained that the Final Connectivity Report was the "most critical factual material" the agencies used to support

the Final Rule. *Id*. at 12. Because interested parties were not given the chance to present evidence to contest the Report, the agencies did not receive material information from "those most interested and perhaps best informed on the subject of the rulemaking at hand." *Id*. at 10 (citation omitted).

This defect stands in sharp contrast to the paradigmatic case in this Circuit justifying remand without vacatur, which is when the agency compiled a complete record but did not sufficiently support its final rule. In *Cent. & S.W. Servs.*, an organization challenged an EPA rule regarding the disposal of polychlorinated biphenyls ("PCBs") because the agency did not address comments in its final rule requesting a nationwide variance for electric utilities from part of the rule governing storage of PCBs for reuse. 220 F.3d at 692. The EPA requested and received comments from the regulated community on whether a nationwide variance was proper, but did not address those comments or explain why it declined to grant the variance. *Id.* On judicial review, the EPA argued that it had in fact considered the comments, evaluated the risks and benefits, and concluded that it could not grant the variance to the electric utility industry. *Id*.

The Fifth Circuit held that the EPA's justification for declining to grant the variance was insufficient. *Id*. The court explained that because the agency specifically requested comments on whether it should grant a national variance and received responsive material, it was "required . . . to give reasons for declining to promulgate a national variance." *Id*. This defect did not require vacatur, however, because the "EPA may well be able to justify its decision to refuse to promulgate a national variance for the electric utilities and it would

be disruptive to vacate a rule that applies to other members of the regulated community." *Id*.

By contrast, the fatal problem with the Final Rule requires more than the agencies simply "provid[ing] any missing rationale." *Basinkeeper v. U.S. Army Corps of Eng'rs*, 715 F. App'x 399, 401 (5th Cir. Mar. 15, 2018) (Owen, J., concurring). Instead, the agencies must reopen the record and take additional comment on the critical scientific and technical basis for the Final Rule. Dkt. 193 at 12-13. It is not likely that the agencies will re-issue the Final Rule because the interested parties will for the first time have the ability to present critical evidence to "deconstruct" the Final Connectivity Report, which was the basis for the Rule. *Id*.

In fact, this Court has observed that the agencies are already reconsidering the Final Rule, citing the EPA's update on its current efforts to revise and repeal the Final Rule. *Id*. at 13 & n. 7. Under these circumstances, there is not a "serious possibility that the agenc[ies] will be able to substantiate [their] decision given an opportunity to do so" because the agencies have made it clear that they intend to move on from the Final Rule. For this reason, vacatur is the proper remedy. *Cent. & S.W. Servs.*, 220 F.3d at 692.

The second prong of the *Cent. & S.W. Servs.* test also favors vacatur. Under that prong, remand without vacatur may be proper if vacating the invalid rule would be disruptive. 220 F.3d at 692. The test "considers . . . the disruptive consequences of an interim change that may itself be changed." *Black Warrior Riverkeeper*, 781 F.3d at 1290 (internal citation omitted). The court should consider both the disruptive consequences to the regulated industry as well as "the potential environmental damage that might continue

unabated while the [agency] revisits its determinations." *Id*. Consideration of the disruptive consequences "is analogous to the inquiry made in determining whether to grant a preliminary injunction." *Permian Basin II*, 2016 WL 4411550, at *3. This requires the agencies to show that they risk irreparable harm and that the balance of equities and public interest favor remand without vacatur. *Id*.

This test is resolved against vacatur at the outset because this Court has already applied the preliminary injunction factors and found that they require the Final Rule to be enjoined. Dkt. 140. In particular, the Court determined that "governmental, administrative, and economic stability" requires that the Final Rule not be enforced because it leaves the Plaintiffs uncertain about what rules apply and risks "asking [them] to expend valuable resources and time operationalizing a rule that may not survive judicial review." *Id*. at 2. It is leaving the Final Rule in place on remand—not vacatur—that risks disruption.

Additionally, there will be no regulatory void that would place the nation's waters at risk if the Final Rule is vacated. Instead, the parties will conform to the pre-existing rules, as they have in the past and as they are doing in the 27 States in which the Final Rule is currently enjoined.[2] Furthermore, the agencies are already moving to repeal and revise

[2] The Final Rule is in effect in only 23 states and the District of Columbia. On July 17, 2019, the U.S. District Court for the District of Oregon joined the growing consensus and preliminarily enjoined the Final Rule within the State of Oregon. *See* Dkt. 52, *Oregon Cattlemen's Assoc. v. E.P.A.*, 3:19-cv-564 (D. Or. July 17, 2019). The U.S. District Court for the District of North Dakota restricted the scope of its previously issued preliminary injunction to remove the State of Colorado due to that State's withdrawal from the litigation. *See* Dkt. 280, *North Dakota v. E.P.A.*, 3:15-cv-0059 (D.N.D. May 14, 2019). Due to the withdrawal of the New Mexico State Engineer and New Mexico Environment Department and simultaneous intervention of ten counties in New Mexico, the parties have sought clarification before the District of North Dakota regarding whether the Final Rule remains enjoined statewide in New Mexico, only in the ten New Mexico counties that

the Final Rule, so the agencies themselves acknowledge that the Final Rule is not essential to preventing environmental harm. *See* Dkt. 193 at 13 & n. 7.

And as the Court acknowledged in granting the preliminary injunction (Dkt. 140 at 2), the regulated industries will suffer in the absence of vacatur. *See Cent. & S.W. Servs.*, 220 F.3d at 692 n. 6 (considering disruption to regulated community). The Private Party Plaintiffs provided concrete examples of harm to a number of industries posed by the threat of a constantly flip-flopping regulatory environment. No. 3:15-cv-165, Dkt. 61 at 14-16. The Private Party Plaintiffs' members operate nationwide and own and work on real property that includes features that may qualify as waters of the United States under the Final Rule, but not under the prior regime. Because there is a regulatory patchwork, these multi-state actors must attempt to comply with different rules in the States where they operate. Indeed, they may own or work on a parcel that crosses State borders, but in one State they would be subject to the Final Rule and not in the adjacent State. The severe disruptive consequences of this situation justifies vacatur.

The Court held that "remand is the best remedy here as it will facilitate the Agencies' active attempts to improve on their work of protecting the environment and bringing predictability and clarity to the definition of the phrase WOTUS." Dkt. 193 at 14. But by not vacating the Final Rule, that predictability and clarity is non-existent given the resultant regulatory patchwork. The agencies are free to pursue their "active attempt to improve on their work" in the subsequent rulemaking, *id*., but the Final Rule does not need

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intervened, or not at all in New Mexico. *See* Dkt. 282, *North Dakota v. E.P.A.*, 3:15-cv-0059 (D.N.D. May 24, 2019); Dkt. 286, *North Dakota v. E.P.A.*, 3:15-cv-0059 (D.N.D. June 7, 2019).

to remain in place for them to do that, especially when the regulated industries suffer due to the inconsistent regulations across the nation.

Because the legal standards for vacatur are easily satisfied here, the Court should revise its order to vacate the Final Rule.

II. IN THE ALTERNATIVE, THE COURT SHOULD ADDRESS PLAINTIFFS' SUBSTANTIVE CHALLENGES TO THE FINAL RULE.

Although the Court stated that it would be "premature" to address Plaintiffs' substantive challenges, Dkt. 193 at 14 n. 8, those claims are fit for resolution. A court should decline to address claims only when they are "abstract or hypothetical." *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003). But when a case presents concrete (and important) legal questions, like this one, it is ripe for resolution. *Id*.

In deciding whether to rule on claims, "[t]he key considerations are the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id*. (internal quotation marks omitted). Here, the substantive challenges to the Final Rule are fit for judicial decision. The issues have been fully briefed by the parties and the court's guidance would assist the agencies in any further rulemaking clarifying the definition of WOTUS. Moreover, the APA instructs that a "reviewing court shall decide all relevant questions of law," 5 U.S.C. § 706, and the parties' substantive challenges to the Final Rule present legal questions. Additionally, the Plaintiffs face significant hardship if the court withholds consideration of the merits because the Final Rule continues to operate in almost half the States and Plaintiffs and their members face an uncertain

regulatory environment that interferes with their everyday operations and planning for the future. *See Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007).

"[A] federal court possessing jurisdiction has a 'virtually unflagging obligation' to exercise it to reach the merits." *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 61 (1st Cir. 2016) (quoting *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015)). If it does not vacate the Final Rule, this Court should exercise its jurisdiction to resolve Plaintiffs' substantive challenges to that Rule. And for the reasons given in the summary judgment briefing by the State and Private Party Plaintiffs, the Court should strike down the Final Rule on the merits.

CONCLUSION

The Court should reconsider its Memorandum Opinion and Order (Dkt. 193) and either vacate the Final Rule or reach the merits of the substantive challenges to the Rule.

Dated: July 25, 2019

Respectfully submitted,

/s/ *Timothy S. Bishop*

Kevin S. Ranlett
Texas Bar No. 24084922
S.D. Tex. Bar No. 1124632
MAYER BROWN LLP
700 Louisiana Street, Suite 3400
Houston, Texas 77002
(713) 238-3000
kranlett@mayerbrown.com

Timothy S. Bishop *(pro hac vice)*
Colleen M. Campbell *(pro hac vice)*
MAYER BROWN LLP
1999 K Street NW
Washington DC, 20006
(202) 263-3000
tbishop@mayerbrown.com
ccampbell@mayerbrown.com

Counsel for the Plaintiffs in No. 3:15-cv-165

/s/ *Hannah D. Sibiski*

Joel M. Gross (*pro hac vice*)
Jonathan S. Martel (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, D.C. 20001
Joel.Gross@arnoldporter.com
(202) 942-5705

Hannah D. Sibiski [24041373]
Christopher M. Odell [24037205]
ARNOLD & PORTER KAYE SCHOLER LLP
700 Louisiana Street, Suite 1600
Houston, Texas 77002-2755
Christopher.Odell@arnoldporter.com
Hannah.Sibiski@arnoldporter.com
(713) 576-2416

S. Zachary Fayne (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, Tenth Floor
San Francisco, California 94111
Zachary.Fayne@arnoldporter.com
(415) 471-3114

Counsel for the Plaintiffs in No. 3:15-cv-266

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2019, 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/ Timothy S. Bishop

CERTIFICATE OF CONFERENCE

In accordance with Local Rule 7.1(D) and Court Procedure 6.C.2, counsel for Private Party Plaintiffs in Nos. 3:15-cv-165 and 3:15-cv-266 certify that based on the telephone status conference held June 13, 2019, they understand that the Federal Defendants and Intervenor Defendants oppose the relief requested. The Plaintiff States do not oppose the relief requested and file separately seeking the same relief. The Private Party Plaintiffs in No. 3:18-cv-176 do not oppose the relief requested but do not join this motion; however, if the Court determines to grant oral argument on the substance of the underlying merits of the Rule, the Private Party Plaintiffs in No. 3:18-cv-176 request to participate.

/s/ Timothy S. Bishop

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

STATE OF TEXAS, *et al.*, *Plaintiffs*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Defendants*.	No. 3:15-cv-162, consolidated with Nos. 3:15-cv-165, 3:15-cv-266, and 3:18-cv-176

[PROPOSED] ORDER GRANTING MOTION FOR RECONSIDERATION OF PLAINTIFFS IN NUMBERS 3:15-CV-165 AND 3:15-CV-266

Having considered the Motion for Reconsideration of the Plaintiffs in Numbers 3:15-cv-165 and 3:15-cv-266, the Court finds good cause exists for granting the motion and that vacatur of the Clean Water Rule: Definition of "Waters of the United States" ("Final Rule"), 80 Fed. Reg. 37,054 (June 29, 2015) is merited. Therefore, the motion is GRANTED. Accordingly, it is ORDERED that the Final Rule is vacated.

SIGNED at Galveston, Texas, this _____ day of _____, 2019.

_____
Hon. George C. Hanks, Jr.
United States District Court Judge