UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, et al., *Plaintiffs,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants.*	§ § § § § § § § § §	CIVIL ACTION NO. 3:15-cv-162
AMERICAN FARM BUREAU FEDERATION, et al., *Plaintiffs,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants.*	§ § § § § § § § § § §	CIVIL ACTION NO. 3:15-cv-165

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS FOR A NATIONWIDE PRELIMINARY INJUNCTION

The United States Environmental Protection Agency, the Department of the Army, and all other Federal Defendants (or "the Agencies") oppose the motions for a nationwide preliminary injunction filed in two of three cases before this Court with parties challenging the validity of the Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (hereinafter "2015 WOTUS Rule" or "2015 Rule"). The movants are the States of Texas, Louisiana, and Mississippi−the "Plaintiff

States" in Case No. 3:15-cv-162 (motion at ECF No. 79)−and 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−the "Plaintiff Associations" in Case No. 3:15-cv-165 (motion at ECF No. 61).

The question presented is straightforward: whether the movants are now entitled to the extraordinary preliminary relief they seek even though the 2015 WOTUS Rule:

- is not currently applicable, *see In re EPA and Dept. of Defense Final Rule,* 803 F.3d 804 (6th Cir. 2015) (nationwide stay of the 2015 Rule);
- will not become applicable to any person for another two years, *see* "Definition of 'Waters of the United States'—Addition of an Applicability Date to the 2015 Clean Water Rule." 83 Fed. Reg. 5,200 (Feb. 6, 2018); and
- is being reconsidered, *see* Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017), and may never be applicable−thereby mooting the need for this Court to ever resolve the merits.

As explained below, the motions for preliminary injunctive relief should be denied for want of immediate, irreparable harm.

BACKGROUND

Congress enacted the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Central to the Act is its bar of "the discharge of any pollutant by any person," 33 U.S.C. § 1311(a), generally unless the person who discharges the pollutant "obtain[s] a permit and compl[ies] with its terms." *Middlesex Cnty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (citation omitted). The CWA establishes permitting programs under which a person can obtain authorization to discharge pollutants. *See* 33 U.S.C. §§ 1342 and 1344; *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009). A "discharge of a pollutant" occurs when a person adds "any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "[N]avigable waters," in turn, are "the waters of the United States." 33 U.S.C. § 1362(7).

The CWA "anticipates a partnership between the States and the Federal Government" to pursue their "shared objective" of protecting the Nation's waters. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The Act states that it is "the policy of the Congress" to "protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). States can, under specified conditions, administer the Act's permitting programs. *See* 33 U.S.C. §§ 1342(b) and 1344(g).

The 2015 Rule revised the regulatory definition of the CWA term "waters of the United States." The Agencies had previously issued regulations that defined the term,

see 42 Fed. Reg. 37,122, 37,127 (July 19, 1977); 51 Fed. Reg. 41,206, 41,216-17 (Nov. 13, 1986), but the Supreme Court has held that the Agencies' application of that definition was overbroad in some respects, *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). In addition, the 1986 regulations did not provide detailed guidance for determining whether particular wetlands were CWA-protected "waters of the United States." *See generally Rapanos* v. *United States*, 547 U.S. 715 (2006).

In June 2015, the Agencies published the final 2015 WOTUS Rule. 80 Fed. Reg. 37,054. Soon after promulgation, numerous parties challenged the Rule in the courts of appeals, invoking the authorization for direct court of appeals review in 33 U.S.C. § 1369(b)(1). The challenges were consolidated in the Sixth Circuit, which issued a nationwide stay of the 2015 WOTUS Rule pending further proceedings. *In re EPA and Dept. of Defense Final Rule,* 803 F.3d at 804. The Sixth Circuit also ruled that its subject-matter jurisdiction was proper. *In re Dept. of Defense*, 817 F.3d 261 (6th Cir. 2016), *reversed and remanded*, 138 S. Ct. 617 (2008).

Meanwhile, in district courts throughout the country, a number of parallel actions seeking judicial review of the 2015 WOTUS Rule were filed. In this Court alone, three such cases exist: Plaintiff States' action, Plaintiff Associations' action, and *Association of American Railroads v. EPA*, No. 3:15-cv-266.

Five district courts concluded that they lack jurisdiction, finding that original and exclusive jurisdiction is vested in the courts of appeals pursuant to 33 U.S.C. § 1369(b)(1). *See Washington Cattlemen's Ass'n* v. *EPA*, No. 15-3058, 2016 WL

6645765, at *3 (D. Minn. Nov. 8, 2016); *Ohio* v. *EPA*, 15-cv-02467 Doc. 54, at 1 (S.D. Ohio Apr. 25, 2016) (appeal pending); *Oklahoma ex rel. Pruitt* v. *EPA*, No. 15-cv-0381, 2016 WL 3189807, at *2 (N.D. Okla. Feb. 24, 2016), *reversed and remanded sub nom.*, *Chamber of Commerce of the United States v. EPA*, No. 16-5038, 2018 WL 577011 (10th Cir. Jan. 29, 2018); *Georgia* v. *McCarthy*, No. CV 215-79, 2015 WL 5092568, at *1 (S.D. Ga. Aug. 27, 2015), *vacated and remanded sub nom., Georgia ex. rel. Carr v. Pruitt*, No. 15-14035, 2018 WL 523333 (11th Cir. Jan. 24, 2018); *Murray Energy Corp.* v. *EPA*, No. 15CV110, 2015 WL 5062506, at *1 (N.D. W. Va. Aug. 26, 2015). One district court asserted jurisdiction to review the 2015 WOTUS Rule and issued a preliminary injunction reaching 13 States. *See North Dakota* v. *EPA*, 127 F. Supp. 3d 1047, 1052-53 (D.N.D. 2015).

In January 2017, the Supreme Court granted *certiorari* to review the Sixth Circuit's jurisdictional judgment. The Sixth Circuit thereafter held all further proceedings in abeyance. Similarly, until very recently, no proceedings had occurred in this Court for more than a year. *See, e.g.,* Order of May 17, 2016, taking subject-matter jurisdictional question under advisement (ECF No. 60).

On February 28, 2017, the President of the United States issued an Executive Order directing the Agencies to reconsider the 2015 WOTUS Rule. Exec. Order No. 13,778, 82 Fed. Reg. 12,497. The order declared it to be "in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." *Id.* § 1(a). It

directed the Agencies to review the 2015 WOTUS Rule for consistency with those objectives, and it instructed the Agencies to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." *Id.* § 2(a).

The Agencies subsequently issued a notice of proposed rulemaking entitled "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules." 82 Fed. Reg. 34,899 (July 27, 2017). That notice proposes to rescind the 2015 WOTUS Rule and to recodify the 1986 regulatory definition of "waters of the United States" while the Agencies undergo a new rulemaking process concerning the term. The Agencies have since been "reviewing and considering the large volume of public comments that they received on the . . . proposal." 83 Fed. Reg. at 5,201.

Separate from that proposal, *id.*, in November 2017, the Agencies published and solicited public comment on a proposal to establish an applicability date for the 2015 WOTUS Rule. "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) ("Applicability Rule proposal"). Citing (*inter alia*) the Supreme Court's then-pending review of the Sixth Circuit's subject-matter jurisdiction; the Sixth Circuit's nationwide stay; the District of North Dakota's 13-State preliminary injunction; the President's Executive Order; and the Agencies' ongoing reconsideration process, the Agencies proposed to add an applicability date to the 2015 WOTUS Rule that would be two years from the date of any final rule on the proposal. *See* 82 Fed. Reg. at 55,542-44.

Many Plaintiff States and Plaintiff Associations, among other challengers of the 2015 WOTUS Rule, submitted comments supporting the Applicability Rule proposal.

See Attach. 1 (comment letter from States of Texas and Louisiana, *et al.* dated Dec. 13, 2017); Attach. 2 (comment letter from the American Farm Bureau, *et al.* dated Dec. 13, 2017). The States, for example, stressed that "the proposal maintains the *status quo* while the Agencies complete their currently pending review of the 2015 WOTUS Rule." Attach. 1 at 1-2. Similarly, the American Farm Bureau, *et al*. emphasized: "If finalized, the proposed action would give the Agencies time to complete reconsideration proceedings on the underlying definition of 'waters of the United States.'" Attach. 2 at 3. In the interim, the commenters observed, an extended applicability date would "help provide continuity and regulatory certainty for regulated entitles, federal and state regulators, and the public generally." Attach. 2 at 1.

On January 22, 2018, the Supreme Court issued a decision. It held that the 2015 WOTUS Rule falls outside the scope of agency actions directly reviewable in the courts of appeals under 33 U.S.C. § 1369(b)(1). *See Nat'l Ass'n of Manufacturers v. Dept. of Defense*, No. 16-299, 2018 WL 491526 (S. Ct. Jan. 22, 2018). On or about February 16, 2018, presuming there are no petitions for rehearing of that decision submitted to the Supreme Court, *see* S. Ct. R. 44, the case will be returned to the Sixth Circuit. S. Ct. R. 45.3. Pending that event and further Order of the Sixth Circuit, the Sixth Circuit's nationwide stay of the 2015 WOTUS Rule nevertheless remains in effect.

On and effective February 6, 2018, the Agencies took final action on their Applicability Rule proposal, delaying the date by which the 2015 WOTUS Rule will take effect. *See* 83 Fed. Reg. 5,200 (Feb. 6, 2018). Specifically, the final Applicability Rule adds an applicability date of February 6, 2020, and will maintain the *status quo,* i.e., the

pre-2015 WOTUS Rule regulatory framework, while the Agencies consider possible revisions to the definition of "waters of the United States."

By Orders dated February 7, 2018 (ECF No. 85 in Case No. 3:15-cv-162, and ECF No. ECF No. 63 in Case No. 3:15-cv-165), this Court reopened the present actions in accordance with its orders scheduling a hearing on the motions for preliminary injunction for February 22, 2018. (ECF No. 62 in Case No. 3:15-cv-162, and ECF No. 54 in Case No. 3:15-cv-165.)

ARGUMENT

I. IMMEDIATE AND IRREPARABLE HARM IS A NECESSARY PREDICATE TO THE ISSUANCE OF A PRELIMINARY INJUNCTION.

"[A] preliminary injunction is an extraordinary remedy that may only be granted if the plaintiffs clearly establish . . . four prerequisites" including "a substantial threat that the movant will suffer immediate and irreparable harm if the injunction does not issue." *Kohr v. City of Houston*, No. 4:17-CV-1473, 2017 WL 6619336, at *4 (S.D. Tex. Dec. 28, 2017). The remaining requisite elements are: (1) there is a substantial likelihood the party will prevail on the merits; (2) the threatened injury outweighs the threatened harm to the defendants; and (3) the granting of the preliminary injunction will not disserve the public interest. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008); *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *see also Khan v. Fort Bend Indep. Sch. Dist.,* 561 F. Supp. 2d 760, 763 (S.D. Tex. 2008).

The Fifth Circuit has "cautioned repeatedly" that a motion for a preliminary injunction "should not be granted unless the party seeking it has 'clearly carried the

burden of persuasion' on all four requirements." *Lake Charles Diesel, Inc. v. General Motors Corp.,* 328 F.3d 192, 195–96 (5th Cir. 2003) (quoting *Miss. Power & Light Co. v. United Gas Pipeline Co.,* 760 F.2d 618, 621 (5th Cir. 1985)). Immediate and irreparable harm is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." *Texas v. United States*, 86 F. Supp. 3d 591, 674 (S.D. Tex. 2015) (quoting 11A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.)).

II. AS A MATTER OF LAW, THE MOVANTS HAVE NOT ESTABLISHED IMMEDIATE AND IRREPARABLE HARM.

Here, the essential element of immediate and irreparable harm is lacking.

Under the Applicability Rule, any implementation of the 2015 WOTUS Rule is nearly two years away. 83 Fed. Reg. 5,200 (Feb. 6, 2018). Thus, no party can demonstrate that immediate and irreparable harm is likely. *See Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.") (emphasis in original; citations omitted).

Incontrovertible facts confirm the absence of any immediate and irreparable harm. As officials with the Agencies attest: "Because the 2015 Rule's applicability date is two years away, the Agencies are not implementing the 2015 Rule in any way, and there are no plans for the Agencies to implement the 2015 Rule pending completion of the Agencies' ongoing reconsideration process." Declaration of D. Lee Forsgren, Deputy Assistant Administrator for the Office of Water at the United States

Environmental Protection Agency (Feb. 12, 2018), at ¶ 8; Declaration of Ryan A. Fisher, Principal Deputy Assistant Secretary of the Army (Civil Works) (Feb. 13, 2018) at ¶ 8 (same). These declarations are Attachments 3 and 4 to this memorandum.

Plaintiff States and Plaintiff Associations have not established any facts to the contrary. Plaintiff States rely on three recent declarations: the Declaration of Carlos Swonke, the Director of the Environmental Affairs Division for the Texas Department of Transportation (Case No. 3:15-cv-162, ECF No. 79-1); the Declaration of David W. Galindo, the Director of the Water Quality Division for the Texas Commission on Environmental Quality (ECF No. 79-2); and the Declaration of Leslie L. Savage, the Assistant Director for Technical Permitting for the Railroad Commission of Texas (ECF No. 79-3). These declarations fail to acknowledge the 2015 WOTUS Rule's extended applicability date. They also appear to claim, incorrectly, that when the Sixth Circuit's nationwide stay is dissolved, the 2015 WOTUS Rule will become immediately effective. *See, e.g.,* Swonke Decl. at ¶ 9 ("With the stay lifted, TxDOT will no longer have the benefit of this predictability in determining whether a project is subject to USACE jurisdiction."); Galindo Decl. at ¶ 12 ("Texas will be irreparably harmed by the application of the 2015 WOTUS Rule[.]"); Savage Decl. at ¶ 6 ("Implementation of the [2015] Rule . . . will cause the RRC irreparable harm[.]").

Plaintiff States' supplemental declarations are to the same non-effect. These declarations also fail to acknowledge the Applicability Rule and appear to claim, incorrectly, that the 2015 WOTUS Rule is scheduled to become immediately effective. *See* Declaration of Brian S. Carter, the Senior Deputy Director of Asset Enhancement

at the Texas General Land Office (Case No. 3:15-cv-162, ECF No. 93-2); and the Declaration of Sid Miller, the Commissioner of the Texas Department of Agriculture (ECF No. 93-1).

Similarly, Plaintiff Associations point to three recent declarations: the Declaration of Ross Evan Eisenberg, the Vice President of Energy and Resource Policy at the National Association of Manufacturers (Case No. 13:15-cv-165, ECF No. 61-1 at pp. 437-39); the Declaration of Howard J. Feldman, the Senior Director for Regulatory and Scientific Affairs at the American Petroleum Institute (ECF No. 61-1 at pp. 441-42); and the Declaration of Don Parrish, the Senior Director of Regulatory Affairs at the American Farm Bureau (ECF No. 61-1 at pp. 444-49). Although these declarants acknowledge the existence of the Applicability Rule, they assert that it "does not resolve the uncertainty." Eisenberg Decl. at ¶ 5. *See also* Feldman Decl. at ¶ 7 (same); Parrish Decl. at ¶¶ 1, 10 (substantially the same). This is so, according to these declarants, because the Applicability Rule will be subject to judicial review. *See, e.g.,* Feldman Decl. at ¶ 7.

These assertions of harm are speculative and thus fall short of the applicable standard. *See, e.g., Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) ("Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant."). The movants are correct that the Applicability Rule, like the 2015 WOTUS Rule, is a final agency action, and as such aggrieved persons may seek judicial review in accordance with the Administrative Procedure Act ("APA"). To date, three sets of parties−including Intervenor-

Defendants National Resources Defense Council and National Wildlife Federation in the present actions−have filed complaints seeking to challenge the Applicability Rule. *See New York v. Pruitt*, Case No. 18-cv-1030 (S.D.N.Y.);[1] *Natural Resources Defense Council v. EPA*, Case No. 18-cv-1048 (S.D.N.Y.); *S.C. Coastal Conservation v. Pruitt,* Case No. 2:18-cv-330 (D.S.C.). Other cases may be filed. Nevertheless, these cases are in their infancy. No substantive order or any other development in any of these cases has occurred that alters the applicability date of the 2015 WOTUS Rule.

Moreover, the mere existence of challenges to the Applicability Rule does not mean that Plaintiff States or Plaintiff Associations have demonstrated that the 2015 WOTUS Rule is "*likely*" subjecting any person to immediate and irreparable harm. *See Winter*, 555 U.S. at 22 (emphasis in original). Under the APA, final agency actions carry a presumption of regularity; "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And even if a court finds agency action to be deficient, remedial options exist. Remanding a rule while leaving it in place "is generally appropriate when 'there is at least a serious possibility that the [agency] will be able to substantiate its decision' given an opportunity to do so, and when vacating would be 'disruptive.'" *Central & Southwest Services, Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir.

[1] An Assistant Attorney General for the State of New York is presenting "seeking admission pro hac vice" in this Court to "file a motion on behalf of the State of New York, and joining states, to file an amicus brief in this proceeding." ECF No. 97-2, Case No. 3:15-cv-162.

2000) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 151 (D.C. Cir. 1993)).

In addition, because the validity of the Applicability Rule is a predicate question to the movants' assertions of irreparable harm in this Court−and Defendant-Intervenors contend it is not valid[2]−it would conserve judicial resources and be more efficient for this Court to consider Defendant-Intervenors' challenge to the Applicability Rule. The Agencies are therefore moving pursuant to 28 U.S.C. § 1404(a) to transfer to this Court Defendant-Intervenors' and all other just-filed actions challenging the Applicability Rule. Consolidation here would allow this Court to first consider claims regarding the Applicability Rule, and if it determines that the Applicability Rule is valid, then no preliminary injunction of the 2015 WOTUS Rule will ever be necessary. But, as noted by Defendant-Intervenors, "[i]f the [Applicability Rule] is vacated, such that the [2015 WOTUS] Rule will again be implemented, the States−or any other party claiming to be harmed by the Rule−may seek preliminary relief at that time, or shortly beforehand." Defendant-Intervenors' Response to Plaintiff States' Motion to Reopen, ECF No. 72 at n.1., Case No. 3:15-cv-162.

At this time, the movants are not entitled to the extraordinary remedy of a preliminary injunction. As this Court has explained, a movant's assertion of what

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[2] In objecting to Plaintiff States' request to file a motion for a preliminary injunction, Defendant-Intervenors urged the Court to "hold any preliminary injunction motion in abeyance until the States demonstrate a reasonable likelihood that the [2015 WOTUS] Rule will be implemented," although noting that Defendant-Intervenors do "plan to challenge the [Applicability Rule] in court as illegal." Defendant-Intervenors' Response to Plaintiff States' Motion to Reopen, ECF No. 72 at 3 & n.1, Case No. 3:15-cv-162.

"might" or "could" happen is insufficient. *Arizona v. Nat'l Telecomms. & Info. Admin.*, No. 3:16-CV-274, 2016 WL 9307615, at *1 (S.D. Tex. Oct. 3, 2016). *See also, e.g., Janvey*, 647 F.3d at 601 ("The party seeking a preliminary injunction must also show that the threatened harm is more than mere speculation."). If and only if the Court wishes to pretermit its evaluation of immediate and irreparable harm until the Applicability Rule is further litigated, the Court could, for example, hold the motions for preliminary injunctive relief in abeyance for a period of time. In no event, however, should the Court now grant the motions.

At bottom, Plaintiff States and Plaintiff Associations are not subject to any immediate and irreparable harm from the 2015 WOTUS Rule because: (1) the Sixth Circuit's nationwide stay currently remains in effect until further order of that court; and (2) the Applicability Rule will maintain the *status quo* for another two years while the Agencies complete their reconsideration process. Should these facts change, Plaintiff States or Plaintiff Associations might renew their motions.

III. THE COURT NEED NOT REACH THE REMAINING ELEMENTS OF PRELIMINARY INJUNCTIVE RELIEF.

Because the movants have not demonstrated any immediate and irreparable harm, the Court need not evaluate Plaintiff States' or Plaintiff Associations' contentions that they have satisfied the remaining prerequisites to the issuance of any preliminary injunctive relief, including but not limited to likelihood of success on the merits. The movants' failure to show any immediate and irreparable harm means that they are not now entitled to any preliminary injunctive relief. *See La Union Del Pueblo Entero v.*

Fed. Emergency Mgmt. Agency, 608 F.3d 217, 225 (5th Cir. 2010) (finding that the court "need not address . . . the other necessary elements for preliminary injunctive relief" upon determining that the movants did not establish a likelihood of success); *Holland Am.,* 777 F.2d at 996-98 (vacating a preliminary injunction due "the absence of irreparable injury").

This conclusion is all the more appropriate given the pendency of a substantive rulemaking reconsidering the definition of "waters of the United States." The Agencies are now reconsidering the 2015 WOTUS Rule in light of (*inter alia*): the Sixth Circuit's conclusion, when staying the Rule, that the challengers had demonstrated "a substantial possibility of success on the merits," *In re EPA and Dept. of Defense Final Rule,* 803 F.3d at 808; the District of North Dakota's similar finding when preliminarily enjoining the 2015 WOTUS Rule throughout 13 States, *see North Dakota* v. *EPA*, 127 F. Supp. 3d at 1055; President Trump's Executive Order directing the Agencies to reconsider the Rule; and numerous comments from Plaintiff States, Plaintiff Associations, Defendant-Intervenors Natural Resources Defense Council and National Wildlife Federation, and scores of other interested persons. Because of that ongoing reconsideration, the Agencies do not express any further views here on the merits of the 2015 WOTUS Rule.

Indeed, the interlocutory stage of the reconsideration process serves only to underscore a lack of current harm to the movants. The Applicability Rule—promulgated through a full notice-and-comment process—means that the 2015 WOTUS Rule will not become applicable for another two years. During that time, the Agencies will continue the ongoing rulemaking process regarding the definition of

"waters of the United States." *See* Forsgren Decl. (Attach. 3); Fisher Decl. (Attach. 4) (declarations from Agency officials discussing the process). It is possible that, following the conclusion of that process, the harms of which the movants complain may be mooted by a new rule. But if they are not, any aggrieved party will have ample opportunity to assert its rights to judicial review and pursue preliminary relief at a future appropriate time.

IV. IN NO EVENT SHOULD THE REACH OF ANY INJUNCTIVE RELIEF BE NATIONWIDE.

Assuming, only for argument's sake, that the Court issued a preliminary injunction, in no event should the scope of that injunction be nationwide as the movants request. First, an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Lion Health Servs., Inc. v. Sebelius*, 635 F3d 693, 703 (5th Cir. 2011); *see also Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying nationwide injunction insofar as it "grants relief to persons other than" named plaintiff). Here, Plaintiff States have submitted recent declarations only from State of Texas officials. *See supra* at 10-11. And Plaintiff Associations' recent declarations, although referencing members throughout the nation, fail to identify the type of "concrete, discernible injury" across every state in the nation that is sufficient to grant Article III standing to pursue and obtain such broad relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Nor do either set of Plaintiffs represent a nationwide class. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) (narrowing injunction in part because plaintiffs "do not

represent a class, so they could not seek to enjoin such an [agency action] on the ground that it might cause harm to other parties."). Thus, there is no basis here to grant relief to individuals that have not even proven an injury sufficient to demonstrate they have standing, let alone the irreparable harm required for preliminary injunctive relief.

The movants' request for nationwide preliminary relief is not only inconsistent with the constitutional and equitable rules, noted above, it also disserves several, related principles important to the orderly, even-handed development of the law. Congress has formulated a regional court system–whose decisions ordinarily do not bind each other pending review by the Supreme Court. *See*, *e.g., Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 489 (1900) (holding that courts of appeals are not bound by holdings of other circuits). An order by a single district court judge granting nationwide preliminary injunctive relief undermines this policy and thwarts the development of the law. *See Califano*, 442 U.S. at 702 (noting that nationwide injunctions "have a detrimental effect by foreclosing adjudication by a number of different courts and judges"); *see also* S. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harvard L. Rev. 417, 482 (2017), ("Power in the American political system is pervasively divided—through federalism, through separation of powers, and through the sprawling system of federal courts. A legal question is resolved through patience and the consideration of many minds").

Indeed, for similar reasons, the Supreme Court unanimously held in *United States v. Mendoza*, 464 U.S. 154 (1984), that the federal government is not subject to issue preclusion. The Court recognized that precluding government re-litigation might yield

efficiency and uniformity (as is sought through nationwide injunctions), but the Court rejected that position because it would "substantially thwart the development of important questions of law" and "deprive [the Supreme Court] of the benefit it receives from permitting several courts of appeals to explore a difficult question before [granting] certiorari." *Id.* at 160.

Relatedly, under the longstanding doctrine of "intercircuit nonacquiesence," federal agencies may ordinarily decline to follow the case law of a court of appeals that has ruled against its administrative action outside of that circuit. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L. J. 679, 687 (1989). A nationwide injunction by a district court is similarly at odds with this principle. *See e.g., Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1018 (5th Cir. 2015); *Heartland Plymouth Court MI, LLC v. N.L.R.B.*, 838 F.3d 16, 22 (D.C. Cir. 2016), *cert. granted*, 85 U.S.L.W. 3341 (U.S. Jan. 13, 2014) (No. 16-307); *Ruppert v. Bowen*, 871 F.2d 1172, 1177 (2d Cir. 1989).

For these reasons, any preliminary injunction by this Court should extend no further than the boundaries of Plaintiff States seeking this relief: Texas, Louisiana, and Mississippi–to the extent Plaintiffs have claimed and demonstrated injury. Indeed, the wisdom of this approach is reinforced by the actions of the District of North Dakota. That court, as already noted, has long since issued a preliminary injunction against the 2015 WOTUS Rule. When doing so, the court clarified that it extends only to the boundaries of the 13 States that are the plaintiffs in that action. Moreover, courts ordinarily should not award injunctive relief that would encroach upon another court's

jurisdiction to decide a matter. *See, e.g., Va. Soc'y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012) (rejecting nationwide injunction because, among other reasons, it "preclude[ed] other circuits from ruling" on issue); *see also Los Angeles Haven Hospice*, 638 F.3d at 664-65 (nationwide injunction was "too broad" where injunction preventing agency from enforcing regulation against plaintiffs was sufficient to afford relief to plaintiffs and several other cases challenging the regulation were pending).

The movants have presented no compelling reason for this Court to follow a different approach. Their reliance on *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd per curiam by an equally divided Supreme Court*, 136 S. Ct. 2271 (2016), is especially misplaced. There, the Fifth Circuit's affirmance of a nationwide injunction stressed the importance of uniformity in immigration policy, citing the Constitution, the statutes, and judicial precedent. *Id.* While the Agencies agree that uniformity in the definition of "waters of the United States" is important—and indeed the Agencies have acted to maintain uniformity in the applicable definition of the "waters of the United States" by issuing the Applicability Rule—absolute uniformity is not required by the Clean Water Act. Accepting the movants' argument—that a nationwide injunction is necessary to protect them from possible changes in the law—would go beyond the narrow circumstances the court in *Texas* relied upon.

CONCLUSION

The motions for a preliminary injunction should be denied.

Dated: February 14, 2018

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division

/s/ *Andrew J. Doyle*
ANDREW J. DOYLE, Attorney in Charge
AMY J. DONA, Attorney in Charge
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
Tel: (202) 514-4427 (Doyle)
Tel: (202) 514-0223 (Dona)
Fax: (202) 514-8865 (Both)
andrew.doyle@usdoj.gov
amy.dona@usdoj.gov

Counsel for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2018, I electronically filed the foregoing opposition with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon counsel of record.

/s/ *Andrew J. Doyle*