IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, *et al.*, *Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*. AMERICAN FARM BUREAU FEDERATION, *et al.*, *Intervenor-Defendants*	Case No. 2:18-cv-330-DCN

MOTION FOR A STAY PENDING APPEAL OR, IN THE ALTERNATIVE, FOR A STAY TO PERMIT A MOTION FOR A STAY TO THE FOURTH CIRCUIT

Pursuant to Federal Rule of Appellate Procedure 8(a)(1) and Federal Rule of Civil Procedure 62(c), the intervenor-defendants respectfully move this Court for a stay pending appeal of the final judgment entered August 16, 2018 (Dkt. 67). In the alternative, the intervenor-defendants request a more limited stay pending resolution of their motion to the Fourth Circuit for a stay pending appeal.

ARGUMENT

The standards for a stay pending appeal "closely resemble the standards for the grant of a preliminary injunction, including (1) 'a strong showing' that the party requesting the stay will succeed on the merits; (2) the presence of irreparable injury by the party seeking the stay; (3) whether the stay will substantially injure other parties to the litigation; and (4) whether the public interest is served by the grant of the stay." *Condon v. Haley*, 21 F. Supp. 3d 572, 587

(D.S.C. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 433-434 (2009)). Each condition strongly favors a grant of relief.

A. Intervenor-defendants are likely to succeed on appeal

The Fourth Circuit is likely to vacate this Court's injunction on appeal for two reasons.

1. The public properly was not invited to comment on the overall "merits" of the 2015 Rule as compared to the prior regulatory regime because, in proposing the Applicability Date Rule, the agencies were not deciding whether the 2015 Rule or the prior regulatory regime best defines the "waters of the United States." The agencies instead invited comment on the question that they were considering: whether, over the next two years, maintaining the existing regulatory regime nationwide was superior as compared to an uncertain, shifting, patchwork regulatory regime in which different definitions of "waters of the United States" apply in different states as a result of judicial injunctions of the 2015 Rule in 24 states (and with additional judicial challenges and injunctions against Rule pending). On that question, the agencies acted reasonably to take and respond to comments that were relevant to the limited action proposed.

2. It is fundamental that "a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief," including by making a showing that "it has suffered an irreparable injury" and that "the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-157 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). In two different respects, the plaintiffs failed to meet this standard.

a. To obtain a permanent injunction, the plaintiffs had the burden to prove that they suffered an irreparable injury as a result of the promulgation of the Applicability Date Rule. Their only argument to that effect was that they had been denied the opportunity to comment on the 2015 WOTUS Rule and instead were asked to comment only on the fact that the

Applicability Date Rule delayed the applicability of the 2015 WOTUS Rule for two years. But the agencies had found in promulgating the 2015 Rule that it was no more nor less expansive in its scope than the prior regulatory regime. Though we disagree with that analysis, this Court could not find irreparable harm to plaintiffs from the delayed replacement of one regulatory regime by another without comparing the relative scopes of the two regimes to determine whether plaintiffs would suffer any irreparable injury if the earlier regime were to remain in effect.[1]

Plaintiffs here failed to prove that they will be irreparably harmed absent an injunction. They have not identified what waters are of interest to their members and their activities, or the ways in which the differences in the regulations would affect those waters or their members' ability to enjoy those waters. As the Sixth Circuit summed it up, there is no "indication that the integrity of the nation's waters will suffer imminent injury if the new scheme is not immediately implemented and enforced." *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015).

Nor will an injunction against the Applicability Date Rule by this Court result in the immediate implementation of the 2015 WOTUS Rule that plaintiffs seek—at least not in the 24

[1] The agencies asserted before the Sixth Circuit (U.S. Br. 31) that it is not possible to determine the number of waters that would be jurisdictional under the 2015 Rule compared to either the 1986 regulation or the post-*Rapanos* period. At the time the agencies promulgated the WOTUS Rule, they estimated that it would result in a small overall increase in positive jurisdictional determinations compared to those made under the *Rapanos* guidance. But they concluded that there will be fewer waters within the scope of the CWA under the Rule compared to the 1986 regulation. And the nature of the increases and decreases were not predicted to be uniform. As to the new "adjacency" provision, for example, the agencies predicted that it would *not* result in "an expansion of jurisdiction as a whole in comparison to the existing regulation." *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed Reg. 37054, 37084 (June 29, 2015). Regardless whether that analysis is correct—and we have explained in our brief here and in many other courts why we do not believe it is correct—this Court cannot make the predicate determination of irreparable injury to plaintiffs without addressing the effect of the Applicability Date delay on jurisdiction, which it did not do. And that issue, far from needing to be the subject of notice and comment as part of the Applicability Date Rule, was fully aired during the proposal and promulgation of the 2015 Rule.

states, including South Carolina, where the WOTUS Rule itself has been enjoined. *See Georgia v. Pruitt*, 2018 WL 2766877 (S.D. Ga. June 8, 2018) (enjoining the WOTUS Rule in Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin) (attached hereto as Exhibit A); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015) (enjoining the WOTUS Rule in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Dakota, and Wyoming).

b. Separately, the plaintiffs have not shown—and the Court did not find—that the public interest would be served by an injunction. As we explained in our opposition brief (Dkt. 63, at 11-28), the public interest is manifestly *disserved* by enjoining the Applicability Date Rule because the 2015 WOTUS Rule was promulgated in the violation of the APA, is inconsistent with the text of the CWA, and is unconstitutional—as every court to consider the issue has concluded. Even the agencies now concede that the 2015 WOTUS Rule is probably unlawful and certainly ineffective. *See Definition of "Waters of the United States"—Recodification of Preexisting Rule*, 83 Fed. Reg. 32227, 32238 (July 12, 2018) ("the 2015 Rule lacks sufficient statutory basis"); *id*. at 32237 ("the 2015 Rule creates significant uncertainty for agency staff, regulated entities, and the public"). Generally speaking, the public interest is served by *preventing* the enforcement of unlawful (and especially unconstitutional) regulations, not by bringing them into effect.

The damage to the public interest of the Court's injunction follows not only from the illegality of the 2015 Rule—which this Court's injunction brings into force—but also from the patchwork regulatory regime that flows from this Court's order as a practical matter. By operation of the two preliminary injunctions issued by the district courts in Georgia and North Dakota, the Court's injunction here will, in practical effect, bring the 2015 Rule into force in

only 26 States—*not* including South Carolina itself.

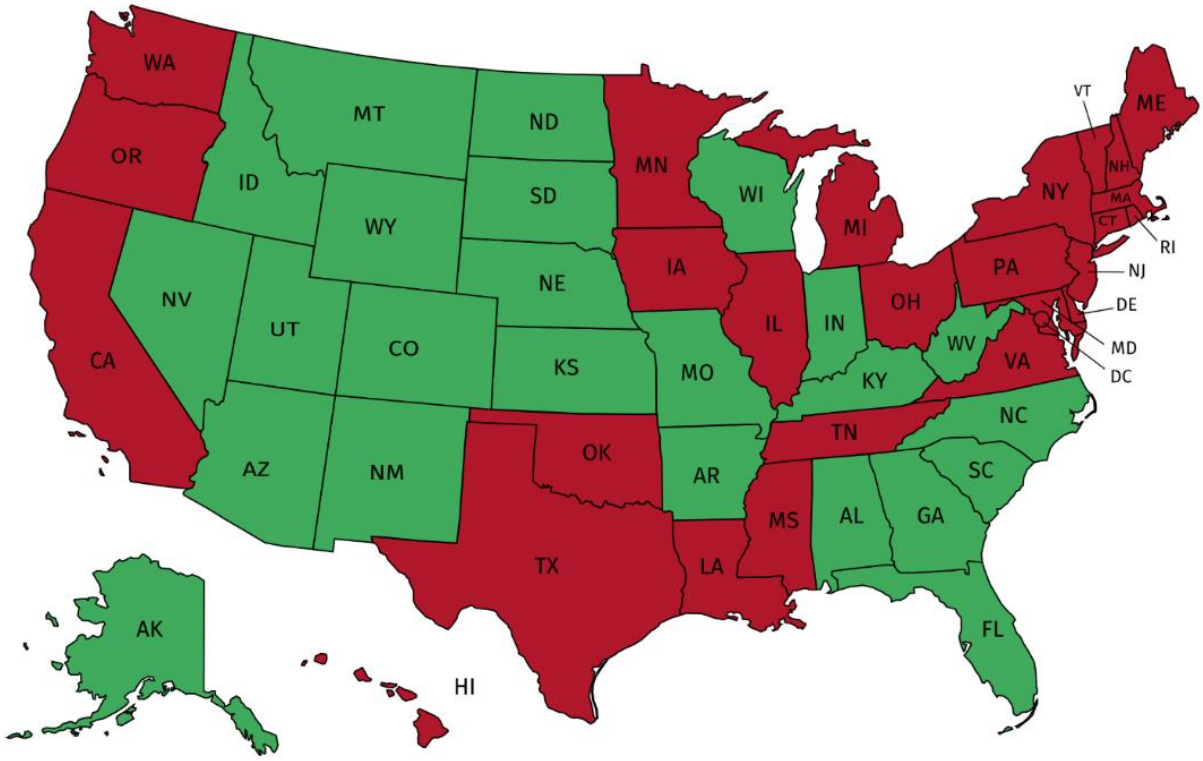

Figure 1: The regulatory patchwork following this Court's injunction; in green states, the 2015 Rule is enjoined, and in red states it is now in effect.

The complications of such a patchwork regime are severe. 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 Missouri, Kentucky, and Tennessee? 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 even greater delay) for activity in those isolated features. The problem would be multiplied many times over throughout the country in similar cases. Likewise, because the 2015 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 two incompatible legal rules.

As the Sixth Circuit explained, "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. That observation concerning the public interest is even more true today than it was when the Sixth Circuit ruled, given the patchwork regime that will otherwise result. 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—should not apply differently depending on whether the activity happens to be located on one side of a state line or the other.

The Court expressly declined to reach these issues, emphasizing that "the issue currently before the court is not the merits of the WOTUS rule but the procedure by which the Suspension Rule was implemented." Order 6-7, n.1. Respectfully, that disregards the permanent injunction framework. Before the Court was permitted to enter a permanent injunction, it was required to consider the public interest; and, to consider the public interest, it was required to consider the practical consequences of reviving in roughly half the nation a burdensome Rule (for both regulators and the regulated public) that three courts have found to be likely unlawful. The Fourth Circuit is likely to reverse on appeal on this basis alone.

B. Intervenor-defendants will be irreparably harmed absent a stay

For all the reasons that the injunction should not have entered in the first place, the intervenor-defendants and their members will be irreparably harmed if the injunction is not stayed.

First, we showed that the 2015 WOTUS Rule is unconstitutionally vague. *See* Dkt. 63, at 19-22. "It is well settled that any deprivation of constitutional rights 'for even minimal periods of time' constitutes irreparable injury." *Condon*, 21 F. Supp. 3d at 588 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). This irreparable injury is immediate and ongoing.

Second, every court to consider a request for an injunction against the 2015 WOTUS

Rule has concluded that its unlawful enforcement is an irreparable injury. Judge Wood in the Southern District of Georgia, for example, concluded that that plaintiffs "overwhelmingly" demonstrated a substantial likelihood of success on the merits of their challenges and that, if the 2015 WOTUS Rule ever came into effect, it would "trigger[] immediate irreparable harm." *Georgia v. Pruitt*, 2018 WL 2766877, at *7, *9 (S.D. Ga. June 8, 2018). Judge Erickson of the District of North Dakota found the same, emphasizing the allowing the WOTUS Rule to come into effect would result in "unrecoverable monetary harm," among other injuries. *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015). And in the Sixth Circuit's view, the showing on irreparable harm was essentially unnecessary because 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," and allowing the WOTUS Rule to take effect would have a "pervasive nationwide impact . . . on state and federal regulation of the nation's waters." *In re EPA*, 803 F.3d at 806, 808.

In addition to the findings of these other courts, the intervenor-defendants submitted numerous declarations originally filed before the Sixth Circuit and in support of their (pending) preliminary injunction motion in the Southern District of Texas. *See* Dkts. 63-12, 63-13. These declarations prove that the intervenor-defendants' members' operations will be significantly disrupted if the WOTUS Rule is allowed to come into effect in 26 states. They will be unable to plan their ongoing operations (especially their multistate operations) in the face of such regulatory uncertainty. We described several examples of the extremely damaging effects of the WOTUS Rule (Dkt. 63, at 31-32), including on mining and energy extraction operations, agricultural and silviculural interests, and construction projects all across the country. The uncertainty created by the hopelessly vague 2015 Rule is compounded by the likelihood of its repeal in the coming months. Against this backdrop, the risk of irreparable harm is undeniable.

C. A stay will not substantially injure the plaintiffs and would serve the public interest

A stay of the Court's injunction will not result in any significant injury to plaintiffs. As a threshold matter, plaintiffs have failed to demonstrate an irreparable injury warranting an injunction in the first place. *See supra*, 2-3. More fundamentally, the plaintiffs have been living with a stay of the WOTUS Rule, in one form or another, for the past three years, almost ever since the Rule was promulgated. Yet in all that time, they have not pointed to a single environmental harm that has occurred that has inhibited their enjoyment of any water features. There is therefore no reason to think that maintenance of the status quo for an additional few months while the intervenor-defendants litigate an appeal will cause them any identifiable injury. Failing to stay the Court's injunction, by contrast, would throw countless commonplace activities across 26 states into regulatory purgatory.

CONCLUSION

The Court should stay its final judgment pending appeal. If the Court is disinclined to enter a stay pending appeal, it should at minimum stay its final judgment while the intervenor-defendants seek a stay from the Fourth Circuit.

Dated: August 20, 2018

Respectfully submitted,

/s/ *W. Thomas Lavender, Jr.*

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CERTIFICATE OF SERVICE

I hereby certify that, on August 20, 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 District of South Carolina on all parties registered for CM/ECF in the above-captioned matter.

/s/ *W. Thomas Lavender, Jr.*