UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

STATES OF NORTH DAKOTA, ALASKA, ARIZONA, ARKANSAS, COLORADO, IDAHO, MISSOURI, MONTANA, NEBRASKA, NEVADA, SOUTH DAKOTA, and WYOMING; NEW MEXICO ENVIRONMENT DEPARTMENT; and NEW MEXICO STATE ENGINEER, Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; REGINA McCARTHY, in her official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. ARMY CORPS OF ENGINEERS; and JO ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works), Defendants.	)	**Case No. 3:15-cv-00059-RRE-ARS**

PLAINTIFF STATES' BRIEF IN SUPPORT OF A NATIONWIDE PRELIMINARY INJUNCTION

On August 27, 2015, this Court issued its Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction ("Injunction Order"). *North Dakota et al. v. U.S. Environmental Protection Agency et al.*, No. 3:15-cv-00059 (D.N.D. Aug. 27, 2015), ECF No. 70. On August 28, 2015, the Court ordered additional briefing on the scope of the Injunction Order. Order Setting Briefing Schedule, *North Dakota et al. v. U.S. Environmental Protection Agency et al.*, No. 3:15-cv-00059 (D.N.D. Aug. 28, 2015), ECF No. 74. The States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming, and the New Mexico Environment Department and New Mexico State Engineer (collectively "Plaintiff States"), respectfully submit their Brief in Support of a

Nationwide Preliminary Injunction of the "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (the "WOTUS Rule" or "Rule").

INTRODUCTION

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (the "Agencies") have repeatedly asserted that uniform applicability, consistency, and predictability were driving forces in the need for and development of the Rule. *See, e.g.*, 80 Fed. Reg. at 37,054 ("The Rule will . . . increase CWA program predictability and consistency . . . ."). This mantra has been oft-repeated by the Agencies throughout the early phases in this and other litigation across the country. Only after this Court enjoined the Rule from taking effect, finding that the Plaintiff States were likely to succeed on their claims that the Rule violates both the Clean Water Act ("CWA") and Administrative Procedure Act ("APA"), the Agencies were quick to abandon their uniform applicability concerns in favor of seeking to limit the scope of this Court's ruling. The Court should reject the Agencies litigation tactic.

The Court's Injunction Order clearly indicated that the Court was "enjoining Fed. Reg. 37,054-127." Injunction Order at 18. Shortly after the Court issued its Injunction Order, the Agencies issued a document entitled "CWR Litigation Statement" claiming that the Agencies will only honor the Injunction Order within the States that are a party to this litigation and "in all other respects the rule is effective on August 28." *See* **Exhibit A**, attached hereto. Plaintiff States respectfully submit that the Agencies' "CWR Litigation Statement" is contrary to, and in defiance of, the Court's Injunction Order.

This Court has broad discretion to exercise its equitable powers through imposition of a nationwide injunction, and should do so here to prevent inconsistent rulings on the proper scope of the CWA during the pendency of this litigation. Doing so would also promote the uniform

application of nationwide rules and would treat regulated entities and regulators consistently across geopolitical boundaries, particularly because watersheds do not respect such boundaries.

Given that Plaintiff States are likely to succeed on the merits of their claims, Injunction Order at 2, a nationwide injunction would preserve the status quo pending final resolution of this case and would mirror the final remedies requested by Plaintiff States in their First Amended Complaint – setting aside the Rule as unlawful, permanently enjoining the Agencies from enforcing the Rule, and requiring the Agencies to rewrite the Rule within the legal framework established by Congress under the CWA while adhering to the procedural mandates of the APA and National Environmental Policy Act ("NEPA").

ARGUMENT

I. The Court has Broad Authority to Grant Nationwide Injunctive Relief.

The Court has broad discretion to remedy the wrongs the Agencies committed in adopting the WOTUS Rule by enjoining the Rule's application nationwide. The notion that the Court's authority to grant relief is somehow geographically limited, as implied by the Agencies' refusal to acknowledge the plain language of the Injunction Order, is simply unsupportable.

There is no geographical limit on the Court's equitable authority. The Agencies are properly before the Court, so the Court "in exercising its equity powers may command [them] to cease or perform acts outside its territorial jurisdiction." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952). The Court's remedial power is also defined by the Agencies' unlawful action, not the concrete injury showing the existence of an Article III case or controversy. *See, e.g., Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 1159 (5th Cir. 2006) ("[A]n injunction must be narrowly tailored to remedy the specific action necessitating the injunction."). As explained by the Supreme Court of the United States, "the scope of injunctive relief is dictated by the extent of

the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

It is also well-established that a court has broad discretion when granting injunctive relief. *See, e.g., Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power."); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."). These broad powers are commonly applied in cases involving facial challenges to agency rules that are found to be unlawful. *See, e.g., Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1407-08 (D.C. Cir. 1998) (affirming a district court order striking an Army Corps rule that purported to expand Corps jurisdiction and enjoining the Corps from applying it nationwide); *see also California ex rel. Lockyer v. U.S. Dept. of Agric.*, 459 F. Supp. 2d 874, 913 (N.D. Cal. 2006) (setting aside a U.S. Forest Service Rule because it was arbitrary and capricious and enjoining the Forest Service from applying the unlawful rule), *aff'd*, 575 F.3d 999 (9th Cir. 2009); *Am. Lithotripsy Soc'y v. Thompson*, 215 F. Supp. 2d 23, 37 (D.D.C. 2002) (striking regulation found to be arbitrary and capricious under the APA and enjoining the Centers for Medicare and Medicaid Services from applying the regulation); *Assoc. Builders & Contractors v. Reich*, 922 F. Supp. 676, 682 (D.D.C. 1996) (setting aside and enjoining the Bureau of Apprenticeship and Training from applying a circular and policy letter that had been issued without complying with the notice and comment requirements of the APA); *Serv. Employees Int'l Union v. Gen. Servs. Admin*, 830 F. Supp. 5, 9-10 (D.D.C. 1993) (enjoining the General Services Administration from applying a regulation that was found to be arbitrary and capricious under the APA); *Vencor, Inc. v. Shalala*, 988 F. Supp. 1467, 1473 (N.D.

Ga. 1997) (enjoining the Health Care Financing Administration from applying a new geographic proximity requirement that the court found violated the APA).

Further, the APA demands that the Court vacate and set aside the Rule upon reaching a determination that it is unlawful. Under 5 U.S.C. § 706(2)(A), "[t]he reviewing court *shall* … *hold unlawful and set aside* agency action … found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (emphasis added). The APA also specifically contemplates the imposition of injunctive relief, as the Act's sovereign immunity waiver provision, 5 U.S.C. § 702, includes both "mandatory" and "injunctive" relief. *See* 5 U.S.C. § 702 ("Nothing herein … affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground."); *Friends of the Wild Swan v. EPA*, 74 Fed. Appx. 718, 722 (9th Cir. 2003) ("The presence of § 702, which specifically identifies injunctive relief, 'militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute.'" (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 316 (1982))).

The Agencies persistently characterize the scope of the Rule as "nationwide." The Court's Injunction Order properly fits the Rule's scope and should be read to extend nationwide as well. No useful purpose is served by allowing a wildly overreaching Rule to take geographically defined effect for the interim period between the issuance of the preliminary injunction and final resolution of the case. This point has special salience given that the Agencies are seeking to reassert a massive jurisdictional land-grab that the Supreme Court cautioned them against in both *SWANCC* and *Rapanos*. The overriding significant harm to state sovereignty that the Court has already identified exists by definition nationwide, a fact that is

bolstered by the litigation actions of thirty-one States representing more than 75% of the land area of this country asking the courts to overturn the Rule.

II. A Nationwide Injunction Preserves the Status Quo Pending Final Resolution of the Litigation.

Given that Plaintiff States are likely to succeed on the merits of their claims, a nationwide injunction would preserve the status quo pending final resolution of this case and would mirror the final remedies requested by Plaintiff States in their First Amended Complaint – setting aside the Rule as unlawful and permanently enjoining the Agencies from enforcing the Rule.

The nature of the Agencies' violations of law and the relief Plaintiff States seek implicate nationwide relief. The Plaintiff States have brought a *facial* challenge to the Rule on several grounds, including that it was promulgated without proper notice-and-comment rulemaking, as required by the APA. This Court found that Plaintiff States were likely to prevail on that procedural claim. Injunction Order at 14-15. The claim necessarily implies that the Rule is invalid when issued because notice and comment requirements were not met. Unsurprisingly, the APA compels that result. It provides that courts "shall . . . hold unlawful and set aside" procedurally improper agency actions. 5 U.S.C. § 706(2)(D). The Court has also found that Plaintiff States have a "substantial likelihood of success" in prevailing in this litigation because the Rule, as in *Rapanos*, "includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of that term." Injunction Order at 10-11. Thus, Petitioner States are "likely to succeed on their claim because (1) it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule, and (2) it appears likely the EPA failed to comply with APA requirements when promulgating the Rule." Injunction Order at 2.

Courts have consistently recognized that the invalidation of a regulation under the APA has "nationwide" effect, for "plaintiffs and non-parties alike." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408-10 (D.C. Cir. 1998.)[1] If Plaintiff States ultimately prevail in this litigation, the appropriate remedy under the APA is to enjoin enforcement of the facially invalid Rule nationwide. *Id.* at 1409-10 ("[I]f the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual . . . . [Thus] [u]nder these circumstances a single plaintiff, so long as he is injured by the rule, may obtain 'programmatic' relief" such as a nationwide injunction of the agency action.); *Sequoia Forestkeeper v. Tidwell*, 847 F. Supp. 2d 1244, 1253 (E.D. Cal. 2012) (granting nationwide injunction where agency exceeded scope of statutory authority, stating a "geographically-restricted injunction is insufficient, as the . . . [agency] has no authority to continue to implement ultra vires regulations in any district of the United States"); *Am. Lands Alliance v. Norton*, No. CIV.A. 00-2339 (RBW), 2004 WL 3246687, at *3-4 (D.D.C. June 2, 2004) ("Issuing a nationwide injunction in this situation is therefore called for because the declaratory judgment alone is inadequate when a policy is found to be facially invalid.").

The substantive and procedural violations committed by the Agencies in promulgating the Rule already identified by this Court highlight the need for a preliminary injunction that will preserve the status quo as a precursor to providing the relief sought in the First Amended Complaint—relief that necessarily has nationwide effect. *Califano v. Yamusaki*, 442 U.S. at 702. In fact, the only remedies that are appropriate to address the illegality of the Rule are those

[1] *See, e.g. Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 19 (D.D.C. 2004) (holding that where a rule establishing a government program was invalid for failure to afford an opportunity for meaningful comment, the rule should be enjoined as to "all persons subject to" the program and not simply as to the plaintiffs), *modified sub nom. John Doe No. 1 v. Rumsfeld*, CIV.A. 03-707(EGS), 2005 WL 774857 (D.D.C. Feb 6, 2005) and *modified sub nom. John Doe No. 1 v. Rumsfeld*, CIV.A 03-707(EGS), 2005 WL 1124589 (D.D.C. Apr. 6, 2005); *cf. Am. Lands Alliance v. Norton*, CIV.A. 00-2339 (RBW), 2004 WL 3246687, at *3 (D.D.C. June 2, 2004) (imposing a nationwide injunction prohibiting the Fish and Wildlife Service from applying a policy that violated the Endangered Species Act's notice-and-comment requirement).

specified in the Plaintiff States' Prayer for Relief: (1) declaring the Rule unlawful as in violation of the CWA, NEPA, and the APA, and as beyond the bounds permitted under the Constitution of the United States; (2) vacating the Rule in its entirety; (3) enjoining the Agencies from "using, applying, implementing, enforcing, or otherwise proceeding on the basis of the final Rule;" and (4) remanding the matter to the Agencies to give them the option to issue a rule that complies with the law. Because the Rule and requested relief are of nationwide consequence, so too should the Injunction Order apply nationwide.

III. A Nationwide Injunction Prevents Inconsistent Rulings and Promotes the Uniform Application of the Agencies' Rules.

A nationwide injunction is necessary to prevent inconsistent rulings on the scope of CWA jurisdiction during the pendency of this litigation, while ensuring a consistent and uniform application of the CWA throughout the country. The Court should affirm that the Injunction Order addresses these concerns by applying nationwide.

The Agencies have repeatedly asserted that the purpose of the WOTUS Rule is to promote consistent application of the CWA across all regions of the country, while ensuring predictability for the regulated community. *See, e.g.*, 80 Fed. Reg. at 37,054 (the Rule will "increase CWA program predictability and consistency"); 79 Fed. Reg. 22,188, 22,189 (Apr. 21, 2014) (stating that the goal of the proposed rulemaking was to "provid[e] greater clarity, certainty, and predictability for the regulated public and the regulators"). Consistency, predictability. and certainty were regular calling cards for the Agencies in their public messaging in support of the Rule's promulgation. See, e.g., EPA Connect, Protecting Clean Water While Respecting Agriculture (May 27, 2015), available at https://blog.epa.gov/blog/2015/05/protecting-clean-water-while-respecting-agriculture/; Fact

Sheet, Clean Water Rule, available at http://www2.epa.gov/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf; Fact Sheet, The Clean Water Rule for Agriculture, available at http://www2.epa.gov/sites/production/files/2015-05/documents/fact_sheet_agriculture_final.pdf.

Further, in moving to stay proceedings on the Rule challenge brought by Ohio, Michigan, and Tennessee, the Agencies argued that the "[r]ule at issue in these proceedings is a nationally-applicable rulemaking defining the scope of the waters of the United States subject to CWA jurisdiction. It is intended to provide clarity and certainty to the regulated community. . . . The potential for inconsistent rulings . . . risks undermining the regulatory clarity and certainty that are at the heart of the Rule." Memo in Support of Defendants' Motion to Stay, *State of Ohio, et al. v. U.S. Army Corps of Engineers, et al.,* case 2:15-cv-02467, Doc. # 21-1 at 9, PGID 91 (S.D. OH); Memo in Support of Defendants' Motion to Stay Pending a Ruling from the Judicial Panel on Multi-District Litigation under 28 U.S.C. § 1407 to Transfer and Consolidate at 8, No. 3:15-cv-00059 (D.N.D. July 21, 2015), ECF No. 12-1. The Agencies have also argued that harm would be caused by "conflicting" interim applications that would work "to the detriment of the plaintiffs, the regulated community, and the public." *See* Brief in Support of the Motion of the United States for Transfer, MDL No. 2663, Doc.1-1 at 11: Memo in Support of Defendants' Motion to Stay Pending a Ruling from the Judicial Panel on Multi-District Litigation under 28 U.S.C. § 1407 to Transfer and Consolidate at 6, No. 3:15- cv-00059 (D.N.D. July 21, 2015), ECF No. 12-1.

The Agencies cannot have it both ways. They cannot be concerned about uniform application and consistency when selling the country on the need for the Rule, but abandon those

principles when faced with litigation adversity. This type of litigation tactic should not be rewarded by limiting the scope of the Court's Injunction Order.

Nationwide rules with nationwide implications should be applied consistently throughout the Nation. Failing to do so would detract from the integrated scheme of regulation for our Nation's waters created by Congress under the Clean Water Act. *See Texas v. U.S.*, 787 F.3d 733, 769 (5th Cir. 2015) (upholding a nationwide preliminary injunction against administrative rule found likely to be in violation of the APA because "[a] patchwork system would 'detract[ ] from the 'integrated scheme of regulation' created by Congress'"). The Fifth Circuit recently addressed a similar attempt by the federal government to limit the scope of a nationwide preliminary injunction enjoining the application of an administrative directive implementing this Administration's Deferred Action for Parents of Americans and Lawful Permanent Residents Program. The federal government in that case argued that the injunction issued by the Southern District of Texas should be constrained to the plaintiff states. The Fifth Circuit swiftly rejected the argument, focusing on the problems associated with the creation of a patchwork system of regulation across the country under a nationally applicable program. *Id*. at 768-69. This Court should reject the Agencies' arguments for similar reasons.

Watersheds do not acknowledge geopolitical boundaries. Nor should the preliminary injunction enjoining the Rule that would greatly expand federal jurisdiction over those waters be confined by geopolitical boundaries. It would be irrational for one set of rules to apply to ephemeral drainages in Wyoming, for example, when similar drainages in Utah in the very same watershed would be treated differently simply because that watershed straddles a state line. Similarly, prairie potholes in the Red River watershed situated in Minnesota will be subject to a different regulatory scheme than those in the same watershed in North Dakota. The same non-

uniform scheme will be implemented on the 23 cross-border watersheds shared between New Mexico and Texas. Additionally, in New Mexico, home to nineteen Native American pueblos and three reservations, many of which are treated as states for purposes of the CWA, watersheds that traverse state and tribal lands will become a checkerboard of jurisdictional uncertainty. Interstate infrastructure projects—pipelines, transmission lines, etc.—will also encounter significant complexity as they cross state or tribal borders, bouncing in and out of jurisdictional schemes. Arizona is similarly situated. It would be irrational to apply different jurisdictional schemes based solely on whether the water is on this or that side of a state/tribal border, but this is exactly what infrastructure development will face if the Agencies are successful in creating their preferred patchwork regulatory scheme. Such a system would create the potential for conflicting rulings and jurisdictional determinations to be made on similar waters in similar settings, varied only by the sovereign power governing the lands at issue, a prospect that is enhanced by the existence of EPA and Corps regional offices that encompass both plaintiff and non-plaintiff States in the instant litigation. But this is precisely the approach being advocated by the Agencies in their CWR Litigation Statement. This regulatory patchwork can be avoided through affirmation of the Court's Injunction Order as applying nationwide.

CONCLUSION

The Court's Injunction Order properly contained no geographical limitations, and its scope should not now be restricted. A nationwide preliminary injunction is necessary to preserve the status quo pending final resolution of this matter and would prevent a patchwork of regulatory action and inconsistent application across the country.

RESPECTFULLY SUBMITTED this 1st day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2015, I electronically filed the foregoing **PLAINTIFF STATES' BRIEF IN SUPPORT OF A NATIONWIDE PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Paul M. Seby

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