

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

STATE OF TEXAS, *et al.*,)
)
Plaintiffs,)
v.)
) Civil Action No. 3:15-cv-0162
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, *et al.*,)
)
Defendants.)

**STATES' MOTION FOR ENTRY OF AN ORDER
ON AN EXPEDITED BASIS
ON THE STATES' MOTION FOR A PRELIMINARY INJUNCTION**

TO THE HONORABLE GEORGE C. HANKS, JR.:

As reported to the Court on August 17, 2018 (ECF No. 130), the final rule at issue in this proceeding has become effective in the States of Louisiana, Mississippi, and Texas (the "Plaintiff States").¹ Without the protections delaying the effectiveness of the Clean Water Rule: Definition of "Waters of the United States,"² ("WOTUS Rule"), immediate Court action to enjoin the rule is essential to prevent the irreparable harms described in the States' Motions for Preliminary Injunction and at the hearing before the Court in February 2018. Therefore, in accordance with Court Procedure 6.D.2., the Plaintiff States ask this

¹ Plaintiff States include the States of Texas, Louisiana, and Mississippi, and six Texas agencies—the Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, and Texas Water Development Board.

² 80 Fed. Reg. 37,054 (June 29, 2015).

Court to issue an order on the Plaintiff States' Motion for a Nationwide Preliminary Injunction (ECF No. 79) on an expedited basis.

The Plaintiff States request the Court issue a nationwide stay of the WOTUS Rule. In the alternative, the Plaintiff States ask the Court to issue a stay of the WOTUS Rule as to the States of Louisiana, Mississippi, and Texas. Two draft orders are attached to this motion. The first enjoins the WOTUS Rule nationwide. The second is an alternative order which enjoins the WOTUS Rule in Louisiana, Mississippi, and Texas.

I. All safeguards protecting Plaintiff States from effectiveness of the WOTUS Rule are gone.

On September 8, 2015, the Plaintiff States first moved for this Court to preliminarily enjoin the implementation of the WOTUS Rule. ECF No. 16-4. Thereafter, multiple challenges to the WOTUS Rule from across the nation were consolidated by the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit, acknowledging both the burden visited on governmental bodies and private parties nationwide by the Rule and the substantial possibility of success on the merits of the challenges to the WOTUS Rule, issued a nationwide stay of the rule. *See In re U.S. Env'tl. Prot. Agency & Dep't. of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015) ("Sixth Circuit Stay").

Because the jurisdiction of the Sixth Circuit remained in dispute, on February 12, 2016, the Plaintiff States again moved for this Court to preliminarily enjoin the WOTUS Rule. ECF No. 39. This Court delayed further briefing pending the resolution of the

jurisdictional disputes and held the Plaintiff States' Motion for Preliminary Injunction in abeyance. ECF No. 50. On February 2, 2017, the Court administratively closed this case (ECF No. 62), but reopened it a year later (ECF No. 68) after the U.S. Supreme Court issued its opinion holding that jurisdiction was appropriate in the U.S. District Courts and not the Sixth Circuit. *See Nat'l. Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

Thereafter, on February 6, 2018, the Plaintiff States moved for a preliminary injunction enjoining the effectiveness, implementation, and enforcement of the WOTUS Rule. ECF No. 79. The Plaintiff States urged the Court to promptly issue a nationwide injunction because the protection from the WOTUS Rule granted by the Sixth Circuit Stay would soon dissolve on jurisdictional grounds.

On February 22, 2018, the Court heard argument from all parties on the Plaintiff States' request for a nationwide preliminary injunction. At the direction of the Court, the arguments of the parties focused on the need for a preliminary injunction considering the "Applicability Rule"³ which delayed the applicability date of the WOTUS Rule by two years. Specifically, the Court asked: "Why can't the Court rule on this if and when the applicability rule is invalidated? That is, why can't the Court wait until that is done and

³ Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018). Sometimes called the "Applicability Date Rule" or "Suspension Rule."

then consider the merits of the injunction?”⁴ The Applicability Rule, which was challenged in at least two courts, has now been found invalid, and the Applicability Rule has been enjoined nationwide. *S.C. Coastal Conservation League v. Pruitt*, No. 2:18-cv-330-DCN, 2018 WL 3933811 (D. S.C. Aug. 16, 2018).

II. The Plaintiff States need immediate action from this Court enjoining the WOTUS Rule.

As the Plaintiff States feared, each of the protections barring the effectiveness of the WOTUS Rule in our states has been erased. First, on February 28, 2018, the Sixth Circuit Stay dissolved. *See In re U.S. Dep’t of Def. & U.S. Env’tl. Prot. Agency Final Rule*, 713 F. App’x. 489 (6th Cir. 2018). Then, on August 16, 2018, the District Court of South Carolina enjoined the effectiveness of the Applicability Rule nationwide. *S.C. Coastal Conservation League*, 2018 WL 3933811, at *7. The Plaintiff States provided immediate notice to the Court of each of these events. ECF Nos. 117, 130.

All factors for an injunction have been met, and any concerns that the Court may have had regarding the need for an injunction while the Sixth Circuit Stay and Applicability Rule were in effect are gone. As previously briefed and argued before the Court, the Plaintiff States will incur immediate and irreparable harm to their sovereign interests, effective permitting processes, transportation project planning, real estate investment

⁴ Prelim. Inj. Hr’g. Tr. 5:16-19, Feb. 22, 2018, ECF No. 120.

portfolios, and the business and agricultural interests of their citizens. *See* Declarations at ECF Nos. 79-1, 79-2, 79-3, 93-1, & 93-2.

The WOTUS Rule is now effective in the Plaintiff States and twenty-three other states, and the need for a preliminary injunction in the Plaintiff States and nationwide is immediate. Further delay will cause continuing and escalating harm to the Plaintiff States based on a rule that will be subject to continuing legal challenge on its merits. An injunction is warranted pending consideration of the WOTUS Rule on the merits. Failure by this Court to promptly act on the pending request for preliminary injunction will leave Plaintiff States no choice than to seek appellate recourse.

The WOTUS Rule has already been enjoined in twenty-four other states.⁵ This Court should enjoin the WOTUS Rule nationwide to provide much-needed consistency in the applicability of the WOTUS rule throughout the nation. However, at a minimum, this Court should follow the lead of the Georgia and North Dakota district courts, and immediately grant the Plaintiff States' motion to enjoin the WOTUS Rule within their states to provide protection from immediate and irreparable harm.

⁵ *See Georgia v. Pruitt*, No. 2:15-cv-79, 2018 WL 2766877 (S.D. Ga. June 8, 2018) (staying WOTUS Rule in Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin); *North Dakota v. U.S. Env'tl. Prot. Agency*, 127 F. Supp. 3d. 1047 (D. N.D. 2015) (staying WOTUS Rule in North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, New Mexico, Nevada, South Dakota, and Wyoming).

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

In accordance with Local Rule 7.1.D and Court Procedure 6.C.2, counsel for plaintiffs certifies that they have conferred with counsel for the Federal Agencies and counsel for Intervenor. The Intervenor is opposed to this Motion. The federal agencies stated as follows “the Federal Defendants agree that, unless and until the District of South Carolina’s injunction against the Applicability Rule is stayed or reversed, the preliminary injunction motions before this Court are ripe for adjudication. The Federal Defendants defer to the Court with respect to the timing of its order.”

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF

CERTIFICATE OF SERVICE

I certify that on August 22, 2018, a copy of the foregoing document was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on all attorneys in this case.

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF