

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

AMERICAN FARM BUREAU
FEDERATION, *et al.*,
Plaintiffs,

v.

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

No. 3:15-cv-165

**PLAINTIFFS' NOTICE OF THE DISTRICT OF SOUTH CAROLINA'S
NATIONWIDE INJUNCTION AGAINST ENFORCEMENT OF THE
APPLICABILITY DATE RULE**

Plaintiffs hereby notify the Court of an order issued today, August 16, 2018, by the United States District Court of the District of South Carolina in related litigation. *See South Carolina Coastal Conservation League v. Pruitt, et al.*, No. 2:18-cv-00330 (D.S.C.) (Dkt. No. 66). The District of South Carolina's order enjoins the Applicability Date Rule on a nationwide basis. In doing so, it brings the 2015 WOTUS Rule into immediate force and effect in 26 states where other district courts have not entered regional preliminary injunctions against enforcement of the 2015 WOTUS Rule. A copy of the order is attached.

* * *

As the parties explained in their briefing on plaintiffs' motion for a preliminary injunction (Dkst. 61, 66, 67, 69), the 2015 WOTUS Rule was stayed by the U.S. Court of Appeals for the Sixth Circuit between August 2015 and February 2018. To maintain the

status quo established by the Sixth Circuit’s stay, the agencies promulgated the Applicability Date Rule, which amended the 2015 WOTUS Rule with a February 2020 “applicability date” to provide “continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the public while the agencies continue to work to consider possible revisions.” *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).

Meanwhile, the U.S. District Court for the Southern District of Georgia joined the U.S. District Court for the District of North Dakota in entering a regional preliminary injunction of the WOTUS Rule. *See* Notice, Dkt. 79. Judge Wood concluded, in particular, that plaintiffs “overwhelmingly” demonstrated a substantial likelihood of success on the merits 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). She therefore enjoined the WOTUS Rule in Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin, effectively expanding the District of North Dakota’s earlier preliminary injunction applicable within Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Dakota, and Wyoming. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

Earlier today, Judge Norton of the District of South Carolina entered a nationwide injunction of the Applicability Date Rule. The result is that the WOTUS Rule has now come into effect for the first time in nearly three years—but only in the 26 states where no

preliminary injunction is pending. Thus, a legally suspect regulation of immense practical importance has come into effect in a patchwork of 26 States.

This Court's resolution of Plaintiffs' pending motion for a preliminary injunction is now extraordinarily urgent. As Judge Wood recognized in her order granting a regional injunction, the irreparable injuries inflicted by the WOTUS Rule's enforcement are immediate. That is all the more true for the plaintiffs before this Court. As we have explained, the ability of plaintiffs' members to plan their projects and organize their affairs is highly sensitive to the scope of the agencies' regulatory jurisdiction under the Clean Water Act. Allowing the WOTUS Rule to come into effect in 26 States will prove enormously disruptive to their operations, and indeed to the entire national economy. 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 for the time being." *In re EPA & Dep't. of Def. Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015). That is still true today.

The WOTUS Rule's now-piecemeal application compounds these far-reaching and deleterious effects. Plaintiffs' members must sort out which regulatory regime applies to which activities under which circumstances—a particularly troubling prospect given that their members manage construction, extraction, and farming projects across multiple states, creating conflicting permitting obligations. Important and consequential national regulations like the WOTUS Rule should not apply differently depending on the happenstance of location. A crazy-quilt regulatory environment is simply untenable.

All of this points strongly in favor of an immediate grant of relief. The defendants' only objection to plaintiffs' motion was that plaintiffs "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.” *See* Dkt. 67, at 14; *see generally id.* at 9-14. But the Sixth Circuit’s stay has long since been dissolved, and as of this morning, the Applicability Date Rule has been enjoined and is no longer in force. Plaintiffs are therefore facing “immediate irreparable harm” (*Georgia*, 2018 WL 2766877, at *7), as even the government indirectly acknowledges. Dkt. 67, at 14.

Plaintiffs motion for a nationwide preliminary injunction accordingly should be granted as expeditiously as possible for all of the reasons given in the motion (Dkt. 61) and reply brief (Dkt. 69).

Dated: August 16, 2018

Respectfully Submitted,

/s/ Timothy S. Bishop

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