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' RESPONSE TO PLAINTIFFS' NOTICES AND MOTION REGARDING D.S.C. DECISION

The United States Environmental Protection Agency, the Department of the Army, and all other "Federal Defendants" (or "the Agencies") hereby respond to "Plaintiff States' Notice of Order in the United States District Court for the District of South Carolina," filed on August 17, 2018, and "States' Motion for Entry of an Order on an Expedited Basis" filed by the States of Texas, Louisiana, and Mississippi—the "Plaintiff States" in Case No. 3:15-cv-162 (Notice at ECF No. 130, Motion at ECF No. 131) —and

"Plaintiffs' Notice of the District of South Carolina's Nationwide Injunction Against Enforcement of the Applicability Date Rule," filed on August 16, 2018, by 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 (Notice at ECF No. 81).

In February 2018, when the Agencies initially responded to Plaintiff States' and Plaintiff Associations' motions for a preliminary injunction of the "2015 WOTUS Rule," 80 Fed. Reg. 37,054 (June 29, 2015), the Agencies explained that there was not any immediacy associated with the allegations of irreparable harm because, under the "Applicability Rule," 83 Fed. Reg. 5200 (Feb. 6, 2018), the 2015 WOTUS Rule would not apply to any person until February 6, 2020. *See* Federal Defendants' Opp'n to Plaintiffs' Motions for a Nationwide Preliminary Injunction ("Fed. Def. Opp'n," ECF No. 101 in Case No. 3:15-cv-162) at pp. 2, 7-11. The Agencies further explained that, although the Applicability Rule had been challenged in several District Courts, including (*inter alia*) the District of South Carolina, "[n]o substantive order or any other development in any of these cases has occurred that alters the applicability date of the 2015 WOTUS Rule." Fed. Def. Opp'n at p. 12.

A substantive order has now issued. In a final judgment dated August 16, 2018, the South Carolina court enjoined the Applicability Rule nationwide. *See S.C. Coastal Conservation League v. Pruitt*, No. 2:18-cv-330, 2018 WL 3933811 (D.S.C. Aug. 16, 2018). The decision's upshot is that the 2015 WOTUS Rule is now applicable throughout 26 states—including Texas, Louisiana, and Mississippi—where preliminary injunctions of that Rule have not, to date, been issued.

At least one set of parties has already filed a notice of appeal and moved for a stay of the South Carolina decision. The Agencies similarly expect to pursue an appeal, believing that "clarity, certainty, and consistency nationwide" are best served by the 2015 WOTUS Rule remaining inapplicable during the Agencies' active and ongoing rulemaking to reconsider that Rule. 83 Fed. Reg. at 5,202.[1] If the South Carolina decision stands, one definition of "waters of the United States" will apply in some states while another definition will apply in the remaining states. Such a regulatory patchwork does not serve the public interest; as the Agencies have explained, it would be "complicated and inefficient for both the public and the agencies." 83 Fed. Reg. at 5,202.

Here, absent a stay or reversal of the South Carolina decision, the Agencies now withdraw their argument that there is not any immediacy associated with the Plaintiffs' allegation that the 2015 WOTUS Rule causes them irreparable harm. Similarly, the Agencies now agree that the motions for a preliminary injunction are ripe for

[1] Indeed, the Agencies recently issued a supplemental notice and solicited public comment on a proposal to permanently repeal the 2015 WOTUS Rule in its entirety. 83 Fed. Reg. 32,227 (July 12, 2018).

adjudication, and that a full evaluation of all of the preliminary injunction elements would be appropriate.

Due to the pending rulemaking referenced above, the Agencies continue to refrain from expressing views on the preliminary injunction element regarding the Plaintiffs' likelihood of success and other aspects of the merits of the 2015 WOTUS Rule. *See* Fed. Def. Opp'n at 15. At the same time, however, the Agencies acknowledge the pertinence of the findings they made in support of the Applicability Rule to the remaining preliminary injunction elements, i.e., "that [the Plaintiffs are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tip in [their] favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 21 (2008) (citation omitted).

More specifically, the Agencies have found that "[h]aving different regulatory regimes in effect throughout the country would be complicated and inefficient for both the public and the agencies." 83 Fed. Reg. at 5202. This concern has reemerged due to the South Carolina court's injunction, which reestablishes a confusing and shifting regulatory landscape with "inconsistencies between the regulatory regimes applicable in different States, pending further rulemaking by the agencies." *Id.* This concern also follows from ongoing litigation and preliminary injunctions against the 2015 WOTUS Rule, determinations from courts that they are "likely" to rule against the Rule, and the Agencies' reconsideration proceedings. *See* Fed. Def. Opp'n at 15; *see also Georgia v. Pruitt*, No. 2:15-cv-79, 2018 WL 2766877 (S.D. Ga. June 8, 2018).

Likewise, the Agencies have concluded that they and their policies would not be harmed from—and the public interest is advanced by—"a framework for an interim period of time that avoids these inconsistencies, uncertainty, and confusion, pending further rulemaking action by the agencies." 83 Fed. Reg. at 5202. The Agencies concluded that, until February 2020, it would be best if "the scope of [Clean Water Act] jurisdiction [is] administered nationwide exactly as it is now being administered by the agencies, and as it was administered prior to the promulgation of the 2015 Rule." *Id.*[2]

There is no change, however, in the Agencies' argument that "in no event should the scope of [any preliminary injunction] be nationwide." Fed. Def. Opp'n at 16.

Dated: August 22, 2018

Respectfully submitted,

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[2] Although the Applicability Rule is currently enjoined, the South Carolina decision does not preclude this Court from considering these findings as they regard the 2015 WOTUS Rule. *See S.C. Coastal Conservation League*, 2018 WL 3933811, at *3 n.1 ("The court reiterates that the issue currently before the court is not the merits of the 2015 rule . . . .").

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2018, I electronically filed the foregoing 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