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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, *et al.* Plaintiff, v. ANDREW R. WHEELER, as the Administrator of the United States Environmental Protection Agency, *et al.* Defendant.	Case No. 3:20-cv-03005-RS **FEDERAL DEFENDANTS' SUPPLEMENTAL BRIEF**

INTRODUCTION

Defendants ANDREW R. WHEELER, as the Administrator of the United States Environmental Protection Agency ("EPA"); EPA; R. D. JAMES, as Assistant Secretary of the Army for Civil Works; and the UNITED STATES ARMY CORPS OF ENGINEERS (collectively "Agencies") submit this supplemental brief pursuant to the Court's June 12, 2020 Order to address the question: Does the existence of a specific statutory provision authorizing a court to stay the effective date of an agency rule have any effect on the considerations otherwise applicable when evaluating the propriety of a so-called "nationwide injunction." *See* Order, Dkt. No. 163. The answer is no. First, the

statutory provision at issue speaks in equitable terms that demonstrates the same considerations should be at issue as when evaluating a preliminary injunction. Second, under Article III, Plaintiffs must demonstrate standing for each form of relief sought and therefore nationwide relief is inappropriate to the extent that, as is the case here, Plaintiffs fail to demonstrate irreparable harm from application of the *Navigable Waters Protection Rule* ("NWPR") in each state in the Country. Third, the statutory provision also does not change that there are ready means of rationally narrowing any injunction to less than nationwide.

ARGUMENT

I. THE APA'S PROVISION AUTHORIZING A STAY OF THE EFFECTIVE DATE OF A RULE DOES NOT CHANGE THE CONSIDERATIONS FOR DETERMINING WHETHER NATIONWIDE RELEF IS APPROPRIATE.

In their Notice of Motion and Motion for a Preliminary Injunction or Stay; Memorandum of Points and Authorities (Dkt. No. 30) (hereinafter "Mot.") and Reply In Support of Motion for a Preliminary Injunction or Stay (Dkt. No. 148) (hereinafter "Reply"), Plaintiffs asked for either a preliminary injunction under Rule 65 enjoining the Agencies from implementing the NWPR or, in the alternative, a stay of the NWPR's effective date pursuant to 5 U.S.C. § 705. *See* Mot. at 40; Reply at 25. In their Motion, Plaintiffs noted that "[t]he standard for a stay under Section 705 is the same as the standard for a preliminary injunction." Mot. at 9 (citing *Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) and *Bauer v. Devos*, 325 F. Supp. 3d 74, 104 -05 (D.D.C. 2018)). The Agencies agree that, when considered by a court, "[t]he 'test to be applied as to whether a stay should be entered is the same as that which applies to requests for preliminary injunctions.'"[1] *Callahan v. U.S. Dep't of Health and Human Servs*, No. 1:19-CV-1783-

[1] An agency may also "postpone the effective date of action taken by it, pending judicial review," under 5 U.S.C. § 705. Plaintiffs do not suggest, nor would the Agencies agree, that when an agency chooses to stay its own rule pending judicial review that it must apply the same preliminary injunction test that courts are to use.

AT, 2020 WL 370209, at *4 (N.D. Ga. Jan. 16, 2020) (quoting *Corning Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 562 F. Supp. 279, 280 (E.D. Ark. 1983)).

In its request for supplemental briefing, the Court asks a slightly different, though related, question: whether a request for a stay of an effective date pursuant to 5 U.S.C. § 705 of the Administrative Procedure Act ("APA") has "any effect on the considerations otherwise applicable when evaluating the propriety of a so-called 'nationwide injunction.'" Order at 1. The answer is no.

The ***first*** reason that 5 U.S.C. § 705 does not change a court's analysis of the appropriateness of nationwide relief from that which should be granted under Rule 65 alone is the text of the statute itself.

> On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. This equitable language mirrors that of federal courts when discussing the appropriate scope of preliminary injunctive relief. *Cf. Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (requiring preliminary injunctive relief "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs") (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) ("The function of a preliminary injunction is to preserve the status quo pending a final determination of the rights of the parties.").

Indeed, the APA's general instruction that unlawful agency action "shall" be "set aside," 5 U.S.C. § 706(2), does not mandate a "depart[ure] from established principles" of equitable discretion, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The Supreme Court held in *Hecht Co. v. Bowles*, 321 U.S. 321, 328-30 (1944), that not even a provision directing that an injunction "shall be granted" with respect to a threatened or completed violation of a particular statute was sufficient to displace traditional principles of equitable discretion, and Congress is presumed to have been aware of that case when it

later enacted the APA. The APA itself confirms that, absent a special review statute, "[t]he form of proceeding for judicial review" is simply the traditional "form[s] of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction," 5 U.S.C. § 703, and that the statutory right of review does not affect "the power or duty of the court to . . . deny relief on any . . . appropriate legal or equitable ground," *id.* § 702(1).

The Northern District of California previously recognized the equitable nature of this provision, explaining that 5 U.S.C. § 705 "'was primarily intended to reflect existing law under the Scripps-Howard doctrine,' which recognized a reviewing court's 'historic power' to 'stay the enforcement of an order pending the determination of an appeal challenging its validity.'" *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1119 n.20 (N.D. Cal. 2018), *aff'd*, 950 F.3d 1242 (9th Cir. 2020) (quoting *Sampson*, 415 U.S. at 73 n.15). This provision of the APA simply ensures that courts retained their "'traditional equipment for the administration of justice,' [to] stay the enforcement of a[n administrative action] pending the outcome of judicial review." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 24 (D.D.C. 2012) (quoting *Sampson*, 415 U.S. at 73 n.15). A handful of out-of-circuit courts have incorrectly found that the APA's instruction to "hold unlawful and set aside agency action," 5 U.S.C. § 706(2), must be read into 5 U.S.C. § 705 "to authorize relief from agency action for any person otherwise subject to the action, not just as to plaintiffs." *D.C. v. U.S. Dep't of Agric.*, No. CV 20-119 (BAH), 2020 WL 1236657, at *34 (D.D.C. Mar. 13, 2020); *see also Casa De Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760, 786 (D. Md. 2019). Unlike the Northern District of California, these courts have ignored the equitable language Congress used in 5 U.S.C. § 705, which plainly envisions any stay of the effective date of an administrative action being tied to those litigating the validity of the rule.

The ***second*** reason that 5 U.S.C. § 705 does not change a court's analysis of the appropriateness of nationwide relief from that which should be granted under Rule 65 alone is the necessity under Article III for a plaintiff to "demonstrate standing . . . for each

form of relief that is sought." *Town of Chester v. Laroe Estates, Inc*., 137 S. Ct. 1645, 1650 (2017) (citation omitted).

Any right to preliminary equitable relief cannot be broader than the imminent and irreparable Article III injury demonstrated by Plaintiffs. As the Supreme Court recently confirmed, any "remedy" ordered by a federal court must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established;" a court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it;" and "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1931, 1933-34 (2018). Indeed, Congress may not expand the Article III powers of the Courts through statutory provisions. *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation.").

The Ninth Circuit has held that a nationwide preliminary injunction was inappropriate where issuing injunctive relief only to plaintiff states "would provide complete relief to them." *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). The court reaffirmed that the scope of a preliminary injunction "must be no broader and no narrower than necessary to redress the injury shown by the plaintiff states." *Id*. The court found that, although the record supported a finding of harm to the plaintiff states, "it was not developed as to the . . . impact on other states."[2] *Id*. The court held that, in order to justify a nationwide injunction, plaintiffs must show a nationwide impact "to foreclose litigation in other districts, from Alaska to Puerto Rico to Maine to Guam." *Id*.

Plaintiffs here, as in *California v. Azar*, have not shown a nationwide impact "from Alaska to Puerto Rico to Maine to Guam." In arguing for a nationwide injunction, Plaintiffs conflate harms to themselves that originate from application of the NWPR

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[2] Plaintiffs liken their purported economic harm of voluntarily spending to adjust their water pollution control programs in light of the NWPR to the economic harm at issue in *California v. Azar*. Reply at 19-20. Even if the Court agrees with Plaintiffs as to this purported economic harm, *Azar* would dictate that injunctive relief would not be warranted nationwide to remedy these economic injuries.

outside of their borders with harms to other parties outside of their borders that are ***not*** parties here seeking relief. *See* Reply at 24. As to the latter, this Court has no Article III power to grant preliminary injunctive relief. Plaintiffs argue that nationwide relief is needed because "[a]n injunction that covers all but a very few states is neither equitable nor practical, because, while some states may suffer 'greater loss in federal protection, all states will be significantly impacted' and 'harms threatened by the Rule will be . . . nationwide.'" Reply at 24 (quoting Sullivan Decl. ¶¶ 3, 21). But even if all states will be impacted, Plaintiffs—representing only 17 states and the District of Columbia—do not have standing—and therefore the right to seek relief—for the other 33 states not challenging the rule in this action.

Plaintiffs' citation to *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) ("*Burford I*") does not stand for the proposition that unspecific allegations of environmental harm are enough to establish a generalized injury to a plaintiff in the nation as a whole and irreparable harm. *See* Reply at 11-12, 14, and 17 (quoting *Burford I*, 835 F.2d at 323-324). In that case, the D.C. Circuit affirmed the district court's denial of the federal agencies motion to dismiss for lack of standing, and also affirmed the district court's grant of a preliminary injunction. *Burford I*, 835 F.2d at 327. The district court did subsequently find, at the summary judgement stage, that plaintiffs lacked standing. The D.C. Circuit, however, reversed that decision in *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422, 434 (D.C. Cir. 1989) ("*Burford II*"). But the Supreme Court then granted certiorari and ***reversed*** the D.C. Circuit's *Burford II* decision *sub nom* in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). So, in the end, the *Burford* plaintiffs' lack of standing was confirmed.

Although *Burford I* was not directly on review in *Lujan*, it can no longer be considered good law. Nor would it be an appropriate out-of-circuit case to rely on in granting a preliminary injunction. *Lujan* demonstrates that the general sorts of broad allegations of environmental harm at issue in *Burford* (and that likewise are at issue here as Plaintiffs readily liken their case to *Burford*) are insufficient to demonstrate irreparable

harm.

Indeed, relying on *Burford I*, Plaintiffs balk at the notion that they are required to "identify a single discharger" because it is not their "burden to catalogue potential dischargers" pursuant to *Burford I*. Reply at 14 (arguing that the fact that "the Rule 'leaves no prohibitions' to protect 'water quality' on *some* lands" is enough under *Burford*; quoting *Burford I*, 835 F.2d at 323-324). The Supreme Court rejected these very same arguments in *Burford/Lujan*. It *is absolutely* Plaintiffs' "burden to catalogue potential dischargers," Reply at 14, to merit a preliminary injunction. As the Supreme Court explained, "[i]t will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege." *Lujan v*, 497 U.S. at 889. Here, the *who*, *what*, *when*, and *where* of discharges of pollutants into newly deregulated waters that will harm Plaintiffs is completely missing.[3]

Moreover, lest there be any doubt about the relevance of *Lujan's* injury-in-fact analysis with respect to standing to the irreparable harm standard, the D.C. Circuit explained in *Burford II* that "the burden of establishing irreparable harm to support a request for a *preliminary injunction* is, if anything, *at least as great* as the burden of resisting a *summary judgment motion* on the ground that the plaintiff cannot demonstrate "injury-in-fact." *Burford II*, 878 F.2d at 432 (emphasis in original). Just as the plaintiffs in *Burford* could not "'presume' the missing facts" to establish injury-in-fact at the summary judgment stage, Plaintiffs cannot do so here to demonstrate irreparable environmental harm at the preliminary injunction stage.

Third, APA Section 705 also does not change that there are ready means of rationally narrowing any injunction to less than nationwide—particularly given the import of 23 states having intervened *in support of* both the Agencies and immediate implementation of the NWPR. As prior litigation over the regulatory definition of

[3] Plaintiffs note that the Roose declares that a large number of unspecified facilities will no longer be subject to permit requirements under the NWPR. Reply at 14. But, even if true, these are discharges that are currently occurring. There is no evidence that these unidentified permittees will suddenly stop complying with permit conditions.

"waters of the United States" demonstrated,[4] any putative "injunction in this case can be limited geographically." *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1130 (N.D. Cal. 2019), *aff'd sub nom. Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020). Moreover, this case does solely "implicat[e] local concerns or values," as the 23 states defending the NWPR clearly "have interests that materially differ from those presented [by Plaintiff States]." *Id*.

Plaintiffs fail to meaningfully wrestle with whether application of the NWPR in ***all*** non-Plaintiff states (most notably Hawaii) will imminently and irreparably affect the water quality in the Plaintiff States. Plaintiff merely asserts "the States and Cities have demonstrated that the Rule threatens loss of water quality protections and harm to streams and wetlands both within and among all states across the country." Reply at 24 n.19. But again, under *Town of Chester*, Plaintiffs may only seek redress for their injuries, not those of other parties, let alone other sovereign states.

To illustrate this point, if the Agencies adopted the NWPR ***only*** for Hawaii, but no other state, Plaintiffs here would obviously lack injury from that state and the ability to obtain a preliminary injunction blocking implementation in Hawaii. Implementation in Hawaii alone would not cause "actual and imminent" injury to the Plaintiff States at all,

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[4] In litigation over the 2015 Rule, courts tailored injunctive relief to specific states where warranted by the harm to those states or entities operating within them, but did not issue nationwide injunctions. *See, e.g.*, *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015); *Ore. Cattlemen's Ass'n v. EPA*, No. 3:19-cv-564, Dkt. 58 (D. Ore. July 26, 2019), *vacated* Dkt. 81 (D. Ore. Mar. 2, 2020); *Texas v. EPA*, No. 3:15-cv-00162, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497, 504-06 (S.D. Tex. 2019). The only court which issued a nationwide injunction was the Sixth Circuit Court of Appeals, which had "four actions transferred to [it] and consolidated in [the] court by the Judicial Panel on Multi–District Litigation for handling [] a multi-circuit case." *In re U.S. Dep't of Def.*, 803 F.3d 804, 805 (6th Cir. 2015). However, as the Supreme Court subsequently explained, the provision of the Clean Water Act which provided for direct review of certain rules in the Courts of Appeals (and under which the Sixth Circuit held it had jurisdiction to issue the injunction), did not apply to challenges to the revised definition of "waters of the United States." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

let alone irreparable injury before their case could be decided on the merits. Yet, this is effectively what Plaintiffs ask for here. Many non-plaintiff and Intervener-Defendant states are *not* upstream of the Plaintiff States. Exhibit 1.[5] To get a nationwide injunction, it is not sufficient for Plaintiff California to claim that if the NWPR goes into effect in neighboring Arizona, Arizona pollution may impose imminent and irreparable environmental harm to California. While a small portion of Arizona is upstream from California—although there are numerous reasons previously explained why even this is insufficient to warrant a preliminary injunction pending summary judgment—there can be no contention that implementation of the NWPR in Texas, Florida, or numerous other states would cause any cognizable harm to Plaintiffs. Even as to Arizona, any injury could only flow from permitting the NWPR to take effect in the watershed where Arizona is upstream from California. So any injunction implicating Arizona would have to be limited to precluding NWPR implementation *in that specific watershed* as well.

The APA's provision which provides for an equitable stay of an administrative rule, 5 U.S.C. § 705, cannot supplement the Article III requirement that "[f]or all relief sought, there must be a litigant with standing." *Town of Chester, N.Y.*, 137 S. Ct. at 1651. Thus, "[i]f a less drastic remedy (such as partial or complete vacatur of [an agency's challenged] decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted." *Monsanto Co v Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010). As applied here, any preliminary injunctive relief must be tailored to the allegations of irreparable harm ***to Plaintiffs***, sufficiently demonstrated to occur prior to this Court reaching the merits of their claims.

[5] To further illustrate this point, the Agencies are attaching Exhibit 1. The Agencies previously cited this watershed map of the United States from the U.S. Geological Survey in response to Plaintiffs' motion. Dkt. No. 106 at 39 n.18. Now that certain states are interveners, the Agencies have delineated Plaintiffs and Defendant-Intervenor States for the Court's reference on this map.

CONCLUSION

In conclusion, the Court should not grant the preliminary injunction at all, but certainly should not grant a nationwide injunction.

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Respectfully submitted,

/s/ Draft

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