

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,)
Mike Hunter, in his official capacity as)
Attorney General of Oklahoma,)

Plaintiff,)

v.)

Case No. 15-CV-0381-CVE-FHM

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, UNITED)
STATES ARMY CORPS OF)
ENGINEERS, E. SCOTT PRUITT, in)
His official capacity as Administrator of)
The United States Environmental)
Protection Agency, and JO-ELLEN)
DARCY, in her official capacity as)
Assistant Secretary of the Army for)
Civil Works,)

Defendants.)

_____)
CHAMBER OF COMMERCE OF THE)
UNITED STATES OF AMERICA,)
NATIONAL FEDERATION OF)
INDEPENDENT BUSINESS, TULSA)
REGIONAL CHAMBER, PORTLAND)
CEMENT ASSOCIATION, and)
STATE CHAMBER OF OKLAHOMA,)

Plaintiffs,)

v.)

Case No. 15-CV-0386-CVE-PJC

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, E. SCOTT)
PRUITT, in his official capacity as)
Administrator of the United States)
Environmental Protection Agency,)
UNITED STATES ARMY CORPS OF)
ENGINEERS, and JO-ELLEN DARCY)
In her official capacity as Assistant)
Secretary of the Army (Civil Works),)

Defendants.)

**MOTION TO REOPEN CASES AND REQUEST FOR RULING ON PENDING
PRELIMINARY INJUNCTION MOTIONS**

Plaintiff the State of Oklahoma (“State” or “Oklahoma”) and Plaintiffs the Chamber of Commerce of the United States of America, National Federation of Independent Business, State Chamber of Oklahoma, Tulsa Regional Chamber, and Portland Cement Association (“Association Plaintiffs”) (collectively, “Plaintiffs”) move this Court, in accordance with LCvR 41.1, to reopen these cases for good cause and rule on Plaintiffs’ pending motions to preliminarily enjoin the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“Corps”) (collectively “Agencies”) from enforcing the *Clean Water Rule: Definition of “Waters of the United States”* 80 Fed. Reg. 37,054 (“WOTUS Rule”). *See* No. 15-cv-381, Docs. 17-18; No. 15-cv-386, Doc. 27.¹ This reopening and injunction were made necessary yesterday, when the U.S. District Court for the District of South Carolina issued a nationwide injunction that had the effect of reviving the WOTUS Rule. In short, the status quo should be maintained while the WOTUS Rule’s legality is determined.

1. On June 29, 2015, the Agencies published the WOTUS Rule, significantly expanding their jurisdiction over waters within Oklahoma and other States. This spurred immediate legal action across the country, contesting the overreach. In addition to other challenges, Oklahoma initiated its lawsuit on July 8, 2015, and filed an amended complaint two days later. On July 24, 2015, the State filed its preliminary injunction motion upon which it now seeks a ruling. *See* No. 15-cv-381, Docs. 17-18. Association Plaintiffs filed their complaint on July 10, 2015 and also moved for a preliminary injunction on July 24, 2015. *See* No. 15-cv-386, Docs. 1, 27.

2. On August 27, 2015, the U.S. District Court for the District of North Dakota ruled that federal district courts had exclusive jurisdiction over challenges to the rule; it then enjoined

¹ Plaintiffs’ unopposed motion to consolidate remains pending with the Court. *See* No. 15-cv-381, Docs. 23, 37. In the interests of judicial economy and efficiency, Plaintiffs respectfully request that the Court grant the motion. *See id.*

enforcement of the WOTUS Rule across several States, stating: “(1) it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the [WOTUS] Rule at issue, and (2) it appears likely the EPA failed to comply with [Administrative Procedures Act (“APA”)] requirements when promulgating the [WOTUS] Rule.” *North Dakota v. EPA*, No. 3:15-cv-59, Doc. 70, Memo. and Order Granting Prelim. Inj., at 2 (D.N.D. Aug. 27, 2015). The North Dakota court found that the likelihood of success on the merits weighed in favor of the States under any standard. *Id.* at 9. The court also found (and it has proved to be true) that while “delaying the [WOTUS] Rule will cause the Agencies no appreciable harm” (indeed, the Agencies now seek to *delay* the rule), the “risk of irreparable harm to the States is both imminent and likely.” *Id.* at 17.

3. Less than two months later, on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the WOTUS rule, having consolidated several WOTUS Rule challenges—including Oklahoma’s. *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015). Like the District of North Dakota, the Sixth Circuit concluded that the plaintiffs “have demonstrated a substantial possibility of success on the merits of their claims.” *Id.* at 807. Contra the District of North Dakota, however, on February 22, 2016, the Sixth Circuit ruled that jurisdiction on this issue was appropriate only in the appellate courts under 33 U.S.C. § 1369(b)(1). *See In re U.S. Dep’t of Def.*, 817 F.3d 261 (6th Cir. 2016). Two days later, on February 24, 2016, this Court dismissed these cases for lack of subject matter jurisdiction. *See* No. 15-cv-381, Doc. 36; No. 15-cv-386, Doc. 49. Plaintiffs appealed. *See* No. 15-cv-381, Doc. 38; No. 15-cv-386, Doc. 51.

4. The jurisdictional question went to the Supreme Court of the United States. On January 22, 2018, the Supreme Court held that original jurisdiction of the WOTUS Rule dispute lies with the district courts, not with the courts of appeals. *See Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617 (2018). The Sixth Circuit’s nationwide stay of the WOTUS Rule was therefore vacated on February 28, 2018. *In re U.S. Dep’t of Def.*, Case Nos. 15-3751, et al. (6th Cir.). As a result, on jurisdictional

grounds, Oklahoma's and Association Plaintiffs' motions for a preliminary injunction are again properly before this Court. *See* No. 15-cv-381, Doc. 50; No. 15-cv-386, Doc. 59.

5. Months before the Supreme Court's decision, however, the President issued an executive order for the Agencies to reconsider the WOTUS Rule. The Agencies proposed a rule on July 27, 2017, that would rescind the WOTUS Rule. In the meantime, the Agencies proposed another rule (the "Suspension Rule") that would delay the effective date of the WOTUS Rule until 2020. The Suspension Rule became final on February 6, 2018. The WOTUS Rule has not been rescinded, but the Agencies maintain that it is being reconsidered. On March 9, 2018, without ruling on the State's or Association Plaintiffs' motions for preliminary injunction, this Court ordered the cases administratively closed while the EPA completes its rulemaking process concerning the definition of "Waters of the United States" that will likely render this case moot. No. 15-cv-381, Doc. 56, at 2; No. 15-cv-386, Doc. 64 at 2.

6. Despite the Suspension Rule and the continued rule-making process, the U.S. District Court for the Southern District of Georgia enjoined the WOTUS Rule in several more States, finding a "likelihood of success on [the] claims that the WOTUS Rule was promulgated in violation of the CWA and the APA." *Georgia v. Pruitt*, No. 2:15-cv-79, at 3 (S.D. Ga., June 8, 2018). Like the District of North Dakota, the Georgia court found the States' loss of sovereignty and unrecoverable monetary harm constitutes an undeniable irreparable injury. *Id.* at 6. Indeed, the Georgia court said that the States "clearly met the burden of persuasion on each of the four factors entitling them to a preliminary injunction." *Id.* at 9. Thus, even aside from the Suspension Rule, the WOTUS Rule is currently enjoined in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Dakota, and Wyoming as well as Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, and Kentucky.

7. Two months later, on August 16, 2018 (*i.e.*, yesterday), Judge David C. Norton of the U.S. District Court for the District of South Carolina issued an injunction on the Suspension Rule, finding that it was likely implemented in violation of the APA by the Agencies' failure to "solicit public comment on the merits [of the proposed rule]" and "refus[al] to consider substantive implications of suspending the WOTUS Rule." *S.C. Coastal Conservation League v. Pruitt*, No. 2:18-cv-330-DCN, Doc. 66, Order (D.S.C. Aug. 16, 2018). Consequently, there are now 24 States where both the WOTUS Rule and Suspension Rule are enjoined, and 26 States where only the Suspension Rule is enjoined. In Oklahoma, only the Suspension Rule is enjoined, and the WOTUS Rule is now technically in effect.

8. This situation creates an intolerable regulatory patchwork across the country, and it harms States like Oklahoma and individuals and businesses represented by Association Plaintiffs that have not been granted an injunction against enforcement of the WOTUS Rule. As detailed in the State's preliminary injunction motion, the WOTUS Rule will deprive Oklahoma of jurisdiction over a significant percentage of the waters over which it had previously exercised sovereign regulatory authority. In addition, absent injunctive relief, Association Plaintiffs' members will be deprived of the ability to improve their property without undergoing costly and time-consuming federal permitting requirements. These deprivations are unlawful because the broadened definition of "waters of the United States" exceeds the Agencies' authority under the Clean Water Act, the APA, the Commerce Clause, and the Tenth Amendment. Unless this rule is enjoined as it has been elsewhere, Plaintiffs will suffer irreparable harm that cannot be remedied by a final judgment.

WHEREFORE, Oklahoma and Association Plaintiffs respectfully request that the Court reopen these cases and enjoin the WOTUS Rule.

Respectfully submitted,

/s/ Randall J. Yates

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CERTIFICATE OF SERVICE

This is to certify that on this 17th day of August, 2018, I electronically transmitted to foregoing document to the Clerk of the Court using the ECF System for filing and that all participants in this case are registered CME/CF users and service will be accomplished by the CM/ECF system.

/s/ Chad J. Kutmas