No. 19-5055

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA *ex rel.* MIKE HUNTER, in his official capacity as ATTORNEY GENERAL OF OKLAHOMA, & 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-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, ANDREW WHEELER, in his official capacity as Administrator of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and RICKY JAMES, in his official capacity as ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS,

Defendants -Appellees.

On appeal from the United States District Court
for the Northern District of Oklahoma (Eagan, J.)
15-CV-0381-CVE-FHM (BASE FILE)
15-CV-0386-CVE-FHM (consolidated)

PRINCIPAL BRIEF FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants disclose the following:

1. Appellant Chamber of Commerce of the United States of America has no parent corporation, and no publicly held corporation owns 10% or more of any common stock.

2. Appellant National Federation of Independent Business has no parent corporation, and no publicly held corporation owns 10% or more of any common stock.

3. Appellant State Chamber of Oklahoma has no parent corporation, and no publicly held corporation owns 10% or more of any common stock.

4. Appellant Tulsa Regional Chamber has no parent corporation, and no publicly held corporation owns 10% or more of any common stock.

5. Appellant Portland Cement Association has no parent corporation, and no publicly held corporation owns 10% or more of any common stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

GLOSSARY

Agencies	*Combined reference* to EPA & Army Corps
Army Corps	United States Army Corps of Engineers
CWA	Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566 (as amended)
EPA	United States Environmental Protection Agency
2015 WOTUS Rule	Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 37,054 (June 29, 2015)
Repeal Rule	Dep't of Defense & EPA, Definition of "Waters of the United States", 82 Fed. Reg. 34,899 (July 27, 2017)
Suspension Rule	Definition of "Waters of the United States" – Addition of an Applicability Dates to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018)
WOTUS	Water(s) of the United States

JURISDICTIONAL STATEMENT

These consolidated actions seek declaratory and injunctive relief from a final rule promulgated by the EPA and Army Corps. The district court had jurisdiction to hear these claims under 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-2202, and 5 U.S.C. § 706.

On May 29, 2019, the district court denied Plaintiffs' preliminary injunction motions. Plaintiffs timely filed a notice of appeal on June 11, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

PRIOR OR RELATED APPEALS

Pursuant to Tenth Circuit Rule 28.2(C)(1), Plaintiffs note the following prior and related appeals:

- *State of Oklahoma, ex rel. E. Scott Pruitt v. EPA, et al.*, No. 15-9551 (10th Cir.);
- *Chamber of Commerce of the United States of America, et al. v. EPA, et al.*, No. 15-9552 (10th Cir.);
- *Chamber of Commerce of the United States of America, et al. v. EPA, et al.*, No. 16-5038 (10th Cir.);
- *State of Oklahoma ex rel. Mike Hunter v. EPA, et al.*, No. 16-5039 (10th Cir.);
- *In re EPA*, (Case Nos. 15-3799 *et. al* (6th Cir.); and
- *Nat'l Ass'n of Manufacturers v. Dep't of Defense*, 138 S. Ct. 617 (2018).

STATEMENT OF THE ISSUES

Whether the district court improperly denied Plaintiffs' motions for a preliminary injunction of the 2015 WOTUS Rule, in conflict with the decisions of other courts across the country. *See, e.g.*, *Texas v. EPA*, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018) (enjoining the rule in three states); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018) (enjoining the rule in 11 states); *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015) (enjoining the rule in 13 states); *In re EPA*, 803 F.3d 804 (6th Cir. 2015) (issuing a nationwide injunction prior to being vacated for lack of jurisdiction).

STATEMENT OF THE CASE

I. Defining "Waters of the United States" under the Clean Water Act

The Clean Water Act ("CWA") grants the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Army Corps") (collectively, the "Agencies") the limited authority to regulate "navigable waters," meaning "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). For example, the Act provides that "any discharge of dredged or fill materials into 'navigable waters'—defined as the 'waters of the United States'—is forbidden unless authorized by a permit issued by the Army Corps of Engineers." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (citing 33 U.S.C. §§ 1311 & 1362). The Act also declares: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of *States* to prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b) (emphasis added).

The Supreme Court has recognized that the term "navigable waters" under the CWA limits the Agencies' jurisdiction, even if the term's reach is somewhat beyond those waters that are traditionally considered navigable-in-fact. For example, the Court upheld the Agencies' decision to regulate wetlands that abut navigable waters because "the Corps must necessarily choose some point at which water ends and land begins" and "the transition from water to solid ground is not necessarily or even typically an

abrupt one." *Riverside Bayview*, 474 U.S. at 132-34. But the Court has since twice rejected the Agencies' attempts to expansively define "the waters of the United States."

First, the Supreme Court rejected the Army Corps' assertion of jurisdiction over isolated ponds that were used as habitat for migratory birds, holding that the Agencies' jurisdiction does not "extend[] to ponds that are not adjacent to open water." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 168 (2001) ("*SWANCC*"). The Court found persuasive "the Corps' *original* interpretation of the CWA," which "defined § 404(a)'s 'navigable waters' to mean 'those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce,'" and which "emphasized that '[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor.'" *Id.* The Court also found no legislative evidence for "the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters." *Id.* at 171. Otherwise, "the use of the word navigable in the statute" would "not have any independent significance," and the Court rejected "reading the term 'navigable waters' out of the statute." *Id.* at 172. The Court rejected the Corps' expansive interpretation of its own authority "to avoid the significant constitutional and federalism questions" under the Commerce Clause and the Tenth Amendment that a broad interpretation of "waters of the United States" raises. *Id.* at 172-74.

Nevertheless, after the Supreme Court's "decision in *SWANCC*, the Corps did not significantly revise its theory of federal jurisdiction under § 1344(a)." *Rapanos v. United States*, 547 U.S. 715, 726 (2006) (plurality op.). In *Rapanos*, the Supreme Court reversed a Sixth Circuit decision that upheld the Agencies' assertion of jurisdiction over, *inter alia*, "54 acres of land with sometimes-saturated soil conditions" where "[t]he nearest body of navigable water was 11 to 20 miles away." *Id.* at 720. Justice Scalia, writing for the four justices in the plurality, criticized two particular aspects of the Agencies' broad assertion of jurisdiction. First, the plurality criticized the assertion of jurisdiction over "adjacent" waters such as wetlands, where adjacency includes lands that "lie within the '100-year floodplain' of a body of water—that is, they are connected to the navigable water by flooding, on average, once every 100 years," even if they are "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes." *Id.* at 724, 728. Second, the plurality rejected the Agencies' jurisdiction "over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow," such as "storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year" and "ephemeral streams." *Id.* at 722, 725; *see also id.* at 727.

The *Rapanos* plurality noted that, whatever the scope of "navigable waters," "the CWA authorizes federal jurisdiction only over 'waters.'" *Id.* at 731. Accordingly, "[t]he

plain language of the statute simply does not authorize [the Agencies'] 'Land Is Waters' approach to federal jurisdiction" over lands like "dry channels through which water occasionally or intermittently flows" or "transitory puddles or ephemeral flows of water." *Id.* at 733-35. Rather, "'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes" but "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739 (cleaned up). And "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act," which does not include "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States.'" *Id.* at 742. Finally, echoing *SWANCC*, the plurality emphasized that these limits were necessary to avoid "an agency theory of jurisdiction that presses the envelope of constitutional validity." *Id.* at 738-39.

Justice Kennedy, concurring in the judgment, found that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered

waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring). But this does not include wetlands with "effects on water quality [that] are speculative or insubstantial." *Id.* And streams or tributaries may be "the waters of the United States" if "due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 781. Not within the scope of the Agencies' power, however, is "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id.*

II. The Agencies' 2015 WOTUS Rule

On June 29, 2015, the Agencies issued a new, broadened definition of "waters of the United States." Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015) (the "2015 WOTUS Rule"). The definition includes waters that "may be susceptible to use in interstate or foreign commerce," "interstate waters," "interstate wetlands," and "[t]he territorial seas" (hereinafter "primary waters"). *Id.* at 37,104. But it also includes other "waters" that the *SWANCC* and *Rapanos* decisions demonstrate are beyond the Agencies' reach.

First, instead of including only adjacent *wetlands* as in past definitions and as what was at issue in *Riverside Bayview*, *SWANCC*, and *Rapanos*, the rule sweeps in "[*a*]*ll waters* adjacent" to the primary waters described above, specifically listing all adjacent

"wetlands, ponds, lakes, oxbows, impoundments, and similar waters." 80 Fed. Reg. at 37, 105. "Adjacent" is defined to mean "bordering, contiguous, or neighboring" a primary water, and includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." *Id.* For purposes of adjacency, "neighboring" means "[a]ll waters located within 100 feet of the ordinary high water mark" and "all waters located within the 100 year floodplain . . . [but] not more than 1,500 feet from the ordinary high water mark" of a primary water or a tributary or impoundment thereof, as well as "[a]ll waters located within 1,500 feet of the high tide line" of a primary water. *Id.* Moreover, the entire water is considered adjacent if any portion of it lies within the above zones. *Id.* . Notably, these distance-based zones for adjacency "did not appear in the proposed rule, and thus the agencies did not receive public comment on these numeric measures." Definition of "Waters of the United States" – Recodification of Preexisting Rules, 83 Fed. Reg. 32,227, 32,229 (July 12, 2018).

Second, the Final Rule expands the definition of "tributary" to include any "water that contributes flow, either directly or through another water" to a primary water, on land that is "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 80 Fed. Reg. at 37,105-06. If a piece of land meets this definition, it would still be considered a tributary even if 'there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields,

or a stream that flows underground)." *Id.* Similarly, a tributary will not lose its tributary status even if it contributes flow "through a *non-jurisdictional water*" to a primary water. *Id.* (emphasis added). Tributaries can be "natural, man-altered, or man-made." *Id.* And the "flow in [a] tributary may be perennial, intermittent, or ephemeral." 80 Fed. Reg. at 37,076. So, "tributaries need not be demonstrated to possess any specific volume, frequency, or duration of flow, or to contribute flow to a traditional navigable water in any given year or specific time period." 83 Fed. Reg. at 32,228.

Third, the 2015 WOTUS Rule has a catch-all category of water features that requires a "case-by-case analysis" to determine whether they are jurisdictional. This category encompasses waters within the 100-year floodplain of primary water and all waters located within 4,000 feet of an ordinary high water mark of a primary water, or tributary or impoundment thereof, when they have a significant nexus to a primary water. 80 Fed. Reg. at 37,105. As with adjacency, "[t]hese quantitative measures did not appear in the proposed rule, and thus the agencies did not receive public comment on these specific measures." 83 Fed. Reg. at 32,229. A significant nexus exists when "a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of" a primary water. 80 Fed. Reg. at 37,106 (emphasis added). This is notably different from Justice Kennedy's requirement that the "chemical, physical, *and* biological integrity" be affected. This test can be met if a water, alone or considered together with

all other similarly situated waters, performs any one of nine functions. *Id.*. As the Agencies themselves have noted, this "could mean that the vast majority of water features in the United States may come within the jurisdictional purview of the federal government." 83 Fed. Reg. at 32,229.

III. A Large Majority of States and Numerous Private Entities File Suit to Enjoin the 2015 WOTUS Rule

Following promulgation of the 2015 WOTUS Rule, 32 States and more than 50 private groups brought suit in district courts across the country to preliminarily and permanently enjoin the 2015 WOTUS Rule. Because many plaintiffs anticipated the federal government would argue that jurisdiction was exclusive in the Courts of Appeals pursuant to 33 U.S.C. § 1369, plaintiffs also filed protective petitions in Courts of Appeals across the country. Under 28 U.S.C. § 2112(a)(3)'s lottery procedure, the protective petitions for review were transferred to the U.S. Court of Appeals for the Sixth Circuit on July 29, 2015. *See In re U.S. Dep't of Def.,* 817 F.3d 261 (6th Cir. 2016) . Believing that the district courts had jurisdiction, many plaintiffs moved to dismiss their petitions in the Sixth Circuit, but also asked the Sixth Circuit to stay the WOTUS Rule until the court completed its review. In the numerous district court cases, meanwhile, the Agencies asked the Judicial Panel on Multidistrict Litigation ("JPML") to transfer and consolidate the cases in the District Court for the District of Columbia—a request that was denied. *In re Clean Water Rule: Definition of "Waters of the United States,"* No. MDL 2663, 2015 WL 6080727, at *1 (J.P.M.L. Oct. 13, 2015).

On August 27, 2015, the U.S. District Court for the District of North Dakota enjoined the WOTUS Rule across thirteen 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*, 127 F. Supp. 3d 1047, 1051 n.1 (D.N.D. 2015). The States were likely to succeed on the merits because the WOTUS Rule suffered from numerous "fatal defect[s]," including that it was inconsistent with any plausible reading of Supreme Court precedent, was arbitrary and capricious, and was procedurally improper. *Id.* at 1056-58. The court also concluded that the WOTUS Rule would "irreparably diminish the States' power over their waters" and inflict "irreparable harm in the form of unrecoverable monetary harm," and that these harms outweighed any asserted injury to the public interest. *Id.* at 1059-60. The court also found that while "delaying the [WOTUS] Rule will cause the Agencies no appreciable harm," the "risk of irreparable harm to the States is both imminent and likely." *Id.* at 1060.

Although the WOTUS Rule went into effect for six weeks in the 37 states not subject to the North Dakota court's injunction, on October 9, 2015, the Sixth Circuit also acted, issuing a nationwide stay of the WOTUS rule. *In re EPA,* 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" because the Rule was "facially suspect." *Id.* at 807. In light of the "the pervasive nationwide impact of the new Rule on state and federal regulation of the nation's waters" and the risk of injury "visited nationwide on governmental bodies, state and federal, as well as private parties," the court determined that "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." *Id.* at 806, 808. The Sixth Circuit concluded that original jurisdiction was appropriate in the appellate courts, not the district courts. *See In re U.S. Dep't of Def.*, 817 F.3d 261 (6th Cir. 2016).

The jurisdictional question went to the Supreme Court, which held that original jurisdiction of the 2015 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.,* Nos. 15-3751, *et al.* (6th Cir.). Litigation resumed in the district courts.

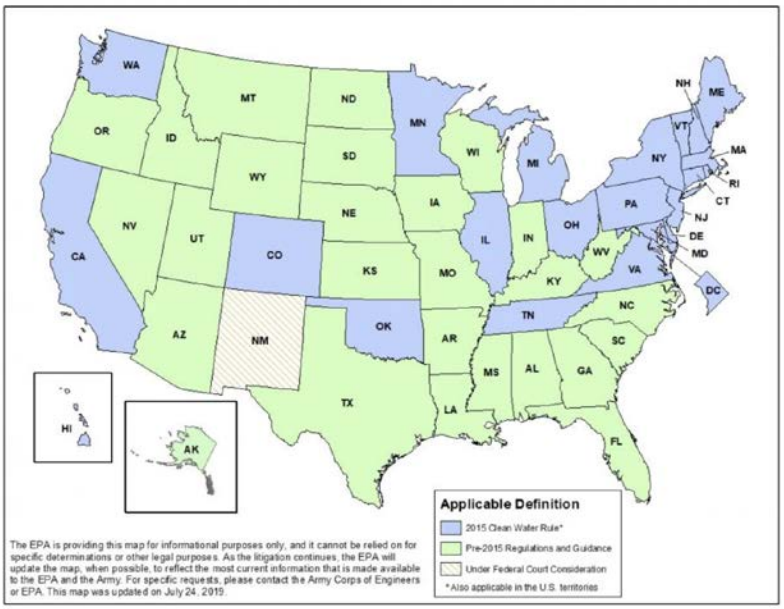
Joining the District of North Dakota, the U.S. District Court for the Southern District of Georgia enjoined the WOTUS Rule in eleven more States, finding a "likelihood of success on [the] claims that the WOTUS Rule was promulgated in violation of the CWA and the APA." *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364 (S.D. Ga. 2018). The Georgia court found the States' loss of sovereignty and unrecoverable monetary harm constitutes an undeniable irreparable injury. *Id.* at 1369. According to

the court, the States had "clearly met the burden of persuasion on each of the four factors entitling them to a preliminary injunction." *Id.* at 1370.

On September 12, 2018, the U.S. District Court for the Southern District of Texas also preliminarily enjoined the WOTUS Rule as to Texas, Louisiana, and Mississippi. *See Texas v. EPA*, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018). According to the court, "a stay provides much needed governmental, administrative, and economic stability." *Id.* "Were the Court not to temporarily enjoin the Rule now, it risks asking the states, their governmental subdivisions, and their citizens to expend valuable resources and time operationalizing a rule that may not survive judicial review." *Id.* The Court thus "decided to avoid the harmful effects of a truncated implementation, and enjoin the Rule's effectiveness until a permanent decision regarding the Rule's constitutionality can be made." *Id.* Most recently, on May 28, 2019, the Southern District of Texas granted Plaintiffs summary judgment, ordering that the 2015 WOTUS Rule be remanded to the agency and remain enjoined in the three States during the remand. *See Texas v. EPA*, 2019 WL 2272464 (S.D. Tex. May 28, 2019). The court held that, *inter alia*, the Agencies had "violated the APA's notice-and-comment requirements by deviating from the Proposed Rule in a way that interested parties could not have reasonably anticipated," switching from a "ecologic and hydrologic" definition of adjacency in the proposed rule to the theretofore announced "use of distance-based criteria" in the final rule. *Id.* at *5. Because the court remanded the rule based on

procedural violations of the APA, the court declined to consider the further substantive challenges to the 2015 WOTUS Rule. *Id.* at *7 n.8.

After an additional state was added to the North Dakota injunction, *see North Dakota v. EPA*, No. 15-cv-59 (D.N.D. Sept. 18, 2018), the number of States in which the 2015 WOTUS Rule is enjoined has now reached 27. *See* Pls.' App'x 226-27.[1] Oklahoma is among those States where the Rule is in effect, as the following EPA map shows:



[1] On March 26, 2019, the Southern District of Ohio denied the states of Ohio, Michigan, and Tennessee their request for a preliminary injunction of the WOTUS Rule, and denied their request for reconsideration on May 2, 2019. *See Ohio v. EPA*, No. 2:15-cv-2467 at Docs. 86 & 89 (S.D. Ohio). Thus rulings are currently being appealed to the Sixth Circuit. *Ohio v. EPA*, No. 19-3500 (6th Cir.).

EPA, *Definition of "Waters of the United States": Rule Status and Litigation Update*, https://bit.ly/2V2y3Z8 (last visited August 1, 2019). In particular, although Oklahoma is subject to the WOTUS Rule, the States that share the bulk of Oklahoma's borders (Kansas, Missouri, Arkansas, New Mexico, and Texas) are subject to the pre-2015 regulations. *Id.*

IV. The Agencies Begin Reconsidering the 2015 WOTUS Rule

During the litigation over the 2015 WOTUS Rule, a separate, administrative process—with its own attendant litigation—has been underway. On February 28, 2017, the President issued an executive order for the Agencies to reconsider the WOTUS Rule. E.O. 13778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

The Agencies proposed a rule on July 27, 2017, that would rescind the 2015 WOTUS Rule (the "Repeal Rule"). Dep't of Defense & EPA, *Definition of "Waters of the United States"*, 82 Fed. Reg. 34,899 (July 27, 2017); 83 Fed. Reg. 32,227 (July 12, 2018) (clarifying proposal and soliciting additional comment). This proposal is part of a two-step process (the second step is replacing the Rule) in which the Agencies seek to restore the regulatory status quo that had persisted since the 1980s, avoiding the "inconsistencies, uncertainty, and confusion" that would result if the 2015 WOTUS Rule remained in the torrent of numerous pending suits. 82 Fed. Reg. at 34,902. The Agencies also explained that portions of "the 2015 Rule may not comport with and accurately implement the legal limits on CWA jurisdiction intended by Congress and

reflected in decisions of the Supreme Court" so, "[a]t a minimum, the agencies find that the interpretation of the statute adopted in the 2015 Rule is not compelled and raises significant legal questions." 83 Fed. Reg. at 32,228. The comment period for this rulemaking closed on August 13, 2018, but no final rule has been issued.

In the meantime, the Agencies proposed another rule (the "Suspension Rule"), which was published on February 6, 2018, that delayed the effective date of the WOTUS Rule until February 6, 2020. Definition of "Waters of the United States" – Addition of an Applicability Dates to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018). The Suspension Rule was intended "to maintain the *status quo* by adding an applicability date to the 2015 Rule and thus providing continuity and regulatory certainty for regulated entities, the States and Tribes, and the public while the agencies continue to consider possible revisions to the 2015 Rule." *Id.* at 5200. This delay in the enforcement of the 2015 WOTUS Rule would have "provide[d] clarity and certainty about the definition of 'waters of the United States' for an interim period while they continue to work on the two-step rulemaking process." *Id.*

But on August 16, 2018, the U.S. District Court for the District of South Carolina issued a nationwide vacatur and permanent injunction of the Suspension Rule. *S.C. Coastal Conservation League v. Pruitt*, No. 2:18-cv-330-DCN, Doc. 66, Order (D.S.C. Aug. 16, 2018); *see also Puget Soundkeeper Alliance v. Wheeler*, Case No. 2:15-cv-1342, Doc. 61, Order (W.D. Wash. Nov. 26, 2018) (same). The Agencies later voluntarily dismissed

their appeals of these rulings, meaning that the Suspension Rule is now permanently enjoined. *See* No. 18-1988 (4th Cir.); No. 19-35074 (9th Cir.). After the Suspension Rule was enjoined, the 2015 WOTUS Rule took effect in 22 States, one of which is Oklahoma. Pls.' App'x 226-27.

V. The Oklahoma Litigation

Although other courts around the country moved quickly to consider the challenges to the 2015 WOTUS Rule, the consolidated cases in Oklahoma took a different course.

Plaintiff, the State of Oklahoma ("the State") and Plaintiffs the U.S. Chamber of Commerce, the National Federation of Independent Businesses, the Tulsa Regional Chamber, the Portland Cement Association, and the State Chamber of Oklahoma ("Private Plaintiffs") filed separate lawsuits in the Northern District of Oklahoma on July 8, 2015 and July 10, 2015, respectively. Pls.' App'x 001 & 024. On July 20, 2015, the Agencies' moved to stay the litigation pending the determination from the JPML, which Plaintiffs opposed. *Id.* at 013-14 & 034 (D.E. 14 & 25). On July 24, 2015, both the State and the Private Plaintiffs moved for a preliminary injunction. *Id.* at 014 (D.E. 17). Unlike the District of North Dakota, which expeditiously moved to consider a preliminary injunction motion, the court below granted the Agencies' request to stay the cases on July 31, 2015. *Id.* at 014 (D.E. 22).

After the JPML denied the Agencies' motion to transfer, the Agencies requested that the litigation remain stayed for a new reason: to await the Sixth Circuit's decision on the jurisdictional issue. *Id.* at 014 (D.E. 25). Plaintiffs objected once more, arguing that the district court should independently determine its own jurisdiction and that jurisdiction was proper in the district court. *Id.* at 014 & 015 (D.E. 28 & 32). For more than a year and a half, the Court issued no ruling on the stay or Plaintiffs' preliminary injunction motions. On February 23, 2016, the Sixth Circuit ruled that it had original jurisdiction to consider the disputes. *Id.* at 015 (D.E. 35). The next day, the district court *sua sponte* dismissed the case, accepting the Sixth Circuit panel's divided jurisdictional determination without independently determining its own jurisdiction. *Id.* (D.E. 36).

Plaintiffs appealed to this Court, *id.* (D.E. 38), but after the appeal was briefed and argued, the U.S. Supreme Court granted certiorari on the jurisdictional issue and this Court held the appeal in abeyance pending the Supreme Court's decision, *Hunter v. EPA*, Order, No. 16-5039 (10th Cir. Jan. 19, 2017). After the Supreme Court held that the district courts had original jurisdiction over these cases, this Court reversed the district court's dismissal and remanded the case. *Id.* (Jan. 29, 2018).

On remand, the district court administratively closed the case in light of the Suspension Rule and the proposed rule to repeal the 2015 WOTUS Rule. Pls.' App'x 016 (D.E. 56). On August 17, 2018, the day after the District of South Carolina enjoined the Suspension Rule—causing the 2015 WOTUS Rule to immediately go into effect in

Oklahoma—Plaintiffs filed a motion in the district court seeking to reopen the case. *Id.* at D.E. 58. Other courts around the country moved expeditiously to review challenges to the 2015 WOTUS Rule. *See Georgia*, 326 F. 3d 1356 (S.D. Ga. June 8, 2018); *Texas v. EPA*, 2018 WL 4518230, at *1 (Sept. 12, 2018). The court below, however, did not reopen the case until December 7, 2018. Pls.' App'x 018 (D.E. 82).

VI. The Ruling Below

In the preliminary injunction briefing, Plaintiffs argued that all four preliminary-injunction factors weighed in favor of staying the 2015 WOTUS Rule until it is finally adjudicated or finally repealed.

First, Plaintiffs argued that they were likely to succeed on the merits because the Rule was both substantively and procedurally unlawful. *See* Pls.' App'x 115-24. In their response, the Agencies maintained that the 2015 WOTUS Rule was procedurally proper, but made no arguments defending the rule's substantive legality. Pls.' App'x 297 & 315-317. Notably, the Agencies did not explicitly oppose an injunction but asked only that the court "consider [their] response." Pls.' App'x 312.

Second, Plaintiffs presented evidence showing the irreparable harms the 2015 WOTUS Rule causes. The first was harm to the State's sovereign interests over the land resources and intrastate waters in Oklahoma because the 2015 WOTUS Rule will expand the reach of the Agencies' CWA regulations, depriving the State of its exclusive authority and ability to set its own policy over these land and water resources.

Pls.' App'x 111 & 317-18 (citing *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (finding that interference with sovereign status is "sufficient to establish irreparable harm"). In their response, the Agencies did not dispute that the 2015 WOTUS Rule causes harm to Oklahoma's sovereign interests, or that this loss of sovereignty is irreparable harm.

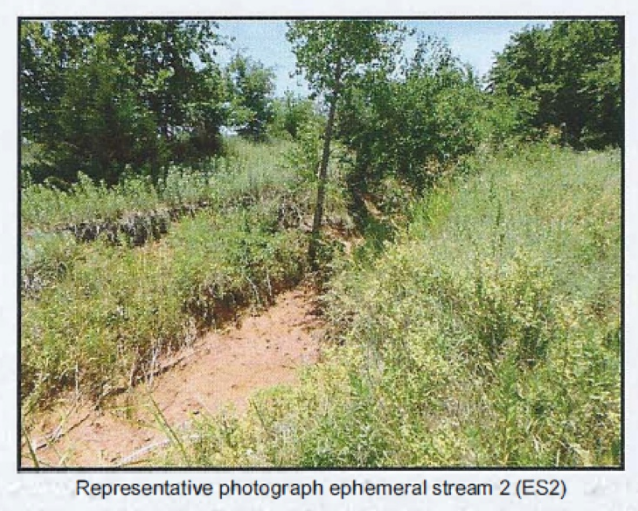
Plaintiffs also showed irreparable harm to the State's fiscal interests, which cannot be recovered from the Agencies if Plaintiffs ultimately prevail. These financial harms include increased regulatory and compliance costs, such as costs associated with implementing the 2015 WOTUS Rule over new waters in the State's CWA certification program, costs in processing additional National Pollutant Discharge Elimination System (NPDES) permit requests, and costs to state programs that may now be burdened by federal regulations, including state highway construction and maintenance with ditches and culverts that run alongside. Pls.' App'x 112-14. These arguments were supported by the Agencies' own estimates of the costs of the 2015 WOTUS Rule to the States and by multiple declarations from state agency officials. Pls.' App'x 113; 127-31; 237, ¶¶ 4-7; 239-40, ¶¶ 2-6.

Plaintiffs finally showed irreparable harm through the increased regulatory burden on private regulated entities, which affected both Private Plaintiffs and the State as *parens patriae* to the citizens of Oklahoma. Pls.' App'x 155-57, 229-32 & 318-19. These harms are certain to occur because the 2015 WOTUS Rule expands the Agencies'

regulatory reach. Indeed, in just the first few months in which the rule went into effect (starting August 16, 2018), the Corps in Oklahoma had taken 112 final permit actions, issued 26 approved jurisdictional determinations, and sent two cease and desist letters pursuant to the 2015 WOTUS Rule (and this does not even include an EPA-related actions). Pls.' App'x 214-15.

Plaintiffs offered specific examples of actions taken in Oklahoma after the 2015 WOTUS Rule went into effect, including through declarations submitted by private landowners, approved jurisdictional determinations by the Army Corps over water or land features in Oklahoma pursuant to the 2015 WOTUS Rule, and Section 401 certifications where regulated entities engaged in CWA compliance efforts for water or land features that are covered by the challenged aspects of the 2015 WOTUS Rule. Pls.' App'x 241-82. For example, Costco sought a permit and purchased mitigation credits because, in order to construct its first-ever store in Oklahoma City, it had to fill two depressions in the land that constituted "ephemeral streams," which are considered "waters of the United States" under the 2015 WOTUS Rule. Pls.' App'x 240, ¶ 4 & 254. Plaintiffs also included two representative photos of these "ephemeral streams" in the record:

Representative photograph ephemeral stream 1(ES1)



Representative photograph ephemeral stream 2 (ES2)

Pls.' App'x 249. These would not be considered "waters of the United States" if Plaintiffs prevailed on their challenge to the 2015 WOTUS Rule. Similarly, Plaintiffs showed how the WOTUS Rule places landowners who may have "waters of the United States" on their land in an impossible predicament: if they want to improve their land, they either must submit to expensive and time-consuming federal permitting requirements, assume the WOTUS Rule does not apply and run the risk of fines or a citizen suit, or do nothing and abandon the economic benefit of such improvements. *See* Pls.' App'x 165-66, ¶¶ 19-24; *id.* at 171-72, ¶¶ 7-10.

Finally, Plaintiffs argued that the Agencies will not be harmed by an injunction and that the public interest will be served by an injunction. An injunction, the Plaintiffs argued, would restore the pre-2015 WOTUS Rule status quo, thus providing the public with the certainty of a regulatory regime that had persisted for forty years prior. Pls.'

App'x 124-25 & 233-34. The Agencies did not dispute that an injunction will not cause them harm and will advance the public interest. *See* Pls.' App'x 307-08 & 320.

The court below nonetheless denied the preliminary-injunction motions because it found that Plaintiffs had not established irreparable harm. Pls.' App'x 331-34. The district court acknowledged that the 2015 WOTUS Rule "would expand federal jurisdiction under the [CWA] to bodies of water that were previously not regulated by the federal government." Pls.' App'x 324-25. But, the court held, the harms suffered by Plaintiffs are "not so 'certain and great' that it rises to the level of irreparable harm" since, in the few months the 2015 WOTUS Rule had been in effect, there has been no "aggressive expansion of federal regulation of Oklahoma waters." *Id.* at 333. Plaintiffs timely appealed. Pls.' App'x 338-340.

SUMMARY OF THE ARGUMENT

The court below erred in denying Plaintiffs' motions for a preliminary injunction because all four injunction factors weigh in Plaintiffs' favor.

I. Plaintiffs have demonstrated a substantial likelihood of success on the merits, as numerous courts around the country have held. First, the 2015 WOTUS Rule is substantively unlawful because it is arbitrary and capricious and exceeds the Agencies' CWA authority as set forth in the *SWANNC* decision and the *Rapanos* plurality, as well as Justice Kennedy's concurrence in *Rapanos*. The rule's inclusion under the "adjacent" definition of all waters within arbitrary distance limits as *per se* WOTUS is not in accordance with *SWANCC* because it includes "nonnavigable, isolated, intrastate waters," and fails to categorically meet both the *Rapanos* plurality's "continuous surface connection" requirement and Justice Kennedy's "significant nexus" requirement. The same can be said of the Agencies' broad definition of "tributaries," which include "ephemeral" and "intermittent" streams, and the Agencies' category of "nexus" waters, which significantly departs from Justice Kennedy's "nexus" test.

None of this is consistent with the CWA's mandate that "primary" jurisdiction over land and water resources remain with the States. And these same issues create constitutional problems under the Commerce Clause and the Tenth Amendment, as flagged by both *SWANCC* and *Rapanos*. The Agencies do not contest Plaintiffs' likelihood to succeed on the merits—and have instead expressed their own grave

concerns with the Rule's legality—and the Sixth Circuit, the District of North Dakota, and the Southern District of Georgia all enjoined the 2015 WOTUS Rule based on these substantive concerns.

The 2015 WOTUS Rule is also procedurally invalid because in numerous instances the Agencies violated the APA's notice-and-comment requirements. As the Southern District of Texas held in granting final judgment to challengers of the Rule, the arbitrary distance limitations in the "adjacent" and "nexus" definitions were never subject to notice and comment. The other courts that have enjoined the Rule have noted the same problems. And these failures are repeated in the context of the Agencies' "tributary" definition and the failure to subject the Agencies' principal technical report supporting the Rule to public comment.

II. The district court's principal error was its holding that, becasue the Agencies have not "aggressive[ly]" applied the 2015 WOTUS Rule since the Rule went into effect in Oklahoma last year, the harm Plaintiffs are experiencing is not so "certain and great" as to constitute "irreparable harm." But this Court has held that "irreparable harm" includes "harm that cannot be compensated after the fact by monetary damages," and Plaintiffs have demonstrated that in spades.

First, the district court found (and it was uncontested below) that the 2015 WOTUS Rule expands the federal government's authority over Oklahoma's waters. This deprives the State of a significant amount of sovereignty and ousts the State from

exercising its policy discretion over a crucial natural resource. This Court has held—and the North Dakota and Georgia courts enjoining the Rule agree—that such harm to the State's sovereign interests constitutes irreparable harm. The Agencies themselves recognize that the 2015 WOTUS Rule represents a large expansion of federal authority. But regardless, any ouster of the State's sovereign rights suffices for irreparable harm, especially when the Rule threatens prerogatives guaranteed by the Constitution.

Second, Plaintiffs will suffer monetary harms that, if Plaintiffs ultimately prevail, they cannot recover from the federal government. This includes increased costs to State agencies in implementing the 2015 WOTUS Rule, costs to the private Plaintiffs in the form of lost economic opportunity and compliance costs, and costs to Oklahoma citizens more broadly whom the State represents as *parens patriae*. Plaintiffs supported these claims with both broad statistics and specific examples. Yet the court below denied an injunction, saying it "would have anticipated" more harms, ignoring the fact that the WOTUS Rule had been in effect in Oklahoma barely seven months when preliminary injunction briefing completed and that the CWA permitting process often takes several years. Regardless, this Court's precedent does not impose the high standard the district court erected. The district court's decision conflicts with the multiple courts around the country that recognized the irreparable harm the 2015 WOTUS Rule will cause.

III. Finally, the balance of equities weighs heavily in favor of a preliminary injunction. An injunction will not harm the Agencies—they would simply apply the pre-2015 status quo that already governs in 28 other states—and the public will benefit from the certainty of a regulatory regime that existed for over 40 years. The Agencies do not contest these realities, and courts around the country have agreed. Moreover, given the constitutional implications of the 2015 WOTUS Rule's expansive reach, equity clearly demands injunctive relief.

STANDARD OF REVIEW

The Court reviews decisions over whether to grant preliminary injunctions for an abuse of discretion, and will reverse a lower court's decision "if it rests on an erroneous legal conclusion or lacks a rational basis in the record." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 796 (10th Cir. 2019). The Court "examine[s] the court's factual findings for clear error and its legal conclusions de novo." *Id.* at 796-97.

"In determining whether to grant a preliminary injunction, a court must weigh (1) the likelihood that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the relative weight of the harm alleged by the movant and the harm to the nonmoving party; and (4) the public interest." *Citizens United v. Gessler*, 773 F.3d 200, 209 (10th Cir. 2014). The purpose of a preliminary injunction is "to balance the equities as the litigation moves forward," *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017), and "to preserve the status quo pending a final determination of the case on the merits." *Keirnan v. Utah Transit Auth.*, 339 F.3d 1217, 1220 (10th Cir. 2003).

Although the district court addressed only whether Plaintiffs could show irreparable injury, if this Court finds that this conclusion was in error, it need not remand for the district court to review the remaining preliminary-injunction factors in the first instance. *See LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1155

(9th Cir. 2006); *SCFC ILC, Inc. v. VIisa USA, Inc.*, 936 F.2d 1096, 1100 (10th Cir. 1991). Because the Court "consider[s] legal questions de novo, the absence of oral or written conclusions of law does not preclude [the Court] from undertaking meaningful appellate review." *LGS Architects, Inc.*, 434 F.3d at 1155.

ARGUMENT

I. Plaintiffs have a substantial likelihood of succeeding on the merits of their claims.

As several courts across the country have held, plaintiffs challenging the 2015 WOTUS Rule have a strong likelihood of success on merits. At least one court, in fact, has entered a final judgment in favor of plaintiffs challenging the Rule. The Agencies, in large part, do not disagree with this conclusion. Even so, "[i]t is not necessary that plaintiffs show positively that they will prevail on the merits before a preliminary injunction may be granted." *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981). Rather, "[i]t is only necessary that plaintiffs establish a reasonable probability of success, and not an 'overwhelming' likelihood of success, in order for a preliminary injunction to issue." *Id.* Plaintiffs amply demonstrated that likelihood of success in the court below.

A. The 2015 WOTUS Rule exceeds the Agencies' statutory authority under the CWA, and therefore violates the APA.

The Agencies' expansive assertion of jurisdiction in the 2015 WOTUS Rule cannot be reconciled with the limits of the CWA set forth in the text of that statute and in the Supreme Court's decisions in *SWANCC* and *Rapanos*. In the court below, the Agencies did not contest these arguments. *See* Pls.' App'x 297 (the Agencies "advance no current position on Plaintiffs' contentions that they are likely to succeed on the merits because the 2015 Rule is *substantively* flawed"). Indeed, the Agencies propose to

repeal the rule because they are "concerned that the 2015 Rule lacks sufficient statutory basis." 83 Fed. Reg. at 32,238. They are right to be concerned. And the Agencies' position only confirms that Plaintiffs have a substantial likelihood to prevail on the merits.

1. Adjacent Waters

The Rule exceeds the bounds of the term "navigable waters" in the CWA because it includes all waters within arbitrary distances of *actual* navigable or interstate waters, such as waters within the 100 year floodplain and within 1,500 feet from the ordinary high water mark of primary waters, even when separated by berms or barriers. *See supra* Statement Part II. All of these are *per se* waters of the United States under the Rule, even if they do not constitute, as required by the *Rapanos* plurality, waters "with a continuous surface connection to bodies that are 'waters of the United States' in their own right." 547 U.S. at 742. A once in a lifetime chance that the waters may interact simply doesn't fit the bill. These waters are also *per se* included even without demonstrating the case-by-case nexus that Justice Kennedy's *Rapanos* concurrence would have required. *Id.* at 780-82; *see also In re EPA*, 803 F.3d at 807 (Sixth Circuit staying 2015 WOTUS Rule because "it is far from clear that the new Rule's distance limitations are harmonious with" Justice Kennedy's concurrence).

The invalidity of this definition is confirmed by the fact that "adjacent" often includes adjacency to a broadly-defined "tributary," which under the 2015 WOTUS

Rule includes the smallest trickles of ephemeral streams that may directly or indirectly contribute something to an actual navigable water. The Agencies' assertion of jurisdiction over such "nonnavigable, isolated, intrastate waters" certainly "read[s] the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 171-72.

And these distance-based measures of adjacency, *sans* any continuous surface connection, are "arbitrary and capricious," 5 U.S.C. § 706, because the riparian implications of being within 100 feet of another water's ordinary high water mark differ drastically from place to place based on numerous factors. One hundred feet from the water is much different on a flat plain than in a steep valley.

2. Tributaries

Similarly, the 2015 WOTUS Rule is also invalid because it includes within the definition of tributaries any lands with certain physical characteristics and that contribute in some way (directly or indirectly) to a navigable water, including intermittent and ephemeral streams, regardless of how little or how infrequently water flows through these channels. *See supra* Statement Part II; *see also* 83 Fed. Reg. at 32,242 (noting the inclusion of "ephemeral streams" in the 2015 WOTUS Rule). The *Rapanos* plurality explicitly rejected the idea that "the waters of the United States" includes "the entire land area of the United States [that] lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls," or other similar "typically dry channels" "through which water

flows intermittently or ephemerally." 547 U.S. at 722, 735, 739. These are not "relatively permanent, standing or continuously flowing bodies of water." *Id.* at 739. And as with adjacent waters under the 2015 WOTUS Rule, such "tributaries" are brought under the Agencies' jurisdiction even when they do not meet Justice Kennedy's nexus test. The Agencies now admit that, "at a minimum," the 2015 Rule's definition of tributary is "in significant tension with Justice Kennedy's understanding of the term significant nexus as explained in *Rapanos*." 83 Fed. Reg. at 32,242

The Agencies are not alone. The Southern District of Georgia concluded that "the same fatal defect" contained in the assertion of jurisdiction in *Rapanos* "appears to plague the WOTUS Rule here." *Georgia*, 326 F. Supp. 3d at 1364. The tributary "definition is similar to the one invalidated in *Rapanos*, and it carries with it the same concern that Justice Kennedy had there—it seems 'to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water.'" *Id.* at 1365. The North Dakota Court also pointed out "the same fatal defect," since "the breadth of the definition of a tributary set forth in the Rule allows for regulation of any area that has a trace amount of water so long as 'the physical indicators of a bed and banks and an ordinary high water mark' exist," which is "precisely the concern Justice Kennedy had in *Rapanos*, and indeed the general definition of tributary is strikingly similar." *North Dakota*, 127 F. Supp. 3d at 1056.

With both the definition of "adjacent" and "tributary," the Agencies are correct to be "concerned that the 2015 Rule does not give sufficient effect to the term 'navigable' in the CWA," and even under Justice Kennedy's *Rapanos* concurrence, "[t]he agencies are considering whether the 2015 Rule's definitions of 'tributary' and 'adjacent' were so broad as to eliminate consideration of the [nexus] factors in a manner consistent with Justice Kennedy's opinion and the CWA." 83 Fed. Reg. at 32,241. At the very least, Plaintiffs have demonstrated a substantial likelihood of success on the merits.

3. "Nexus" Waters

Even the Rule's catch-all category significantly loosens Justice Kennedy's test to include waters that significantly affect either the "chemical, physical, *or* biological" integrity of a primary water, rather than requiring that all three elements of Justice Kennedy's nexus test be met. *See supra* Statement Part II. Inclusion of all such waters certainly would not meet the *Rapanos* plurality's test.

For example, use of the disjunctive "or" means that a water could be considered WOTUS simply because, in combination with *all* other similar waters in the entire watershed, it significantly affects only certain biological functions, like "life cycle dependent aquatic habitats (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area)." 80 Fed. Reg. at 37,106. But it is hard to see how this is all too different from the "Migratory Bird Rule" struck down in *SWANCC*. The "WOTUS Rule will likely fail for the same reason that the rule in *SWANCC* failed." *Georgia*, 326

F. Supp. 3d at 1365. The Agencies agree this is sufficient reason to consider repealing the 2015 WOTUS Rule, and additionally point out that the seasonal ponds in *SWANCC* would be eligible to be a "nexus" water under the 2015 WOTUS Rule because they are "located within 4,000 feet of Poplar Creek, a tributary to the Fox River, and may have the ability to store runoff or contributed other ecological functions in the watershed." 83 Fed. Reg. at 32,241-42.

This is not the only problem. As with the definition of "adjacent" waters, the nexus test includes arbitrary and capricious distance metrics. And the 2015 Rule's definition of "similarly situated" waters for determining whether a combination of waters have a significant nexus to navigable waters also exceeds the limits of Justice Kennedy's test. *See* 83 Fed. Reg. at 32,240. In short, the Agencies now recognize that "court rulings against the 2015 Rule suggest that the interpretation of the 'significant nexus' standard as applied in the 2015 Rule may not comport with and accurately implement the legal limits on CWA jurisdiction intended by Congress and reflected in decisions of the Supreme Court." *Id.* at 32,228. "At a minimum," the Agencies have found, "the interpretation of the statute adopted in the 2015 Rule is not compelled and raises significant legal questions." *Id.*

All three of these aspects of the 2015 WOTUS Rule—adjacency, tributaries, and nexus—alone or taken together, also flout a key provision of the CWA: that "the policy of the Congress [is] to recognize, preserve, and protect the primary responsibilities and

rights of *States* to prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b) (emphasis added). Where (as here) the Agencies concede that the Rule "could mean that the vast majority of water features in the United States may come within the jurisdictional purview of the federal government," 83 Fed. Reg. at 32,229, it is hard to see how States remain primary, what surface waters are left within the State's primary jurisdiction, or how Plaintiffs do not have a likelihood of succeeding on the merits.

B. The 2015 WOTUS Rule was promulgated in violation of the procedures required by the APA.

Under the APA, an agency must give a "[g]eneral notice of proposed rule[making]" and give "interested persons an opportunity to participate in the rule[making] through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c). It is not enough that the agency merely notifies the public that a rulemaking is underway; the agency must put the public on sufficient notice about the likely result of such a rulemaking, and give notice of "the range of alternatives being considered with reasonable specificity." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983); *see also CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009). Specifically, courts must ensure that a final rule is "a logical outgrowth of the proposed [rule]." *American Mining Congress v. Thomas*, 772 F.2d 617, 637, 639 (10th Cir. 1985). An Agency final rule will be held invalid if it is not "a 'logical

outgrowth' of the rule proposed," or it otherwise fails to provide adequate notice and comment. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The Agencies' promulgation of the 2015 WOTUS Rule violated these bedrock procedural requirements.

Most significantly, the agency adopted a definition of "neighboring" waters (one category of "adjacent" waters that are *per se* WOTUS) that was not a logical outgrowth of the proposed rule. Whereas the proposed rule defined "neighboring" based on a hydrological connection to a traditional "water of the United States," Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188, 22,263 (April 21, 2014), the final rule adopted a definition that includes not only an expanded definition of neighboring, but also a definition based on unyielding, seemingly arbitrary numeric thresholds. The Agencies executed a similarly precipitous change with the creation of new distance-based criteria to trigger a "nexus" analysis in their final catch-all category of waters. *Compare* 79 Fed. Reg. at 22,263, 22,269 *with* 80 Fed. Reg. at 37,106. For example, the final rule includes waters within 1,500 feet (five football fields) of a primary water's high tide line as *per se* "waters of the United States," and waters within 4,000 feet (more than three Empire State buildings) of the high tide line or ordinary high water mark of a primary water, impoundment, or tributary are subject to the "nexus" analysis. 80 Fed. Reg. 37,105. Interested parties had no notice that the proposed method for addressing adjacency and nexus, which focused on hydrological

and other connectivity, would become a distance-based definition. The Agencies admit these distance values (for both "adjacent" and "nexus" waters) "did not appear in the proposed rule, and thus the agencies did not receive public comment on these numeric measures." 83 Fed. Reg. at 32,229.

It is not enough that the proposed rule's ecological and hydrological definitions of adjacency incorporated some concept of "distance." Otherwise, the Agencies could adopt literally any distance no matter how categorically or essentially different from the one proposed. That is why courts have held that the Agencies "materially altered" and "transmogrif[ied]" the 2015 WOTUS Rule "by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule." *North Dakota*, 127 F. Supp. 3d at 1058; *see also In re EPA*, 803 F.3d at 807 (holding that "the rulemaking process by which the distance limitations were adopted is facially suspect" and finding nothing in the rulemaking record showing "that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered"); *Georgia*, 326 F. Supp. 3d at 1366 (same). Most recently, the Southern District of Texas granted summary judgment to challengers to the WOTUS Rule, holding that in the final rule the Agencies had "abandoned" the hydrological and ecological approach and "switched to the use of distance-based

criteria"—a "shift in terminology and approach … that was different in kind and degree from the concept announced in the Proposed Rule." *Texas*, 2019 WL 2272464, at *5.

The 2015 WOTUS rulemaking contained other procedural flaws. The Agencies, for example, failed to reopen the comment period when they completed the final technical report that informed large portions of the Rule, precluding anyone from questioning whether the rule's determinations were based on sound technical data. *See Texas*, 2019 WL 2272464, at *5-6 (holding that the Agencies violated the APA "by preventing interested parties from commenting on the studies that served as the technical basis for" the 2015 WOTUS Rule). The final rule also adopted a definition of "tributary" that is significantly different than the one originally proposed. The proposed rule required "the presence of a bed and banks and ordinary high water mark" along with some flow that, at least on occasion, reached a traditionally navigable water. 79 Fed. Reg. at 22,269. But the final rule does not require the actual presence of a bed, banks, and high water mark, only the "presence of physical indicators" of such features. [80 Fed. Reg. at 37,058]. So, for example, rather than being required to actually observe bed and banks—or for that matter, the actual flow and presence of water—on the ground, the Agencies need only use sensing and mapping technology to discover a "tributary." 80 Fed. Reg. at 37,076-77. These ideas were not subject to notice or the scrutiny of public comment.

C. The 2015 WOTUS Rule exceeds the Federal Government's authority under the Commerce Clause and infringes on the rights guaranteed by the Tenth Amendment.

The Supreme Court has repeatedly warned that expansive assertions of the Agencies' jurisdiction under the CWA risks exceeding the limits of federal power under the Commerce Clause and infringing on the prerogatives guaranteed to the States by the Constitution's federal structure and by the Tenth Amendment. *Rapanos*, 547 U.S. at 738; *SWANCC*, 531 U.S. at 172-74. These constitutional limits are to be construed together; the Commerce Clause "must be considered in the light of our dual system of government and may not be extended as to embrace effects upon interstate commerce [that are] indirect and remote." *United States v. Lopez*, 514 U.S. 549, 557 (1995) (citations omitted).

"Indirect and remote" describes precisely the alleged effects upon interstate commerce on which the 2015 WOTUS Rule relies. *See supra* I.A. The final rule unconstitutionally attempts to regulate as *per se* "waters of the United States" those waters that either have an attenuated or no connection whatsoever to interstate commerce. Regulating waters that are isolated and wholly intrastate (as the Agencies do when defining "adjacent" waters), or isolated streams, culverts, and ditches with intermittent or ephemeral flow (as the Agencies do when defining "tributaries"), cannot pass constitutional muster. Notably, because these *per se* waters are separate from the "nexus" waters the Agencies seek to regulate, the Agencies are necessarily asserting

jurisdiction over these land and water features without any determination that they "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of" waters *actually* connected to interstate commerce. 80 Fed. Reg. at 37,106. If a land or water feature has no effects on interstate commerce, even when examined in combination with other similar waters, it is hard to see how federal regulation of them can meet even the broad standards of the Commerce Clause. States, instead, have the "traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. This "is a quintessential state and local power." *Rapanos*, 547 U.S. at 738. Accordingly, the 2015 WOTUS Rule infringes on liberties and prerogatives guaranteed by the limits on federal power contained in the Constitution.

II. Plaintiffs will continue to suffer irreparable harm absent an injunction.

"[A] plaintiff satisfies the irreparable harm requirement by demonstrating a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (citation omitted). Although "[p]urely speculative harm will not suffice," a plaintiff "who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative and will be held to have satisfied his burden." *Id.* (citation omitted). Here, without a preliminary injunction, Plaintiffs will suffer two distinct

irreparable harms, neither of which can be compensated by future monetary damages: the loss of sovereignty and unrecoverable economic losses.

A. Without an injunction, Plaintiff the State of Oklahoma will suffer irreparable harm because it will lose of sovereignty over its land and water resources.

Without an injunction, the WOTUS Rule will deprive Oklahoma of its sovereign authority to regulate its land and water resources. This Court has long held that a State suffers irreparable harm when the defendant's actions "place [the State's] sovereign interests and public policies at stake." *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001); *see also Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.32d 709, 716 (10th Cir. 1989).

Here, the 2015 WOTUS Rule massively expands the federal government's authority over State lands and waters. The Agencies have acknowledged as much. *See, e.g.,* Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4197 (Feb. 14, 2019) (the 2015 WOTUS Rule "expanded the scope of jurisdictional wetlands well beyond those wetlands . . . that the Supreme Court has long held to be a permissible exercise of authority of the CWA"); *id.* at 4172 (the Rule's "broad interpretation" of "neighboring" waters and "inclusion of ephemeral streams" increased "the number of interstate waters that [were] jurisdiction"). The Agencies have also recognized that previous estimates of the scope of federal expansion under the 2015 WOTUS Rule may have been far too conservative, and that the expansion will be especially profound in

more arid states. *See* 83 Fed. Reg. at 32,243-48. In fact, the Agencies have suggested that the WOTUS Rule "could mean that the *vast majority* of water features in the United States may come within the jurisdictional purview of the federal government." *Id.* at 32,229 (emphasis added); *see also* 84 Fed. Reg. at 4161.

This loss of sovereign interests is why multiple courts have granted a preliminary injunction against the operation of the 2015 WOTUS Rule. *See North Dakota v. EPA*, 127 F. Supp. 3d at 1059 (finding irreparable harm because "the [WOTUS] Rule will irreparably diminish the States' power over their waters"); *Georgia v. Pruitt*, 326 F. Supp. 3d at 1366-67 (finding irreparable harm because "the States will lose their sovereignty over certain intrastate waters that will become subject to the scope of the [CWA]").

The district court, however, held that the State had not shown irreparable harm to the State's sovereign interests because "the 2015 Rule has been in effect for varying periods of time since this case was filed," and the State could "identify no evidence of an aggressive expansion of federal regulation of Oklahoma waters." Op. 11. That is wrong on multiple levels.

As a factual matter, the WOTUS Rule *does* represent an "aggressive expansion of federal regulation." As explained, the Rule's definition of "waters of the United States" expanded the Agencies' reach exponentially over the nation's waters. The WOTUS Rule asserts federal jurisdiction over isolated ponds, intermittent and ephemeral streams, certain wetlands, and a host of other previously unregulated waters. Indeed, it is

implausible that a "slight" expansion of federal power over the nation's waters would have resulted in dozens of lawsuits from numerous private entities and the majority of States in the country. *Supra* Statement Part III.

In any event, the *size* of the federal government's unwarranted expansion of authority is irrelevant. There is no dispute that the WOTUS Rule represents *some* expansion of federal power; the district court itself found that the WOTUS Rule "would expand federal jurisdiction under the [CWA] to bodies of water that were previously not regulated by the federal government." Pls.' App'x 324-25. That should have been the end of it. After all, State sovereignty is no small matter. "The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 564 U.S. 211, 221 (2011). "The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Any* loss of sovereign interests thus is irreparable. *See id.*; *see also Kansas v. United States*, 249 F.3d at 1228 (rejecting as irrelevant the argument that "the State has overstated its sovereign interests"). This is especially true because the loss of sovereignty is of constitutional importance, implicating the State's rights under Article I and the Tenth Amendment. *See supra* Part I.C. In this Circuit, "well-settled law supports the constitutional-violation-as-irreparable-injury principle" and "Plaintiffs need to show no further irreparable harm." *Free the Nipple*, 916 F.3d at 806.

B. Without an injunction, Plaintiffs will suffer unrecoverable economic losses.

The WOTUS Rule is causing and will continue to cause the State of Oklahoma and its citizens to suffer unrecoverable monetary harm. For the State, it must now incur compliance and administrative costs, both of which are monetary damages that cannot be recovered from the Agencies. These harms were well documented in the State's declarations, including the Agencies' own (overly conservative) 2015 estimates of compliance costs around a million dollars. Pls.' App'x 112-114; 128-129, ¶¶ 4-10; 130-131, ¶¶ 4-6; 237, ¶ 7; & 239-40, ¶¶ 2, 3.

And there is no dispute that these economic losses are unrecoverable, because "there is neither an alternative source to replace the lost revenues nor a way to avoid the increased expenses." *Georgia*, 326 F. Supp. 3d at 1367; *see Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury."). Multiple courts have found irreparable harm from the 2015 WOTUS Rule for precisely this reason. *See North Dakota v. EPA*, 127 F. Supp. 3d at 1048 (finding irreparable harm from the 2015 WOTUS Rule because the States must undertake new jurisdictional studies and bear the costs of additional CWA § 401 certifications); *Georgia v. Pruitt*, 326 F. Supp. 3d at 1367 (finding irreparable harm because the 2015 WOTUS Rule "requires States to expend resources updating the water quality goals under the CWA's Water Quality Standard program," to "expend resources

in issuing additional state certifications under the Section 404 program", and "to create, process, and issue additional National Pollution Discharge Elimination System permits").

As for private citizens, without an injunction, the WOTUS Rule will harm landowners with definitional waters on their property by forcing them to submit to expensive and time-consuming federal permitting requirements in order to conduct routine activities on their property. *See* Pls.' App'x 265-68, ¶¶ 6-25; Pls.' App'x 270-72, ¶¶ 4-14. For example, before the WOTUS Rule took effect in August 2018, Michael Jacobs had "made plans to develop [his] land by harvesting timber, impounding water, and improving [his] land." Pls.' App'x 267, ¶ 21. Now that the Rule is in effect, however, he has "once again halted [his] plans" because he believes he could not go forward without "a costly permit from the federal government." *Id.* at ¶ 22.

These fears are real. The CWA's reach "is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) (quoting *Sackett v. EPA*, 4566 U.S. 120, 132 (2012) (Alito, J., concurring)). If landowners discharge into a "water of the United States" without a permit, "in the mistaken belief that their property did not contain jurisdictional waters, they would expose themselves to civil penalties of up to [$54,833] for each day they violated the [Clean Water] Act, to say nothing of potential criminal liability." *Id.* at 1815; *see* 40 C.F.R.

§ 19.4 (Feb. 6, 2019) (statutory civil penalties for violations of the CWA). They might also be subject to liability through a citizen suit by private individuals. *See Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1136 (10th Cir. 2005). The Agencies themselves recognize these harsh realities. *See* 83 Fed. Reg. at 32,273.

Landowners who believe their property may contain "waters of the United States" under the WOTUS Rule now face three options: (1) spend irrecoverable resources to determine whether their land is even covered by the WOTUS Rule; (2) assume their land is covered by the rule and so attempt to obtain the necessary permits, which will be "arduous, expensive, and long," *Hawkes*, 136 S. Ct. at 1816; or (3) simply abandon the project entirely, thus forever losing the economic benefit from such improvements. *See, e.g.,* Pls.' App'x 267-68, ¶¶ 21-25. These economic losses are irrevocable. *See Chamber of Commerce*, 594 F.3d at 771; *see also Advantus, Corp. v. T2 Int'l, LLC*, 2013 WL 12122313, at *10 (M.D. Fla. 2013) ("Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm."). The State of Oklahoma suffers these same harms as *parens patriae*. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 (1982); Pls.'App'x 237, ¶ 5-6; Pls.'App'x 240, ¶ 4-6.

Moreover, Plaintiffs' harms are magnified by the geographic inconsistency in the rule's enforcement. The WOTUS Rule is in effect in Oklahoma but is *not* in effect in the States that share the vast bulk of Oklahoma's border. *Supra* Statement Part III. The

increased regulatory burden associated with the WOTUS Rule puts Oklahoma businesses at a competitive disadvantage with respect to other businesses in the region. As the Agencies recently told the Southern District of Texas, the WOTUS Rule's "regulatory patchwork does not serve the public interest," as it is "'complicated and inefficient for both the public and the agencies." Federal Defendants' Response to Plaintiffs' Notices and Motion Regarding D.S.C. Decision, *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex. Aug. 22, 2018) (quoting 83 Fed. Reg. at 5,202).

These injuries are not speculative or imaginary. Since the WOTUS Rule took effect in Oklahoma in August 2018, regulated entities within Oklahoma have been the subject of regulatory actions by federal agencies, or state agencies required to implement federal programs, under the CWA for activities that should not be subject to federal regulation and should not trigger the regulatory responsibilities permit applications impose on the State.

Examples abound of the types of injuries the WOTUS Rule is causing in Oklahoma. On August 21, 2018, Oklahoma's Department of Environmental Quality (ODEQ) issued a mandatory Section 401 certification to Costco, which had to spend time and resources to seek a federal permit and state certification (and purchase mitigation credits) for a store it is constructing in Oklahoma City because there were two ephemeral streams located at the site. Pls.'App'x 240, ¶ 4; *id.* at 241-49 (permit documentation as well as photos of dry land that constitutes an "ephemeral stream").

The Whirlpool Corporation endured similar administrative burdens for a warehouse and distribution facility it is seeking to construct in Tulsa on a property with two ephemeral streams—for which ODEQ was required to issue a Section 401 certification on October 4, 2018. Pls.'App'x 240, ¶ 5 & 250-57.

Another company, which is seeking to construct a residential subdivision in Tulsa, was the subject of a Section 401 certification on October 10, 2018 because of "unavoidable impacts to a potentially jurisdictional ephemeral stream that traverses the site interior," despite the fact that "[t]his ephemeral stream provides minimal functional value, primarily due to decreased hydrological flow and connectivity resulting from residential and commercial development in the surrounding upstream and downstream drainage basins." Pls.'App'x 240, ¶ 6 & 258-63. The Agencies also issued a final interim jurisdictional determination on September 24, 2018, asserting jurisdiction over a real estate development in Coweta because of intermittent streams, an isolated pond, and wetlands within the 100-year floodplain of a jurisdictional water. Pls.' App'x 274-82.

More comprehensively, in the first few months in which the rule went into effect, the Army Corps in Oklahoma had taken 112 final permit actions, issued 26 approved jurisdictional determinations, and sent 2 cease and desist letters pursuant to the 2015 WOTUS Rule (and this does not even include any EPA-related actions). Pls.' App'x 214-15. Given the time that has elapsed, these numbers have likely increased, but the Agencies have not provided updated figures to Plaintiffs or the Court since December

2018. And all of this does not include the chilling effects of the WOTUS Rule—the numerous individuals, for example, who have chosen to forgo developing their land because of 2015 WOTUS Rule, and therefore never sought permits or jurisdictional determinations for Plaintiffs to enter into evidence.

The district court rejected this evidence as not "certain and great" because "this case has been pending for nearly four years" and the court "would have anticipated" more. Op. 11. But that view is overly dismissive. Aside from six weeks in 2015, the 2015 WOTUS Rule did not take effect until August 2018. *See supra* Statement Parts III & IV. It thus is not surprising that Plaintiffs could not point to scores of data demonstrating the economic impact of the 2015 WOTUS Rule when it submitted its supplemental brief six months later. Regulatory actions under the CWA take far more than a few months from cradle to grave. *See Rapanos*, 547 U.S. at 721 ("The average applicant for an individual [Section 404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permits spends 313 days and $28,915."). And there exists no "map or dataset that accurately or with any precision portrays CWA jurisdiction at any point in the history of this complex regulatory program." 83 Fed. Reg. at 32,244. Indeed, if this were the standard, few pre-enforcement preliminary injunction motions would succeed. *Cf. Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("A party [] is not required to prove his case in full at a preliminary-injunction hearing.").

Yet Plaintiffs' evidence was still sufficient to show irreparable harm. The Agencies do not dispute that (1) the 2015 WOTUS Rule significantly expands the Agencies' regulatory reach; (2) that this expansion of federal power precludes the State from exercising its regulatory discretion in a conflicting manner, including the decision to leave particular activities unregulated; (3) that the Rule increases state monetary and personnel costs; and (4) that private citizens were suffering economic losses due to the Rule. The likelihood that Plaintiffs will suffer irreparable injury without a preliminary injunction thus "overwhelmingly" weighs in favor of enjoining the WOTUS Rule. *Georgia v. Pruitt*, 326 F. Supp. 3d at 136.

III. The balance of equities and the public interest weigh in favor of an injunction.

As noted above, "[a] preliminary injunction serves to preserve the status quo pending a final determination of the case on the merits." *Keirnan*, 339 F.3d at 1220. Here, the status quo—*i.e.* "the last peaceable uncontested status existing between the parties before the dispute developed," *Free the Nipple*, 916 F.3d at 798 n.3—is the well-established regulatory regime that existed prior to promulgation of the 2015 WOTUS Rule and that governed Oklahoma until the latter half of last year. *See In re EPA*, 803 F.3d at 806. The Agencies do not contest that an injunction restoring the status quo will not harm them, but will instead advance the public interest. Because the balance of

equities tips heavily in favor of Plaintiffs, the district court erred in refusing to grant a preliminary injunction.

In contrast to the irreparable harm Plaintiffs will suffer, the Agencies will face no additional burdens if an injunction is issued—they will not be forced to take any action and can instead simply apply the regulatory structure that existed for forty years prior and exists now for 27 States. In the court below, the Agencies did not contest this reality, but instead pointed to their findings in the Suspension Rule that a nationwide return to how the Rule "was administered prior to the promulgation of the 2015 Rule" would benefit both the Agencies and the public interest. Pls.' App'x 308-09 (citing 83 Fed. Reg. at 5,202). Indeed, that was the whole point of the Agencies' Suspension Rule: "to maintain the *status quo* by adding an applicability date to the 2015 Rule and thus providing continuity and regulatory certainty for regulated entities, the States and Tribes, and the public while the agencies continue to consider possible revisions to the 2015 Rule." 83 Fed. Reg. at 5200. And the Agencies have proposed the Repeal Rule too because "[t]he agencies believe that, until a new definition is completed, it is important to retain the status quo that has been implemented for many years rather than the 2015 Rule, which has been and continues to be mired in litigation." 83 Fed. Reg. at 32,250. This would "maintain[] a longstanding regulatory framework that is more familiar to and better-understood by the agencies, states, tribes, local governments, regulated entities, and the public." *Id.* at 32,228. As the Agencies have noted, the reliance interests

on the pre-2015 regime far outweigh any reliance interests that have developed over the short period of time the 2015 WOTUS Rule has been in effect. *See id.* at 32,250.

Even if an injunction in this case is limited to Oklahoma and thus does not secure the nationwide consistency benefits that both the Agencies and Plaintiffs seek, it would at least restore regional uniformity by putting Oklahoma on the same regulatory footing as nearly all states that border it. At a minimum, restoring the status quo to Oklahoma will not cause any *additional* burden to the Agencies.

Not surprisingly, courts across the country have held that the balance of the equities weighs "heavily" and "overwhelmingly" in favor of enjoining the 2015 WOTUS Rule. *Georgia v. Pruitt*, 326 F. Supp. 3d at 1369. "[T]he sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo." *In re EPA*, 803 F.3d at 808. Meanwhile, there is no "indication that the integrity of the nation's waters will suffer imminent injury if the new scheme is not immediately implemented and enforced." *Id.* The harm to the Agencies of preserving the status quo as this case progresses thus "pales in comparison to the harm that the [Plaintiffs] urge." *Georgia v. Pruitt*, 326 F. Supp. 3d at 1369; *North Dakota v. EPA*, 127 F. Supp. 3d at 1059-60 (enjoining the WOTUS Rule because "[t]he risk of irreparable harm to the States is both imminent and likely" and "delaying the Rule will cause the Agencies no appreciable harm"). It would put Oklahoma "in the same position as the [27] States granted preliminary injunctive relief … thereby adding

consistency of judicial determination as well as of the Rule's applicability." *Georgia v. Pruitt*, 326 F. Supp. 3d at 1370.

Finally, given that Plaintiffs have demonstrated a substantial likelihood to prevail on the merits, *supra* Part I, it must be recognized that the Agencies "have no interest in enforcing a law that is likely constitutionally infirm"—or for that matter, statutorily infirm. *Chamber of Commerce*, 594 F.3d at 771; *see also Free the Nipple*, 916 F.3d at 806 ("the City has no interest in keeping an unconstitutional law on the books"). Indeed, "[w]hen a constitutional right hangs in the balance, … even a temporary loss usually trumps any harm to the defendant." *Free the Nipple*, 916 F.3d at 806 (citation and internal marks omitted).

Similarly, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012); *accord Free the Nipple*, 916 F.3d at 807. The "public interest . . . is served by enjoining the enforcement of the invalid provisions of [the] law." *Chamber of Commerce*, 594 F.3d at 771. Since the irreparable harms suffered by Plaintiffs are also suffered by the public at large (including uncertainty caused by a new regulatory regime, chilling or delay of putting property into productive use, the onerous permitting promise, and the steep fines for violation), granting a preliminary injunction would promote the public interest and ensure that the sovereign, constitutional, and statutory prerogatives of the State and its citizens remain intact until the matter can be adjudicated on the merits. This is why

the Southern District of Texas held that "it is the fourth factor pertaining to the public's interest in this matter that tipped the balance in favor of granting an injunction—and did so to an overwhelming degree." *Texas*, 2018 WL 4518230, at *1. "[A] stay provides much needed governmental, administrative, and economic stability." *Id.*

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the order of the district court be reversed and the case be remanded with instructions to enter a preliminary injunction enjoining the 2015 WOTUS Rule.

ORAL ARGUMENT STATEMENT

Plaintiffs respectfully request oral argument and believe that argument will aid the Court's determination of this appeal. The issues presented are of statewide, if not nationwide, importance and therefore merit the additional attention and clarity that oral argument provides.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies this document complies with the typeface requirements of Fed. R. App. P. 32 and Tenth Circuit R. 32 because it was prepared in a proportionally spaced font (Garamond, 14-point with footnotes at 13-point) using Microsoft Word 2016. The motion complies with the type-volume limitation of Fed. R. App. P. 27(d) because it contains 12,916 words, excluding the parts exempted. All required privacy redactions have been made in accordance with Fed. R. App. P. 25(a)(5) and 10th Cir. 25.5.

/s/ Mithun Mansinghani
Mithun Mansinghani

ECF CERTIFICATION

Counsel certifies that all required privacy redactions have been made as required by Tenth Circuit Rule 25.5 and the ECF Manual and that this filing was scanned with Symantec Endpoint Protection antivirus using the latest version (14.2), most recently updated on August 6, 2019.

/s/ Mithun Mansinghani
Mithun Mansinghani

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2019, I caused the foregoing PRINCIPAL BRIEF to be filed with this Court and served on all parties via the Court's CM/ECF filing system. Seven hard copies, which are exact reproductions of the document filed electronically, will be dispatched via commercial carrier to the Clerk of the Court for receipt within 2 business days.

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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,	)	**Case No. 15-CV-0381-CVE-FHM** **BASE FILE**
and	)	
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	)	**Consolidated with: Case No. 15-CV-0386-CVE-FHM**
Consolidated Plaintiffs,	)	
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, ANDREW WHEELER, in his official capacity as Acting Administrator of the United States Environmental Protection Agency, and RICKEY JAMES, in his official capacity as Assistant Secretary of the Army for Civil Works,	)	
Defendants/Consolidated Defendants.	)	

OPINION AND ORDER

Now before the Court are the following motions: Plaintiff's Motion for a Preliminary Injunction (Case No. 15-CV-381-CVE-FHM, Dkt. # 17); Plaintiffs' Motion for Preliminary Injunction (Case No. 15-CV-386-CVE-FHM, Dkt. # 27); Defendants' Motion and Memorandum in

Support Thereof to Stay Proceedings Pending a Ruling from the United States Court of Appeals for the Sixth Circuit on Subject-Matter Jurisdiction (Case No. 15-CV-381-CVE-FHM, Dkt. # 25); Defendants' Motion and Memorandum in Support Thereof to Stay Proceedings Pending a Ruling from the United States Court of Appeals for the Sixth Circuit on Subject-Matter Jurisdiction (Case No. 15-CV-386-CVE-FHM, Dkt. # 39)[1]; the Motion to Intervene as Defendants (Case No. 15-CV-381-CVE-FHM, Dkt. # 64); the Motion to Intervene as Defendants (Case No. 15-CV-386-CVE-FHM, Dkt. # 74); Waterkeeper Alliance Et Al's Motion and Memorandum in Support of Leave to File Brief in Opposition to Plaintiff's Request for Preliminary Injunction (Case No. 15-CV-381-CVE-FHM, Dkt. ## 74, 75); Waterkeeper Alliance Et Al's Motion and Memorandum in Support of Leave to File Brief in Opposition to Plaintiff's Request for Preliminary Injunction (Case No. 15-CV-386-CVE-FHM, Dkt. ## 87, 88); the Renewed Motion and Memorandum to Allow Filing of Brief or Proposed Brief in Opposition to Motions for Injunctive Relief and Memorandum (Case No. 15-CV-381-CVE-FHM, Dkt. # 98).

I.

On July 8, 2015, the State of Oklahoma filed a case challenging the validity of a new rule adopted by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Cops of Engineers). State of Oklahoma ex rel. E. Scott Pruitt v. United States Environmental Protection Agency et al., 15-CV-381-CVE-FHM (N.D. Okla.). The rule is known as the "Clean Water Rule" and it would expand federal jurisdiction under the Clean Water Act

[1] It appears that the motions to stay were inadvertently reinstated after the case was re-opened, but the motions to stay were terminated by a previous order. The Court mentions the motions to stay only to clarify that motions are moot and should no longer show as pending motions on the docket sheet.

(CWA) to bodies of water that were previously not regulated by the federal government.[2] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015). A separate case challenging the 2015 Rule was filed by the Chamber of Commerce of the United States of America and other plaintiffs. Chamber of Commerce of the United States of America et al. v. United States Environmental Protection Agency et al, 15-CV-386-CVE-FHM (N.D. Okla.). The plaintiffs in both cases asked the Court to declare the 2015 Rule invalid and to permanently enjoin the defendants from enforcing the 2015 Rule. The plaintiffs also filed motions for preliminary injunction seeking to prevent the defendants from enforcing the 2015 Rule while the cases are pending. Case No. 15-CV-381-CVE-FHM, Dkt. # 17; Case No. 15-CV-386-CVE-FHM, Dkt. # 27. The plaintiffs in Case No. 15-CV-386-CVE-FHM also filed motions to consolidate both pending cases challenging the 2015 Rule.

Under the CWA, 33 U.S.C. § 1251 et seq., certain types of cases are subject to direct review in the courts of appeals and cannot be brought in federal district court. Numerous cases were filed in federal district courts across the country and, in addition, at least 21 petitions for review were filed in the federal courts of appeal. Pursuant to 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation (JPML) transferred all pending petitions for review to the United States Court of Appeals for the Sixth Circuit and the petitions were consolidated before a single panel. The Sixth Circuit stayed enforcement of the 2015 Rule nationwide pending a determination of whether it could exercise jurisdiction over the case. In re EPA, 308 F.3d 804 (6th Cir. 2015). On February 22, 2016,

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[2] The Court will refer to the rule that plaintiffs are seeking to invalidate as the "2015 Rule" to maintain consistency with prior orders and to distinguish the rule from other ongoing rulemaking processes.

the Sixth Circuit ruled that it had jurisdiction over the consolidated petitions for review and it retained jurisdiction over the consolidated petitions for review.

In light of the Sixth Circuit's decision, this Court dismissed plaintiffs' claims for lack of subject matter jurisdiction. The plaintiffs appealed the Court's ruling to the Tenth Circuit Court of Appeals, but the appeal was held in abatement pending a ruling by the Supreme Court in a case that would decide whether the Sixth Circuit had jurisdiction over the consolidated appeals. In National Association of Manufacturers v. Department of Defense, 136 S. Ct. 617 (2018), the Supreme Court determined that challenges to the 2015 Rule should be filed in federal district courts, and the Sixth Circuit lacked jurisdiction over the consolidated appeals. The Tenth Circuit reversed this Court's dismissal for lack of jurisdiction and remanded the cases for further proceedings. Chamber of Commerce of United States v. United States Environmental Protection Agency, 709 F. App'x 526 (10th Cir. Jan 29, 2018). The Court reopened the cases and reinstated plaintiffs' motions for preliminary injunction.

Waterkeeper Alliance and Grand Riverkeeper and Tar Creekkeeper (Waterkeeper Alliance), projects of the Local Environmental Action Demand Agency, Inc. (L.E.A.D. Agency), filed motions seeking leave to intervene as defendants. The Waterkeeper Alliance states that it is a long-standing advocate of clean water issues in Oklahoma and nationally, and it participated in the rulemaking process that led to the adoption of the 2015 Rule. Case No. 15-CV-381-CVE-FHM, Dkt. # 64, at 4. The proposed intervenors claim that they "regularly live, work, and recreate in and around water bodies that may lose [CWA] protections" if the plaintiffs prevail, and they argue that they will be unable to protect this interest unless they are permitted to intervene. Id. at 5. Waterkeeper Alliance and L.E.A.D. Agency also request leave to file a briefs in opposition to the plaintiffs' motions for

preliminary injunction. The plaintiffs oppose WaterKeeper Alliance and L.E.A.D. Agency's request to file a brief in opposition to plaintiffs' motions for preliminary injunction, because this would delay a ruling on their motions for preliminary injunction.

Defendants filed a status report (Case No. 15-CV-381-CVE-FHM; Dkt. # 91) advising the Court as to the status of the 2015 Rule and subsequent rulemaking proceedings that have taken place since the rule was enacted. On February 28, 2017, the President of the United States signed an executive order directing the relevant federal agencies to rescind or revise the 2015 Rule. Dkt. # 91, at 1. A proposed rule that would rescind the 2015 Rule has been published and the comment period has closed, and the proposed rule remains under consideration. Id. at 2. In February 2018, federal agencies finalized a rule that would have placed an applicability date of February 6, 2020 on the 2015 rule, and this would have temporarily restored the "Waters of the United States" rule in effect before 2015. Id. The applicability rule has been challenged in several federal district courts, and two district courts have entered nationwide injunctions enjoining enforcement of the applicability rule. Id. at 2-3. The 2015 Rule is currently in effect in 22 states, including Oklahoma. Id. at 3. Federal agencies have now proposed a second rule that would revise the 2015 Rule to define "Waters of the United States" consistently with the pre-2015 regulations, and the comment period for the proposed rule has closed. Id. Between August 16 and December 19, 2018, the Corps of Engineers had taken 112 final permit actions to authorize the discharge of dredged or fill material at sites in Oklahoma, and 50 permit actions were still pending as of the date the status report was filed. Id. at 5. The Corps of Engineers issued 23 approved jurisdictional determinations during that time finding that certain waters qualified as "Waters of the United States," but defendants could not state whether the waters at issue would or would not have qualified under a prior definition of "Waters of the United

States." Id. at 5. Defendants state that it they are not aware of any current administrative or civil action taken pursuant to the 2015 Rule. Id.

On December 21, 2018, the Court held a status conference in both pending cases, and granted the motions to consolidate. Case No. 15-CV-381-CVE-FHM; Dkt. # 92. The Court set a schedule for supplemental briefing on plaintiffs' motions for preliminary injunction, and the parties were advised that the motions to intervene would remain under advisement. Id. In their supplemental brief, plaintiffs argue that the State of Oklahoma (the State) has been denied its sovereign authority to regulate waters within its boundaries because of the 2015 Rule. Case No. 15-CV-381-CVE-FHM, Dkt. # 96, at 7. The State also argues that it will incur compliance and administrative costs that cannot be recovered as monetary damages. Id. at 8. Plaintiffs attached the declaration of Shellie McClary, the Water Quality Division Director for the Oklahoma Department of Environmental Quality (ODEQ), to their motion for preliminary injunction (Case No. 15-CV-381-CVE-FHM, Dkt. # 17-1), and they have included a supplemental declaration (Case No. 15-CV-381-CVE-FHM, Dkt. # 96-2) of the current water quality director for ODEQ, Shellie Chard, with their supplemental brief. Teena Gunter, general counsel for the Oklahoma Department of Agriculture, Food, and Forestry, is responsible for implementing various laws governing the agriculture industry, and this includes laws concerning the discharge of pollutants. Case No. 15-CV-381-CVE-FHM, Dkt. # 96-1. She states that an expanded definition of "Waters of the United States" could subject more concentrated animal feeding operations (CAFO) to federal regulation, and this could lead to civil and criminal penalties for any CAFO that discharges pollutants into waters falling within the scope of the 2015 Rule. Id.

at 2. Plaintiffs have re-submitted the declarations of Michael Jacobs and Leo Stevens that were attached to the original motion for preliminary injunction filed in case no. 15-CV-386-CVE-FHM.[3]

Defendants have filed a supplemental response and they decline to take a position on the merits of plaintiffs' claims. Case No. 15-CV-381-CVE-FHM, Dkt. # 103. Defendants state that there is an ongoing rulemaking process and many of the comments submitted as part of the rulemaking "mirror the arguments made in this case." Id. at 9. However, defendants have made arguments as to other issues concerning plaintiffs' motions for a preliminary injunction.[4]

II.

Plaintiffs seek a preliminary injunction enjoining the defendants from enforcing the 2015 Rule until a final judgment is entered in this case, and they raise a series of constitutional and statutory arguments in support of their motion. A preliminary injunction is an "extraordinary equitable remedy designed to 'preserve the relative positions of the parties until a trial on the merits

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[3] The Court notes that there are slight differences between the original and supplemental declarations submitted by Jacobs and Stevens, but the substance of the declarations is essentially the same. Both Jacobs and Stevens state that they have refrained from developing or improving their property out of a fear that they would be subject to federal regulation under the 2015 Rule. Case No. 15-CV-381-CVE-FHM, Dkt. # 96-3, Dkt. # 96-4. However, they do not suggest that any adverse consequences based on their existing use of their property have actually occurred.

[4] Plaintiffs take the position in their reply that defendants do not oppose the pending motions for preliminary injunction, and they claim that defendants do not dispute that plaintiffs have established a likelihood of success on the merits. Case No. 15-CV-381-CVE-FHM, Dkt. # 106. Plaintiffs' reply misrepresents defendants' arguments. Defendants "believe it prudent to take no current position on any substantive issue associated with the 2015 Rule" due to the ongoing rulemaking processes, because it is important for the public to believe that their comments will be taken seriously and that defendants are proceeding with an open mind. Case No. 15-CV-381-CVE-FHM, Dkt. # 103, at 9. This is not a concession that plaintiffs are likely to succeed with their claims, and defendants' response does not represent an "agreement" that plaintiffs are entitled to injunctive relief. See Case No. 15-CV-381-CVE-FHM, Dkt. # 106, at 2.

can be held.'" Westar Energy, Inc. v. Lake, 552 F.3d 1215, 1225 (10th Cir. 2009) (quoting Univ. Of Tex. v. Camenisch, 451 U.S. 390, 395 (1981)). To be entitled to a preliminary injunction, the moving party must establish the following:

> (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.

Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001). "Because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1066 (10th Cir. 2001) (quoting SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991)); see also Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) ("It is frequently is observed that a preliminary injunction is an extraordinary remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.").

Plaintiffs' motions for preliminary injunction focus heavily on whether they are likely to succeed on the merits of their claims. However, the Tenth Circuit has stated that "probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction," and the "moving party must demonstrate that such injury is likely before the other requirements will be considered." DTC Energy Group, Inc. v. Hirschfeld, 912 F.3d 1263, 1270 (10th Cir. 2018). "Proving irreparable harm . . . is not 'an easy burden to fulfill,'" and the moving party must show "a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages." Husky Ventures, Inc. v. B55 Investments, Ltd., 911 F.3d 1000, 1011 (10th Cir. 2018). "Purely speculative harm will not suffice," and the plaintiff must show that the threatened harm is likely to occur before the district court rules on the merits of the case." RoDa

Drilling Co. v. Siegal, 552 F.3d 1203, 1210 (10th Cir. 2009). The Tenth Circuit has summarized its precedent as to irreparable harm to require that the moving party's injury "must be both certain and great, and that it must not be merely serious and substantial." Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 356 F.3d 1256, 1262 (10th Cir. 2004).

The Court will begin its analysis concerning plaintiffs' motion for preliminary injunction by considering whether any of the plaintiffs has established a significant risk of irreparable harm if the Court declines to enter a preliminary injunction, and the Court will closely examine the evidence submitted by plaintiffs in an attempt to show that they will suffer irreparable harm if the 2015 Rule is not enjoined. The State has submitted the declaration of McClary, the former director of the Water Quality Division of ODEQ, and she states that ODEQ is the lead agency that administers the CWA for the State. 15-CV-381-CVE-FHM, Dkt. # 18-1, at 1. The declaration was attached to the State's motion for preliminary injunction and was signed by McClary on July 23, 2015. McClary anticipated that the State would likely be processing more permit applications under the CWA based on the 2015 Rule's expanded definition of "Waters of the United States." Id. at 2. She believed that the 2015 Rule could lead to increased administrative and compliance costs for the State due to an increased workload. Id. at 2-3. The State also submitted the declaration of J. Michael Patterson, the Director of the Oklahoma Department of Transportation, and Patterson claims that the State was likely to incur costs to determine if any roads or ditches fell within federal regulation under the 2015 Rule. 15-CV-381-CVE-FHM, Dkt. # 18-2. The Court does not find that the declarations of McClary or Patterson are particularly helpful to the irreparable harm analysis, because the declarations are speculative and the State can submit evidence based on the actual effects of the 2015 Rule in the State of Oklahoma.

In Case No. 15-CV-386-CVE-FHM, the plaintiffs submitted the declarations of Jacobs and Stevens in support of their motion for preliminary injunction. Jacobs states he owns a 20 acre plot of land in Delaware County, Oklahoma, and this plot is adjacent to a 50 acre plot that he also owns. 15-CV-386-CVE-FHM, Dkt. # 27, at 33. The 50 acre plot of land is undeveloped, but Jacobs states that he has planned to use the land for cattle grazing. Id. Jacobs had planned to clear timber from the 50 acre plot in furtherance of possible cattle ranching, but he was concerned that the land could be subject to federal regulation under the 2015 Rule. Id. He claims it is not economically feasible for him to develop the 50 acre plot of land if he is required to obtain permits under the CWA, and he believes that property will become less marketable if he decides to sell the land. Id. at 35. Stevens owns land in Rogers County, Oklahoma and a small creek runs through his property. Id. at 40. Stevens believes that the creek could qualify as "Waters of the United States" under the 2015 Rule, and he claims that the 2015 Rule devalues his property. Id. Stevens states that he "would one day like to build a home on it for one of my children or grandchildren," and he "might use it for farming or for recreation." Id.

The State's supplemental briefing includes some evidence addressing the actual impact of the 2015 Rule. Gunter states that the State department of agriculture has issued permits allowing 252 entities to operate as CAFOs, and a CAFO is required to obtain a federal permit if it could potentially discharge a pollutant into a body of water that qualifies as "Waters of the United States." 15-CV-381-CVE-FHM, Dkt. # 96-1, at 2. Gunter claims that the permitting process is expensive and only 39 CAFOs have pollution discharge permits, and she states that additional CAFOs may preemptively seek such permits to avoid heavy fines. Id. However, this is merely hypothetical and she does not provide any specific evidence that a CAFO has actually sought such a preemptive

permit. Id. Chard, the current director of the Water Quality Division for ODEQ, states that expanded federal jurisdiction under the 2015 Rule will require her staff to spend additional time and resources processing permit applications under the CWA. Case No. 15-CV-381-CVE-FHM, Dkt. # 96-2, at 1. The 2015 Rule has been in effect in Oklahoma since August 18, 2018, and Chard states that ODEQ has processed several permit applications that may not have been necessary prior to enactment of the 2015 Rule. Id. at 2. Chard provides three examples of permit applications that were submitted based on the presence of ephemeral streams that may qualify as "Waters of the United States" under the 2015 Rule. Id.

The Court has reviewed the evidence submitted by plaintiffs and finds that the potential harm from leaving in place the 2015 Rule is not so "certain and great" that it rises to the level of irreparable harm. The State claims that the 2015 Rule infringes on its sovereignty to regulate its lands and waters and assumes that the 2015 Rule will lead to an expansion of federal regulation in Oklahoma. However, the 2015 Rule has been in effect for varying periods of time since this case was filed, and the State can identify no evidence of an aggressive expansion of federal regulation of Oklahoma waters. Instead, the State has identified a handful of cases in which private landowners have preemptively sought to comply with the 2015 Rule. The affidavits of Jacobs and Stevens suggest that they have harbored vague plans to improve land that may now be subject to regulation under the CWA and they claim that the 2015 Rule makes their property less marketable. This is not the type of harm that is so imminent and serious that it would warrant the extraordinary remedy of a preliminary injunction. This case has been pending for nearly four years, and the Court would have anticipated a showing of substantial, actual harm in support of a motion for preliminary injunction. Plaintiffs have not shown that they will suffer irreparable harm if the 2015 Rule is permitted to

remain in effect while this case is pending, and this is an essential element that must be established for the Court to enter a preliminary injunction. Plaintiffs' motions for preliminary injunction (Case No. 15-CV-381-CVE-FHM, Dkt. # 17; Case No. 15-CV-386-CVE-FHM, Dkt. # 27) are denied, and the proposed intervenors' motions to file briefs in opposition to the motions for preliminary injunction are moot.

III.

Waterkeeper Alliance and L.E.A.D. Agency seek leave to intervene as defendants in order to defend the legal interests of their members in protecting "water bodies that may lose [CWA] protections making them vulnerable to pollution, impairment, or destruction should [p]laintiffs prevail in this action." Case No. 15-CV-381-CVE-FHM, Dkt. # 64, at 5. Waterkeeper Alliance and L.E.A.D. Agency state that plaintiffs and defendants take no position on their motions for intervention. Id. None of the parties has filed a response to the motions for intervention, and the deadline to respond has expired.

Under Fed. R. Civ. P. 24(a), "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." To intervene as of right, a party seeking to intervene must show that "(1) the application is 'timely'; (2) 'the applicant claims an interest relating to the property or transaction which is the subject of the action'; (3) the applicant's interest 'may as a practical matter' be 'impaired or impeded'; and (4) 'the applicant's interest is [not] adequately represented by the existing parties.'" United States v. Albert Inv. Co., Inc., 585 F.3d 1386, 1391 (10th Cir. 2009). The Tenth Circuit "follows 'a somewhat

liberal line in allowing intervention.'" Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1249 (10th Cir. 2001) (quoting Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 384 (10th Cir. 1977)). Rule 24(a) does not impose "rigid, technical requirements," but it has instead been construed as "capturing the practical circumstances that justify intervention." Public Service Company of New Mexico v. Barboan, 857 F.3d 1101, 1113 (10th Cir. 2017).

The Court has considered the factors for interventions under Rule 24(a) and finds that Waterkeeper Alliance and L.E.A.D. Agency should be permitted to intervene. Although the motions to intervene were filed in September 2018, the case was administratively closed at the time and the Court had not yet determined how the case would proceed pending an ongoing rulemaking process. See Case No. 15-CV-381-CVE-FHM, Dkt. # 56. The Court also notes that there was substantial litigation concerning whether this Court had jurisdiction over the case, and there would have been no reason to seek leave to intervene until the jurisdictional issues were resolved. The Court finds that the motions to intervene were timely filed. The next factor is whether the intervenors have an interest relating to the subject matter of this litigation and, based on Tenth Circuit precedent, the Court finds that they have such an interest. This case is comparable to Utah Ass'n of Counties in which the Tenth Circuit found that organizations seeking to protect and conserve wildlife had an adequate interest in litigation that would threaten the organizations' goals. Utah Ass'n of Counties, 255 F.3d at 1252-53. A ruling in favor of plaintiffs would clearly harm the goals of Waterkeeper Alliance and L.E.A.D. Agency to preserve and protect water resources in Oklahoma from harmful pollution and development. See Western Energy Alliance v. Zinke, 877 F.3d 1157, 1165 (10th Cir. 2017) ("[w]ith respect to Rule 24(a)(2), we have declared it indisputable that a prospective intervenor's environmental concern is a legally protectable interest"). This finding also disposes of

the third factor under Rule 24(a), because a ruling in favor of plaintiffs' would "impair or impede" the intervenors' interest. Finally, the Court must consider whether the intervenors' interest is adequately protected by the existing parties. This factor clearly weighs in favor of allowing intervention. As evidenced by the briefing on plaintiffs' motions for preliminary injunction, defendants cannot publicly take a position on the merits of plaintiffs' claims due to the ongoing rulemaking processes, and plaintiffs have misinterpreted the defendants' actions as a concession that plaintiffs are entitled to relief. Allowing Waterkeeper Alliance and L.E.A.D. Agency to intervene will provide a party to step in and make the arguments in support of the 2015 Rule that cannot be asserted by the existing defendants, and it is strongly preferable to have a well-defined adversary process when ruling on complex issues of statutory interpretation and constitutional law. The Court finds that Waterkeeper Alliance and L.E.A.D. Agency's motions to intervene should be granted.

IT IS THEREFORE ORDERED that Plaintiff's Motion for a Preliminary Injunction (Case No. 15-CV-381-CVE-FHM, Dkt. # 17) and Plaintiffs' Motion for Preliminary Injunction (Case No. 15-CV-386-CVE-FHM, Dkt. # 27) are **denied**.

IT IS FURTHER ORDERED that the Motion to Intervene as Defendants (Case No. 15-CV-381-CVE-FHM, Dkt. # 64) and the Motion to Intervene as Defendants (Case No. 15-CV-386-CVE-FHM, Dkt. # 74) are **granted**, and Waterkeeper Alliance and L.E.A.D. Agency are permitted to intervene in these consolidated cases under Rule 24(a). The intervenors' complaint in intervention is due no later than **June 13, 2019**.

IT IS FURTHER ORDERED that Defendants' Motion and Memorandum in Support Thereof to Stay Proceedings Pending a Ruling from the United States Court of Appeals for the Sixth Circuit on Subject-Matter Jurisdiction (Case No. 15-CV-381-CVE-FHM, Dkt. # 25), Defendants'

Motion and Memorandum in Support Thereof to Stay Proceedings Pending a Ruling from the United States Court of Appeals for the Sixth Circuit on Subject-Matter Jurisdiction (Case No. 15-CV-386-CVE-FHM, Dkt. # 39), Waterkeeper Alliance Et Al's Motion and Memorandum in Support of Leave to File Brief in Opposition to Plaintiff's Request for Preliminary Injunction (Case No. 15-CV-381-CVE-FHM, Dkt. ## 74, 75), Waterkeeper Alliance Et Al's Motion and Memorandum in Support of Leave to File Brief in Opposition to Plaintiff's Request for Preliminary Injunction (Case No. 15-CV-386-CVE-FHM, Dkt. ## 87, 88), and the Renewed Motion and Memorandum to Allow Filing of Brief or Proposed Brief in Opposition to Motions for Injunctive Relief and Memorandum (Case No. 15-CV-381-CVE-FHM, Dkt. # 98) are **moot**.

IT IS FURTHER ORDERED that the parties shall submit a joint status report no later than **June 13, 2019**.

DATED this 29th day of May, 2019.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE