United States District Court
Southern District of Texas
ENTERED
September 12, 2018
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

AMERICAN FARM BUREAU FEDERATION, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 3:15-CV-00165
	§	
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al*,	§	
	§	
Defendants.	§	

ORDER

Pending before the Court is Plaintiffs' Motion for a Preliminary Injunction. (Dkt. 61). Having read the briefs in support of this motion, the response, and the reply, this Court hereby **ORDERS** that the motion is **GRANTED** and that the "Clean Water Rule: Definition of 'Waters of the United States'" (the "Rule"), 80 Fed. Reg. 37,054 (June 29, 2015), be enjoined temporarily as to Texas, Louisiana, and Mississippi until this case is finally resolved.

In order to obtain a preliminary injunction, the applicant must demonstrate: (1) a substantial likelihood that it will prevail on the merits, (2) a substantial threat that it will suffer irreparable injury if the injunction is not granted, (3) that its threatened injury outweighs the threatened harm to the party whom it seeks to enjoin, and (4) that granting the preliminary injunction is in the public's interest. *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). While each of these factors must be met in order for a preliminary injunction to be granted, a stronger showing of one factor can compensate for a weaker showing of another. *State of Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975) ("[A]s we have noted, none of the four prerequisites [for a preliminary injunction] has a fixed quantitative value. Rather, a sliding scale is utilized,

which takes into account the intensity of each in a given calculus."); *see also Siff v. State Democratic Executive Comm.*, 500 F.2d 1307, 1309 (5th Cir. 1974).

Here, the applicant Associations have made a sufficient showing that a preliminary injunction should be granted in this case. At this early stage in the proceedings, the strength of the Associations' case should not be overstated. While the Court does believe that each of the above listed factors for a preliminary injunction have been met, 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.

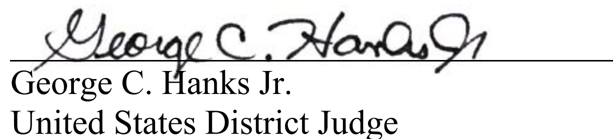
As both the Plaintiff and the Defendant have pointed out, clarification regarding what is, and what is not, a navigable water under the Clean Water Act is long overdue. *See United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (holding that Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), provided the controlling test for what is a navigable water under the Clean Water Act); *cf. United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (approving of the use of the plurality's opinion and the Kennedy opinion in *Rapanos* as the controlling test for determining what is a navigable water); *cf. also United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (applying pre-R*apanos* Circuit precedent because it could not discern clear direction from *Rapanos*). And, until that question can ultimately be answered, a stay provides much needed governmental, administrative, and economic stability.

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. *See* companion case, *State of Texas et al v. United States Environmental Protection Agency, et al*, 3:15-CV-00165, Dkt. 79, Exh. 1 at p. 3 (implementation of the rule "would require TxDOT to spend significant time and taxpayer resources attempting to determine how [the United States Army Corps of Engineers] will interpret and implement the Rule."); *see also id.*, Dkt. 79,

Exh. 3 at p. 2 (implementation of the rule will cause a reduction in the production and refinement of oil and gas resources); *see also id*., Dkt. 93, Exh. 8 at p. 3 (implementation of the rule will make it harder for agricultural producers to operate their business). Accordingly, the Court has 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. Determining which governmental bodies have jurisdiction over our nations waters is an important task, and one that this Court is unwilling to do without full discovery and briefing on the matter.

Finally, after additional review, the Court finds it inappropriate to issue a nationwide preliminary injunction in this case. An extraordinary remedy, a preliminary injunction should only be granted nationwide when it is clear and unambiguous that the harm threatened is one of a national character. Here, the evidence before the Court is insufficient to establish whether implementation of the Rule presents an irreparable harm to those States not a party to this litigation. Accordingly, the Court declines to enjoin the Rule nationwide at this time. This ruling is without prejudice to the Court's reconsideration of this issue based on future decisions and developments in this case.

SIGNED at Galveston, Texas, this 12th day of September, 2018.



George C. Hanks Jr.
United States District Judge