IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

State of Georgia, *et al.*,
Plaintiffs,
v.

Andrew Wheeler, *et al.*,
Defendants.

Case No. 2:15-cv-79-LGW-RSB

PLAINTIFF STATES' MOTION FOR RECONSIDERATION OR TO ALTER OR AMEND THE JUDGMENT

The Plaintiff States move this Court to reconsider or alter its August 21 summary judgment order by vacating the 2015 WOTUS Rule. This relief is warranted because vacatur is the proper remedy under the Administrative Procedure Act (APA) when, as here, the reviewing court identifies fundamental flaws in a rule that preclude the agency from enacting the same rule on remand. And this relief is needed because without it, there remains a real risk that challenges to the Agencies' planned repeal of the 2015 Rule brought in different district courts could result in this unlawful rule going into effect in some or all of the Plaintiff States—after the States have spent more than four years in litigation before this Court to protect their residents from that very result. This Court issued a preliminary injunction to protect the Plaintiff States from that harm during the pendency of this litigation. Having now concluded in a final order that the 2015 WOTUS Rule is unlawful in numerous respects, this Court should provide a remedy that will make that protection permanent. Vacatur is that remedy.[1]

STATEMENT

Two developments since the Plaintiff States' last filing in this case warrant discussion: The Court granted summary judgment in the plaintiffs' favor, *see* Order (Aug. 8, 2019), ECF No. 261, and the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) signed a final rule repealing the 2015 WOTUS Rule (the Repeal Rule), which is set to

[1] The North Carolina Department of Environmental Quality has not joined this motion.

be promulgated 60 days after it is published in the Federal Register, *see* Pl.-Intv'rs' Notice of Final Rule Repealing the 2015 WOTUS Rule, Ex. A (Repeal Rule) at 2, ECF No. 263.

A. This Court's Summary Judgment Order

On August 21, 2019, this Court granted the plaintiffs' motions for summary judgment in this action brought under the Administrative Procedure Act. Order, ECF No. 261. In its order, the Court held the 2015 WOTUS Rule unlawful because it exceeded the Agencies' statutory authority under the Clean Water Act, *see* 5 U.S.C. § 706(2)(C)); was promulgated in violation of the APA's notice-and-comment procedures, *see* 5 U.S.C. § 706(2)(D)); and was arbitrary and capricious in certain respects, *see* 5 U.S.C. § 706(2)(A). Order, ECF No. 261.

The Court first concluded that the Rule exceeded the Agencies' statutory authority under the Clean Water Act in at least five different respects: The Rule includes all "interstate waters" without any regard for whether those waters were navigable, thus asserting jurisdiction over "waters that are not navigable-in-fact and otherwise have no significant nexus to any other navigable-in-fact water." *Id.* at 34. The Rule's definition of "tributaries" asserts jurisdiction over waters that lack dependable present indicators of regularity and volume of flow, contrary to Justice Kennedy's controlling opinion in *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring). *Id.* at 36–42. The Rule sweeps waters into its definition of "adjacent waters" based on adjacency to nonnavigable tributaries in a way that mirrors the approach Justice Kennedy expressly rejected as too broad in *Rapanos*. *Id.* at 43–47. The Rule deems waters "adjacent waters" based on geographic limits—for example, 100-year floodplains and 1500-foot radii—that are unlawfully overbroad because they do not ensure that a majority of the waters within those limits have a significant nexus to navigable waters. *Id.*at 47–52. Because the Rule's definitions of "interstate waters" and "tributaries" are overbroad, the Rule's assertion of jurisdiction on a case-by-case basis over waters within 4000 feet of those categories is likewise unlawfully overbroad. *Id.* at 53. And as a general matter, the Rule's significant increase in federal

jurisdiction over an area of traditional state power and responsibility impermissibly altered the federal-state balance without clear congressional authorization. *Id.* at 57–60.

The Court next concluded that the Agencies violated the APA's notice-and-comment requirements, which "ensure that agency regulations are tested via exposure to diverse public comment," "ensure fairness to affected parties, and … give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Id.* at 62 (punctuation omitted) (quoting *Miami-Dade Cty. v. EPA*, 529 F.3d 1049, 1058 (11th Cir. 2008)). The Agencies failed to provide sufficient notice of the final rule's distance-based limits for adjacent waters and case-by-case waters, *id.* at 63–73, or its decision to exempt waters used for farming from the definition of "adjacent waters" but not "tributaries," *id.* at 73–75.

Finally, the Court concluded that portions of the WOTUS Rule are arbitrary and capricious. The Agencies did not explain why the Rule exempts waters used for farming from the definition of "adjacent waters" but not "tributaries." *Id.* at 77–78. They did not explain their choice of a 100-year floodplain to define adjacent and case-by-case waters. *Id.* at 78–79. And they did not provide more than conclusory statements to explain why they chose a 1500-foot limit for adjacent waters. *Id.* at 79.

The Court acknowledged that "the normal remedy under the APA" for an unlawful rule is vacatur. *Id.* at 82. But the Court declined to vacate the rule, reasoning that "administrative efforts are already underway to repeal and replace the WOTUS rule with a new rule that abides by [the Clean Water Act and the APA]," and "vacating the Rule may cause disruptive consequences to the ongoing administrative process." *Id.* at 83. So the Court remanded the 2015 WOTUS Rule to the Agencies for further proceedings. *Id.* at 84. The Court ordered that its preliminary injunction "will REMAIN in place pending the outcome of the ongoing administrative proceedings regarding the WOTUS Rule." *Id.*

B. The Repeal Rule

As the Plaintiff-Intervenors indicated in their notice filed with this Court, the Agencies signed a final rule repealing the 2015 WOTUS Rule (the Repeal Rule) on Thursday, September 12, 2019. *See Definition of "Waters of the United States" – Recodification of Pre-Existing Rules (Pre-Publication Version)*, Environmental Protection Agency, https://www.epa.gov/sites/production/files/2019-09/documents/wotus_rin-2040-af74_final_frn_prepub2.pdf. The Agencies explain in the Repeal Rule that they are repealing the 2015 Rule because (1) the 2015 Rule "did not implement the legal limits on the scope of the agencies' authority under the Clean Water Act (CWA)"; (2) the Agencies failed with that rule "to adequately consider and accord due weight to" Congress's policy to "recognize, preserve, and protect the primary responsibilities and rights of the States" with respect to their own land and water resources; (3) the Agencies seek to "avoid interpretations of the CWA that push the envelope of the constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority"; and (4) "the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support." *Id.* at 1–2 (punctuation omitted).

The Agencies state that upon promulgation of the Repeal Rule, "the regulations defining the scope of federal CWA jurisdiction will be those portions of the CFR as they existed before the amendments promulgated in the 2015 Rule." *Id.* at 2. They explain that "reinstating the longstanding and familiar pre-2015 Rule regulatory regime will provide regulatory certainty in this interim period … while the agencies reconsider the proper scope of federal CWA authority in the agencies' separate rulemaking process," through which the Agencies have proposed to promulgate a revised WOTUS Rule. *Id.* at 133.

The final Repeal Rule is set to be promulgated 60 days after the rule is published in the Federal Register. *Id.* at 2. As of this filing, the rule has not yet been published in the Federal Register.

LEGAL STANDARD

"Under Rule 59(e) of the Federal Rules of Civil Procedure, a court may alter or amend a judgment if there is newly-discovered evidence or manifest errors of law or fact." *Metlife Life & Annuity Co. of Connecticut v. Akpele*, 886 F.3d 998, 1008 (11th Cir. 2018). The decision to alter or amend the judgment is "committed to the sound discretion of the district court." *Id.* at 1003.

ARGUMENT

Vacatur of the 2015 WOTUS Rule is the only proper remedy in this case.

The Administrative Procedure Act specifies a single remedy for unlawful agency action: the reviewing court "shall … hold unlawful and *set aside* [the] agency action." 5 U.S.C. § 706 (emphasis added). "Setting aside means vacating; no other meaning is apparent." *Checkosky v. S.E.C.*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., concurring); *Cf. Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 671 (D.C. Cir. 2006) (citing *Set Aside,* Black's Law Dictionary (8th ed. 2004) (meaning "to annul or vacate")) ("'Set aside' usually means 'vacate.'").

Despite this unqualified language, circuit courts have that held it is "within a reviewing court's equity powers under the APA" to remand agency action held to violate the APA back to the agency for further consideration without vacating the rule. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1289–90 (11th Cir. 2015) (quoting *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1369 (11th Cir. 2008)) (Kravitch, J., concurring in part and dissenting in part); *but see Checkosky*, 23 F.3d at 491 (Randolph, J., concurring) (arguing that remanding unlawful agency action without vacatur violates the APA); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting) (same). Still, vacatur remains "the ordinary APA remedy." *Black Warrior Riverkeeper*, 781 F.3d at 1290. Remand without vacatur is a narrow, equitable exception, to be granted only in the case of an "inadequately supported rule" if (1) the agency likely can resolve the rule's deficiencies and lawfully adopt the same rule on remand, and (2) the consequences of vacating the rule instead would be overly disruptive. *Sierra Club v. United States Army Corps of Engineers*, 909 F.3d 635,

655 (4th Cir. 2018) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993)).

Vacatur is warranted in this case because neither of these factors favor mere remand. This Court identified numerous fundamental flaws in the 2015 WOTUS Rule that even the Agencies agree prevent them from substantiating that rule on remand. Further, vacating the rule will aid, not disrupt, the orderly administrative proceedings that are already taking place to reconsider what changes to make to the pre-2015 WOTUS regime.

A. Vacatur is the proper remedy because this Court found fundamental flaws in the 2015 WOTUS Rule that prevent the Agencies from lawfully substantiating the same rule on remand.

Whether remand without vacatur is warranted depends first on "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)." *Black Warrior*, 781 F.3d at 1290 (quoting *Allied-Signal*, 988 F.2d at 150–51). At the heart of this inquiry is the question whether the agency's error is the kind that it can correct on remand without changing its substantive decision. *See, e.g., N. Air Cargo v. United States Postal Serv.*, 674 F.3d 852, 860–61 (D.C. Cir. 2012) (articulating the first remand-without-vacatur factor as "whether … the agency's decision is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all"). Courts may remand without vacatur if, given another chance, the agency could "substantiate its decision" and lawfully "adopt the same rule on remand." *Allied-Signal*, 988 F.2d at 151; *Pollinator Stewardship Council v. United States EPA*, 806 F.3d 520, 532 (9th Cir. 2015). But rules with "fundamental flaws that 'foreclose EPA from promulgating the same standards on remand'" must be vacated. *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir.) (quoting *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1261–62 (D.C. Cir. 2007), *on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008)).

Circuit courts have applied this standard in case after case to determine whether remand without vacatur is warranted. In *North Carolina*, for instance, the D.C. Circuit required vacatur "because very little will survive remand in anything approaching recognizable form," 531 F.3d at

929 (cleaned up), and in *Natural Resource Defense Council*, the same court vacated EPA standards and distinguished decisions that remanded without vacatur because "[i]n neither case did our decision foreclose EPA from promulgating the same standards on remand," 489 F.3d at 1261–62. *See also, e.g.*, *Pollinator Stewardship Council*, 806 F.3d at 532 ("We have also looked at whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand."); *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 585 (D.C. Cir. 2018) (vacating FERC orders and noting that "it [is] at least uncertain that FERC can reach the same result after addressing the deficiencies identified in this opinion").

By contrast, courts have permitted remand without vacatur only where the agency would be able to approve the invalidated rule "once again, after conducting a proper analysis on remand." *Susquehanna Int'l Grp., LLP v. Sec. & Exch. Comm'n*, 866 F.3d 442, 451 (D.C. Cir. 2017) (remanding without vacatur because "[h]ere, the SEC may be able to approve the Plan once again, after conducting a proper analysis on remand"). *See also, e.g.*, *United States Sugar Corp. v. EPA*, 830 F.3d 579, 652 (D.C. Cir.), *on reh'g en banc,* 671 F. App'x 822 (D.C. Cir. 2016), and *on reh'g en banc in part,* 671 F. App'x 824 (D.C. Cir. 2016) (remanding without vacatur because "there is a strong possibility that the Agency can properly explain its decision to exclude synthetic boilers from the Title V permitting requirement"); *N. Air Cargo*, 674 F.3d at 860–61 (remanding without vacatur because "we think it at least likely … that on remand, the Postal Service will be able to advance reasonable interpretations of the provisions at issue" to "justify its decision"); *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (remanding without vacatur because it was "plausible that FERC can redress its failure of explanation on remand while reaching the same result"); *Allied-Signal*, 988 F.2d at 151 (favoring remand because "there is at least a serious possibility that the Commission will be able to substantiate its decision on remand"); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir.), *opinion modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002) ("[W]e cannot say with

confidence that the Rule is likely irredeemable because the Commission failed to set forth the reasons—either analytical or empirical—for which it no longer adheres to the conclusions in its 1984 Report. We do not infer from this silence that the agency cannot justify its change of position."); *Cent. & S. W. Servs., Inc. v. U.S. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (remanding without vacatur because "EPA may well be able to justify its decision" on remand); *cf. Black Warrior Riverkeeper*, 781 F.3d at 1291 (remanding without vacatur because court could not discern "extent and implications of the Corps' error"; concluding that the district court should make that determination and then decide whether to vacate the rule in question in the first instance).

This Court's order leaves no doubt that the 2015 WOTUS Rule suffers from just the kind of fundamental flaws that require vacatur. Two sets of errors the Court identified easily meet this description. *First*, the Court concluded that the Rule exceeded the Agencies' statutory authority under the Clean Water Act in at least five different respects. *See supra.* A determination that an agency's rule exceeds its statutory authority identifies a fundamental flaw that requires vacatur; after all, the agency will not be able to expand its own statutory authority so it can lawfully adopt the same rule on remand. *See Sierra Club*, 909 F.3d at 655 (explaining that "*Allied-Signal*'s use of the remedy of remand without vacatur principally is relevant in matters where agencies have 'inadequately supported rules,' which "is not the case where the agency's actions 'were legally deficient, [because] they exceeded the [agency's] statutory authority'"). Just so here. Lacking the power to amend the Clean Water Act to provide the necessary authority, the Agencies will not be able to correct any of these overreaches on remand without changing their rule. Put another way, remand without vacatur would be futile, because there is *no* possibility, much less a "serious" one, "that the [agency] will be able to substantiate its decision on remand." *Allied-Signal*, 988 F.2d at 151. This is the hallmark of an error that demands vacatur.

Second, the Court concluded that the Agencies violated the APA's notice-and-comment requirements by failing to adequately apprise interested parties of several of the Rule's distance-based limitations or its partial farming exclusion. *See supra*. "[D]eficient notice is a

'fundamental flaw' that almost always requires vacatur," *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (quoting *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009)). This makes sense: Insufficient notice deprives the agency of the full set of information it should have had before it in considering the rule, and the interested parties of the chance to build the record necessary to challenge the rule, *Miami-Dade Cty.*, 529 F.3d at 1058–60. These are problems that usually cannot be solved retroactively on remand, so vacatur is the appropriate remedy for these errors, too.

The Repeal Rule confirms that the errors this Court identified in the 2015 WOTUS Rule are fundamental flaws that require vacatur. The Agencies explain in the Repeal Rule that they are repealing the 2015 WOTUS Rule precisely because it is legally flawed and thus cannot be lawfully adopted: Among their reasons for repealing the rule, they acknowledge that the 2015 WOTUS Rule "impermissibly expanded the scope of federal jurisdiction, resulting in the regulation of waters beyond what Congress intended"; "raises significant questions of Commerce Clause authority and encroaches on traditional state land-use regulation"; and—reversing course from their prior litigation position before this Court—"did not contain sufficient record support for the distance-based limitations that appeared for the first time in the final rule." Repeal Rule at 49–52 (citing *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at *23 (S.D. Ga. Aug. 21, 2019). In short, even the Agencies agree that the 2015 WOTUS Rule contained fundamental flaws that prevent them from substantiating it on remand, and they have acted accordingly by repealing the rule. Vacatur is the only proper remedy for these kinds of errors.

B. Vacating the 2015 WOTUS Rule will prevent disruptive consequences, not cause them.

Remand without vacatur is a viable remedy only where the agency "likely can resolve the rule's deficiencies" on remand *and* "the consequences of vacating the rule instead would be overly disruptive." *Sierra Club*, 909 F.3d at 655. This means that this Court need not reach the second part of the test. Indeed, "the threat of disruptive consequences cannot save a rule when its fundamental flaws 'foreclose EPA from promulgating the same standards on remand.'" *North*

Carolina v. EPA, 531 F.3d 896, 929 (D.C. Cir.) (quoting *Natural Res. Def. Council v. EPA,* 489 F.3d 1250, 1261–62 (D.C.Cir. 2007), *on reh'g in part,* 550 F.3d 1176 (D.C. Cir. 2008); *see Comcast Corp. v. F.C.C.*, 579 F.3d 1, 9 (D.C. Cir. 2009) ("Of course, the second *Allied–Signal* factor is weighty only insofar as the agency may be able to rehabilitate its rationale for the regulation."). Having already determined that the WOTUS Rule has such fundamental flaws, this Court should therefore vacate the rule without further inquiry.

But in any event, vacatur is not likely to have the kind of disruptive consequences that could cut against providing that remedy. This Court reasoned that "an order vacating the Rule may cause disruptive consequences to the ongoing administrative process." Order at 83, ECF No. 261. But the Agencies themselves assert that vacatur would in fact make for a smoother administrative process. As they explain in the Repeal Rule, "reinstating the longstanding and familiar pre-2015 Rule regulatory regime will provide regulatory certainty in this interim period … while the agencies reconsider the proper scope of federal CWA authority in the agencies' separate rulemaking process," through which the Agencies have proposed to promulgate a revised WOTUS Rule. Repeal Rule at 133, ECF No. 263. Vacating the 2015 WOTUS Rule would achieve that regulatory certainty too, since vacatur would also reinstate pre-2015 Rule regulatory regime.

The fact that vacating the 2015 WOTUS Rule would in theory duplicate the Repeal Rule's effect does not, however, make vacatur any less warranted. For one thing, the applicable considerations still cut in favor of vacatur: The rule's fundamental flaws still require it, and the fact that vacatur would be consistent with the Agencies' preferred approach means it would not pose any apparent disruption to the administrative process. For another, it is not clear as a practical matter when the Repeal Rule will go into effect. The rule has not been published in the Federal Register, and the Agencies will wait 60 days after that (unknown) publication date to promulgate the rule. In the meantime, the Repeal Rule will almost certainly be challenged in federal court. *See, e.g.*, Annie Snider, *Trump administration rolls back landmark water protections*, POLITICO.com, https://www.politico.com/story/2019/09/12/trump-repeal-epa-

water-rule-1492183 (last visited Sept. 15, 2019) ("Environmental groups and state attorneys general vowed to challenge the rollback…."). Any one of the federal district courts to which plaintiffs bring such a challenge could issue a nationwide injunction against the Repeal Rule—as recent experience with the Applicability Rule proved. *See South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018) (issuing nationwide injunction against Applicability Rule meant to delay effective date of the 2015 WOTUS Rule, thus putting rule into effect); *Puget Soundkeeper Alliance v. Wheeler*, 2018 WL 6169196 (W.D. Wash. Nov. 26, 2018) (vacating Applicability Rule). And the result of such an injunction, of course, would be to leave the 2015 WOTUS Rule in effect across the country. Vacating the 2015 WOTUS Rule now would prevent this result and ensure that the Plaintiff States are not subjected to that unlawful rule after more than four years of litigation before this Court, and indeed, after this Court has agreed that enforcing the rule against the Plaintiff States would be illegal.

That result is not necessarily foreclosed by this Court's preliminary injunction. The Court has ordered that its injunction against enforcement of the 2015 WOTUS Rule in the Plaintiff States "will REMAIN in place pending the outcome of the ongoing administrative proceedings regarding the WOTUS Rule." Order at 84, ECF No. 261. But the Agencies' administrative proceedings with respect to the Repeal Rule or their pending Replacement Rule may well end before legal challenges to either rule do. A nationwide injunction issued as a result of any such challenges could then result in the 2015 WOTUS Rule going into effect even in the Plaintiff States, despite this Court's final determination in this case that the rule is unlawful.

Vacating the 2015 Rule in this case would avoid that unfair, illegal, and disruptive result. Unlike a preliminary injunction, vacatur of a rule is permanent; once the judgment is final, the rule is "set aside" for good. 5 U.S.C. § 706. A final judgment vacating the 2015 WOTUS Rule therefore would prevent a later nationwide injunction (or vacatur) of the Repeal Rule from letting the 2015 WOTUS Rule spring into effect in the Plaintiff States for the first time. In short, vacatur is not only *not* a source of potential disruption to the Agencies; it is the surest way to maintain the status quo in the Plaintiff States.

C. This case remains a live controversy now and for the foreseeable future.

The Plaintiff States agree with Plaintiff-Intervenors, *see* Pl.-Intv'rs' Notice, ECF No. 263, that this action is not moot. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (cleaned up). This Court can still grant effectual relief to the plaintiffs in this case: The plaintiffs seek vacatur of the 2015 WOTUS Rule, and that Rule remains in effect (now and for the foreseeable future, *see supra*). As both this Court and the U.S. Supreme Court explained at earlier stages of this litigation, "because the WOTUS Rule remains on the books for now, the parties retain a concrete interest in the outcome of this litigation, and it is not impossible for a court to grant any effectual relief ... to the prevailing party." *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364 n.6 (S.D. Ga. 2018) (cleaned up) (quoting *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 627 n.5 (2018)).[2]

In any event, it is enough for purposes of this motion that the Plaintiff States seek vacatur of the 2015 WOTUS Rule and, as of now, that rule remains in effect. This Court therefore has jurisdiction to vacate the rule.

CONCLUSION

For the reasons set out above, this Court should vacate the 2015 WOTUS Rule and remand this matter to the Agencies for further proceedings.

[2] This case likely would not be moot even if the Repeal Rule were to go into effect (for example, if 60 days pass after the rule is published and the rule is not subject to an injunction), because the Repeal Rule does not alter the preexisting definition of "interstate waters," which plaintiffs challenged and which this Court concluded was in excess of the Agencies' authority under the Clean Water Act, *see* Order, at 33–36, ECF No. 261.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2019, I served this motion by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

/s/ *Andrew A. Pinson*
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