UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

STATES OF NORTH DAKOTA, ALASKA, ARIZONA, ARKANSAS, COLORADO, IDAHO, MISSOURI, MONTANA, NEBRASKA, NEVADA, SOUTH DAKOTA, and WYOMING; NEW MEXICO ENVIRONMENT DEPARTMENT; and NEW MEXICO STATE ENGINEER, Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; REGINA McCARTHY, in her official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. ARMY CORPS OF ENGINEERS; and JO ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works), Defendants.	)	**Case No. 3:15-cv-00059-RRE-ARS**

STATES' MEMORANDUM IN SUPPORT

OF MOTION FOR PRELIMINARY INJUNCTION

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The States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming, and the New Mexico Environment Department and New Mexico State Engineer (the "States"), by and through undersigned counsel and pursuant to N.D. Civ. L.R. 7.1 (B), respectfully submit this Memorandum in Support of Motion for Preliminary Injunction.

INTRODUCTION

The U.S. Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") (collectively the "Agencies") recently promulgated Clean Water Rule: Definition of Waters of the United States, 80 Fed. Reg. 37,054 (June 29, 2015) (the "WOTUS Rule" or the "Rule"), which is set to go into effect on August 28, 2015, provides sweeping changes to the jurisdictional reach of Clean Water Act ("CWA"), drastically altering the administration of water quality programs implemented by the States, EPA, and the Corps.

The States are actively seeking postponement of the impending implementation of the WOTUS Rule to maintain the status quo while the serious legal failings of the WOTUS Rule can be addressed by the courts. Preserving the status quo is particularly appropriate here—the Corps' own staff has noted, in regard to a draft final rule not significantly different from the WOTUS Rule, that the Rule is "not likely to survive judicial review in federal courts." *See* U.S. Army Corps of Engineers, *Memorandum for Deputy Commanding General for Civil and Emergency Operations (Attn: MG John W. Peabody), Through the Chief Legal Counsel (Attn: David R. Cooper), from Lance Woods, Assistant Chief Counsel, Environmental Law and Regulatory Programs, Regarding Legal Analysis of Draft Final Rule on Definition of Waters of the United States*, at 9, attached as Exhibit A. Indeed, Corps staff acknowledges that:

> It will be difficult, if not impossible, to persuade the federal courts that the implicit, effective determination that millions of acres of truly isolated waters (which have no shallow or confined surface

> connection to the tributary system of the navigable or interstate waters) do in fact have a 'significant nexus' with navigable or interstate waters.

Id. On July 28, 2015, the Attorney General of North Dakota and representatives, including Attorneys General and directors of State executive agencies, from thirty other states, sent the Agencies a letter asking that the challenged WOTUS Rule not be implemented on August 28, 2015. *See* Exhibit B. To date, the Agencies have not responded to this request. The States cannot stand by as their sovereign interests are undermined, and are left with no option but to turn to this Court for injunctive relief from the irreparable harm implementation of the WOTUS Rule will bring.

An injunction is appropriate here because implementation of the WOTUS Rule will drastically reconfigure the landscape of federal/state cooperation in implementing the CWA and impermissibly infringe on the States sovereign authority to regulate land and water use within their borders. In contrast, the Agencies have not, and cannot, demonstrate any compelling reason that implementation of the WOTUS Rule must occur on August 28, 2015. The Agencies have claimed that the WOTUS Rule is necessary to "increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States.'" 80 Fed. Reg. at 37,054. Yet the Agencies insist on rushing implementation of the WOTUS Rule in the face of numerous challenges to the jurisdictional scope that is purportedly "clarified" in the Rule. Rather, the Agencies approach to implementation appears designed to push the expansive assertion of jurisdiction embodied in the WOTUS Rule into practice before the federal courts have the opportunity to review the important legal issues with the WOTUS Rule raised by the States and the plaintiffs in the multiple other challenges to the Rule filed in courts across the country.

The Agencies' approach cannot stand. The States are entitled to a preliminary injunction because implementation of the WOTUS Rule: (1) will cause immediate and irreparable harm; (2) deprive the States of the opportunity to present the merits of their case, which they have a substantial likelihood of succeeding on because the WOTUS Rule exceeds the federal government's constitutional and statutory authority and violates the procedural mandates of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, and the National Environmental Policy Act, 42 U.S.C. §§ 4371 *et seq.*; (3) will delay implementation during the pendency of judicial review, which will not cause any harm to the Agencies; and, (4) the public interest will be best served by allowing meaningful judicial review of the WOTUS Rule before its unprecedented jurisdictional reach goes into effect.

BACKGROUND

The CWA establishes a system of cooperative federalism that recognizes states have the "primary responsibilities and rights" to "prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" and to "consult with the administrator in the exercise of [her] authority under this chapter." 33 U.S.C. § 1251(b). This system of cooperative federalism requires the states to promulgate water quality standards, designate impaired waters, issue total maximum daily loads, and certify federal permits as compliant with state law. The States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming also administer delegated permitting programs under the CWA. By extending the reach of the CWA, the Rule fundamentally redefines the scope and burden of the States' authority and obligations under the CWA.

The WOTUS Rule declares that "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" as well as "[a]ll interstate waters, including interstate

wetlands" and "the territorial seas" are also per se jurisdictional waters. 80 Fed. Reg. at 37,104. These waters are referred to herein as "primary waters," because the jurisdictional test for all other waters is based on a relationship to one of these three categories of waters.

All intrastate "tributaries" of primary waters are per se jurisdictional waters. *Id*. The WOTUS Rule defines "tributary" as "a water that contributes flow, either directly or through another water" to a primary water and "is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." *Id*. at 37,105. A water is defined as a tributary even if it has man-made or natural breaks, "so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." *Id*. at 37,106. An "ordinary high water mark" (OHWM) is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means." *Id*.

The WOTUS Rule's definition of tributary sweeps within the Agencies' authority ephemeral streams and channels that are usually dry. It also makes man-made features such as ditches, not specifically excluded, per se jurisdictional by sweeping them into the definition of tributary. Under the WOTUS Rule, all intrastate waters "adjacent" to primary waters, impoundments, or tributaries are per se jurisdictional. 80 Fed. Reg. at 37,104. "[A]djacent waters" are waters "bordering, contiguous, or neighboring" primary waters, impoundments, or tributaries. *Id*. at 37,105. The category includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." *Id*. It also includes wetlands within or abutting the ordinary high water mark of an open water, such as a pond or lake. *Id*.

"Neighboring" includes "[a]ll waters [at least partially] located within 100 feet of the ordinary high water mark of a" primary water, impoundment, or tributary. *Id*. at 37,105. And includes "[a]ll waters [at least partially] located within the 100-year floodplain of a" primary water, impoundment, or tributary "and not more than 1,500 feet from the ordinary high water mark of such water." *Id*. "Neighboring" also includes "[a]ll waters [at least partially] located within 1,500 feet of the high tide line." *Id*.

Additionally, the WOTUS Rule permits the Agencies to exercise authority on a case-by-case basis over a water not covered by any other part of the Rule—i.e., not already included in a per se category—that, alone or in combination with other similarly situated waters have a "significant nexus" to a primary water. 80 Fed. Reg. at 37,104-105. This includes five enumerated geographic features, including prairie potholes, regardless of how remote they are to a primary water. The WOTUS Rule includes within federal jurisdiction, on a case-by-case basis, "[a]ll waters [at least partially] located within the 100-year floodplain of a" primary water that have a significant nexus with a primary water. *Id*. at 37,105. It further includes, on a case-by-case basis, "all waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment, or tributary that have a significant nexus to a primary water. *Id*.

The case-by-case test the Agencies will apply under the WOTUS Rule is whether waters alone or in combination with "similarly situated waters in the region . . . significantly affect[] the chemical, physical, or biological integrity" of a primary water. *Id*. at 37,106. "Region" is defined as "the watershed that drains to the nearest [primary water]." *Id*. Waters with only a shallow sub-surface connection or no hydrologic connection whatsoever to a primary water, impoundment, or tributary can satisfy this test.

The Agencies admit in their economic analysis of the WOTUS Rule that these definitions will increase the jurisdictional scope of the CWA over existing practice. *See* US EPA and Corps, *Economic Analysis of Proposed Revised Definition of Waters of the United States*, at 5-6 (May 20, 2015) (hereinafter "Economic Analysis"). If the Rule is implemented, this jurisdictional expansion will harm the States in their capacity as partners and regulators in implementing programs for which the states have direct and delegated authority under the CWA. As acknowledged in the Agencies' own Economic Analysis, the WOTUS Rule will result in an increased volume of permit applications, water quality certifications, and other administrative actions that the States will have to address. *Id*. at 53. This administrative burden immediately and irreparably harms the States by requiring a significant commitment of additional resources from the States.

The significant expansion of the Agencies' jurisdiction also directly infringes on the sovereign authority of the States—which previously had exclusive jurisdiction over state waters. Since 2000, the Supreme Court has twice restricted the Agencies' claim of jurisdiction when, as here, they exceeded the jurisdictional scope of the CWA and constitutional limits on federal authority. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Eng's*, 531 U.S. 159 (2001). Implementation of the WOTUS Rule on August 28, 2015, will also place a significant hardship on the States and others that have immediately pending and proposed infrastructure projects by increasing the cost, timing, and complexity of obtaining necessary permits or approvals from the Agencies.

Further, the WOTUS Rule will significantly impact water supply, agricultural, oil and gas, and mining operators as they try to navigate between established state regulatory programs and the Agencies' new burdensome and conflicting federal requirements. This uncertainty

especially threatens states (like North Dakota) that substantially rely on revenues from industry development to fund a wide variety of state programs for the benefit of their respective citizens.

Contrary to the longstanding history of partnership between states and the federal government and in disregard of the sovereign interests implicated and immediate harm to states caused by the WOTUS Rule, the Agencies spuriously conclude that the WOTUS Rule "does not have federalism implications." 80 Fed. Reg. at 37,102. This conclusion lacks credibility given that the Agencies declined to even conduct a federalism analysis, despite numerous requests by states and other concerned parties. In the attached memorandum from the EPA Administrator and the Assistant Secretary of the Army, the Agencies conclude that, rather than work with the states to assess and address the federalism implications of the WOTUS Rule, the Agencies continue to proceed without acknowledging the Rule's impact on state sovereignty. U.S. EPA and Corps, *Memorandum For Deputy Assistant Administrator For Water Regional Administrators (Regions I-X) Chief of Engineers Division And District Engineers* (July 7, 2015), attached as Exhibit C.

ARGUMENT

The Agencies' promulgation of the WOTUS Rule irreparably harms the States. The WOTUS Rule unlawfully exerts federal jurisdiction over the States' land and water resources beyond the limits established by Congress under the Clean Water Act. A preliminary injunction is warranted here because halting implementation of the WOTUS Rule, and its overreaching expansion of federal regulatory authority, will "preserve the relative position of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). When considering whether to grant a preliminary injunction, the Court must consider four factors: (1) the threat of irreparable harm to plaintiffs; (2) the balance of this harm with the injury that granting the preliminary injunction will cause defendants; (3) the probability of plaintiffs'

success on the merits; and (4) the public interest. *See Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). Because each factor weighs in favor of the States, the Court should grant a preliminary injunction against implementation of the WOTUS Rule.

I. THE STATES WILL SUFFER IRREPARABLE HARM IF THE WOTUS RULE IS IMPLEMENTED.

To obtain a preliminary injunction, the States must establish that they will suffer irreparable harm if a preliminary injunction is not issued. *See Dataphase Systems, Inc.*, 640 F. 2d at 113. Absent a voluntary stay from the Agencies or an order from the Court preventing its implementation, the WOTUS Rule will imminently and irreparably harm the States. Here, the Agencies themselves concluded that the WOTUS Rule increases CWA jurisdiction by up to 4.65 percent from existing practice. 80 Fed. Reg. at 37,101. This significant expansion of federal jurisdiction will impinge on the State's sovereign authority to regulate their own waters and require the states to immediately expend resources that would be unrecoverable should the WOTUS Rule be reversed. Both of these categories are sufficient to establish irreparable harm.

A. The States' Sovereign Rights in Regulating State Waters and Lands Are Harmed by the WOTUS Rule.

Because the States' sovereign interests in controlling their own waters and lands are put at stake by the WOTUS Rule, the States will be irreparably harmed if the WOTUS Rule is implemented without them first being given "a full and fair opportunity to be heard on the merits." *Kansas v. United States*, 249 F. 3d 1213, 1227 (10th Cir. 2001). As the CWA and the courts recognize, states have a constitutional right to maintain their "traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174; *see, e.g., Hess v. Port Authority TransHudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). Consistent with this authority, the States have

enacted comprehensive regulatory schemes to protect, maintain and improve the quality of waters in their state, consistent with the CWA's overall goal to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (a); *see* N.D. Cent. Code §§ 61-28-01 *et seq.*; Wyo. Stat. Ann. §§ 35-11-301 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; S.D. Codified Laws §§ 34A-2-1 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. § 8-4-101 *et seq*. By significantly expanding federal jurisdiction over intrastate waters in the WOTUS Rule, the States' sovereign interest in protecting, maintaining, and improving the waters in their state, stands to suffer, causing immediate and irreparable harm. *See Kansas*, 249 F. 3d at 1227; *Int'l Snowmobile Mfrs. As'n. v. Norton*, 304 F. Supp. 2d 1278, 1287 (D. Wyo. 2004); *see also Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171-1172 (10th Cir. 1998) (significant interference with tribal self-government causes irreparable injury).

B. Expanded CWA Programs Will Cause Unrecoverable Monetary Harm.

Monetary harms caused by unlawful federal rules are irreparable, even when actual unrecoverable losses may not occur. Indeed, the "threat of unrecoverable economic loss" qualifies as irreparable harm. *Iowa Utilities Board v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996); *accord Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013); *America's Health Ins. Plans v. Hudgens*, 915 F. Supp. 2d 1340, 1354-65 (N.D. Ga. 2012), *aff'd* 742 F.3d 1319 (11th Cir. 2014); *see also*, *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (APA does not waive agencies' sovereign immunity for damages actions). When a party litigates against the federal government and cannot recover losses therefrom for reasons of sovereign immunity, and it is unlikely to be able to recover those costs in the market place, the costs are unrecoverable and the loss irreparable. *Iowa Utilities Board*, 109 F.3d at 426.

Implementation of the WOTUS Rule will burden the States with substantial unrecoverable costs. For example, North Dakota will be burdened with costs from commissioning extensive jurisdictional studies each time a project to install an underground natural gas, oil, or produced water pipelines is commenced. *See* Helms Decl., ¶¶ 19-21, attached as Exhibit D. North Dakota will also be burdened with cost associated with highway construction and maintenance and deteriorating air quality, since delays from additional permitting for pipelines will put more trucks on the road and undermine the North Dakota Legislature's effort to reduce flaring. Exhibit D at ¶¶ 15-17. Implementation of the Rule will also immediately threaten the viability of important public infrastructure projects, including highway and water storage, transportation, and delivery projects. *See* Levi Decl., ¶ 8, attached as Exhibit E; Sando Decl., ¶¶ 11-13, attached as Exhibit F; DeKrey Decl., ¶¶ 11-15 and 20-22, attached as Exhibit G.

States such as Wyoming will be burdened with costs associated with additional CWA § 401 certifications, expanded permitting and oversight obligations, and additional technical and legal analysis of potential permitting requirements for Wyoming reclamation and development projects. Parfitt Decl., ¶¶ 10-14, attached as Exhibit H; Tyrell Decl., ¶¶ 10-13, attached as Exhibit I. States such Arizona, Alaska, and New Mexico will incur increased compliance costs because the many ephemeral water sources in arid Arizona and New Mexico will need to be evaluated to assess jurisdiction, as will the multitude of wetlands and other waters in Alaska. *See* Halikowski Decl., ¶¶ 8-9, attached as Exhibit J; Hale Decl., ¶¶ 22-27, attached as Exhibit K; *See* Kliphuis Decl., ¶¶11-18, attached as Exhibit L; *see e.g.* Goehring Decl., ¶ 15 attached as Exhibit M.

In *Iowa Utilities*, the Eighth Circuit considered whether a Federal Communications Commission ("FCC") promulgation of rules and regulations implementing the local competition provisions of the Telecommunications Act of 1996 should be stayed pending judicial review. Similar to the FCC's rules there, the operation of the WOTUS Rule here dictates the behavior and operation of the marketplace, and the ability for the States to recover costs within that market. Yet, unlike competing private entities, the States perform a public service, most often funded primarily from state tax dollars and the state budget. *See* Exhibit H at ¶ 14; *See infra* footnote 3. Thus, there is no recovery mechanism for these costs, and the greater the amount of work to be done, the greater the expenditure of the States' finite resources. These costs cannot simply be recovered through fees, for example, for CWA § 401 Water Quality Certifications.[1] The majority of the States do not charge such a fee,[2] while others charge only a nominal fee that is not enough to cover the costs of processing a CWA § 401 Water Quality Certification.[3] Moreover, that the States *could* charge a fee is irrelevant. The fact is that today, when the impacts from the WOTUS Rule will be felt, most of the States do not charge a fee, or only charge only a nominal fee.[4] *See Iowa Utils.*, 109 F.3d at 426 (evaluating the harm to the movant from the federal rule based on the current market conditions); *Baker Electric Cooperative, Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) (same).

[1] This argument is particularly misplaced with regard to the costs related to identifying WOTUS under the WOTUS Rule, setting WQS, and developing TMDLs, as those regulatory burdens fall squarely on the States and there are no customers upon which to impose a fee.

[2] *See, e.g.*, Arizona Department of Environmental Quality, Water Quality Division: Permits: Clean Water Act (CWA) 401 Water Quality Certification Program, at https://www.azdeq.gov/environ/water/permits/cwa401.html; Nevada Department of Environmental Protection, Guidance for Completing a § 401 Water Quality Certification Application, at https://ndep.nv.gov/bwqp/file/401appguidance.pdf, at 2.

[3] *See, e.g.*, Missouri Department of Natural Resources, 401 Water Quality Certification, at http://dnr.mo.gov/env/wpp/401/ (charging a $75 flat fee).

[4] Even if states could impose the fees EPA claims, depending on the state, a law would need to be passed to permit such a fee, or at the very least a regulation promulgated. As the parties and the judiciary are painfully aware, these tasks take a very long time, in addition to requiring political and/or administrative consensus.

The States are also harmed because the WOTUS Rule will put them in an irreconcilable position. The increased costs and burden on resources from the WOTUS Rule will put the States in the position of choosing between finding a way to increase budgets or otherwise raise revenue to cover the increased demand for the service, cutting this service, cutting another service in favor of this service, or capitulating and failing to perform their CWA § 401 Water Quality Certification duties to protect water quality within their borders.[5] *See* Glatt Decl., ¶¶ 12, attached as Exhibit N. Regardless of the choice, the States are harmed irreparably.

The monetary harms resulting from the WOTUS Rule are not speculative. While the States cannot pinpoint with accuracy exactly how much their costs related to implementing each CWA program will rise due to the WOTUS Rule, as noted above, there is no doubt they will, and the impacts will be severe. *See* Exhibit F at 18-26¶ ; Exhibit H at ¶ 14; Exhibit J at ¶¶ 22-24; Exhibit K at ¶ 8; Exhibit L at ¶ 16-18. Even EPA's paltry economic analysis admits as much. *See, e.g.*, Economic Analysis at 19 (regarding increased costs with respect to CWA § 401 Water Quality Certifications). In such contexts, courts have had no problem finding irreparable harm. *See, e.g., Planned Parenthood of Minn., Inc. v. Citizens for Comm. Action*, 558 F.2d 861, 866-67 (8th Cir. 1977) (impact of ordinance resulted in obvious, but incalculable, unrecoverable economic loss that constituted irreparable harm); *Martin Marietta Materials, Inc. v. City of* Greenwood, 2007 U.S. Dist. LEXIS 99373, at *9-10 (W.D. Mo. June 26, 2007) (finding irreparable economic losses despite the fact that the losses were "difficult to track and calculate").

[5] The Agencies may argue states can avoid this harm by simply waiving the CWA § 401 Water Quality Certification requirement, and there may be instances in which the States have in the past waived, and will in the future waive the requirement, the for a particular permit. *See* United States' Response In Opposition To Motion For Preliminary Injunction, *Georgia et al. v. McCarthy et al.*, Civil No. 2:15-cv-00079-LGW-RSB. This argument lack credibility, it is simply abhorrent to the CWA's purpose, including its commitment to cooperative federalism, to assert that the States are not harmed because they could abandon their sovereign interest and abdicate authority expressly granted them by Congress.

II. THE STATES ARE LIKELY TO SUCCEED ON THE MERITS.

The States are likely to prevail on their claims that the WOTUS Rule is unconstitutional, in excess of statutory authority, or otherwise legally defective. The Eighth Circuit has rejected the need for a showing of a more than 50% likelihood of success on the merits, rather: "[i]n balancing the equities no single factor is determinative." *Dataphase Systems, Inc.*, 640 F.2d at 113. The likelihood that the movant will prevail on the merits "must be examined in the context of the relative injuries to the parties and the public." *Id.* For example: "If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less." *Id.* Here, because each of the States' claims set forth an independent basis for vacating the WOTUS Rule, this Court need only find that the States are likely to succeed on any one of their claims.

A. The WOTUS Rule Extends the Agencies' Jurisdiction Beyond Constitutional and Statutory Limits.

1. The WOTUS Rule Violates the Tenth Amendment and the Commerce Clause.

Under the system of "dual sovereignty" established by the U.S. Constitution, the States retained "a residuary and inviolable sovereignty" over those powers not conferred upon Congress. *Printz v. United States*, 521 U.S. 898, 918-19 (1997). A Tenth Amendment violation occurs when a challenged regulation "regulates states as states," when it "addresses matters that are indisputably attributes of state sovereignty," and when "compliance with [the regulation] would directly impair the State's ability to structure integral operations in areas of traditional state functions." *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996),

cert. denied, *Hampshire v. United States*, 519 U.S. 1084 (1997) (rejecting Tenth Amendment challenge where the regulatory scheme only affected private individuals and private businesses).

The Supreme Court has clearly recognized that one of the functions typically reserved to the states is the authority to regulate land use and water. *SWANCC*, 531 U.S. at 174 (rejecting any "significant impingement on States' traditional and primary power over land and water use"). While the federal government may exercise power over some interstate activities under the Commerce Clause if the activity "substantially affects interstate commerce," that power is limited in scope so not to "obliterate the distinction between what is national and what is local in the activities of commerce." *United States v. Lopez*, 514 U.S. 549, 566-67 (1995) (rejecting expansion of a federal regulatory scheme that would impinge upon a state's traditional police powers) (internal quotations and citations omitted).

Despite these limitations on federal authority, the WOTUS Rule asserts jurisdiction over numerous geographic features that do not have any effect, let alone the substantial effect required by *Lopez*, on interstate commerce. *Id.* For instance, under the definition of adjacent, the WOTUS Rule would assert per se jurisdiction over an entirely intrastate and otherwise isolated water simply because it is within the 100-year flood plain of another isolated water that happens to straddle state borders. *See* 80 Fed. Reg. at 37,105 (the definition of "adjacent" includes waters within the 100-year floodplain of an "interstate water, including interstate wetlands). The Agencies assertion of per se jurisdiction in this scenario cannot stand because the intrastate water does not have more than an "indirect and remote" effect on interstate commerce. *Lopez*, 549 U.S. at 557. Because there is no authority under the Commerce Clause such regulation is also an unauthorized infringement on the States' sovereignty.[6]

[6] While the States also allege that the WOTUS Rule violate the Due Process Clause and implicates other constitutional concerns, in the interest of brevity the States have omitted those arguments here.

2. The WOTUS Rule Violates the CWA in Excess of the Authority Granted the Agencies by Congress.

While the assertion of *per se* jurisdiction over waters that have no effect on the instrumentalities of commerce is unconstitutional, the States can also demonstrate they are likely to prevail on the merits of their claims without wading into those issues because the WOTUS Rule assumes jurisdiction not authorized by the CWA. The Supreme Court has unequivocally found that Congress did not grant the Agencies authority to regulate to the full extent of its Commerce Clause authority under the CWA. *SWANCC*, 531 U.S. at 174. However, the Supreme Court has not spoken with a single voice regarding exactly how far the Agencies authority to regulate under the CWA extends. *See Rapanos*, 547 U.S. at 742 and 782. In *Rapanos*, a plurality of the Justices held that wetlands not directly abutting a traditional navigable-in-fact water had to have a "continuous surface connection" to a navigable-in-fact water, while Justice Kennedy's concurrence held that, because "the word 'navigable' in the [CWA] must be given some effect," a demonstration of a "significant nexus" to a navigable-in-fact water had to exist for regulation under the CWA to be appropriate. *Id.*

The Agencies assert that the WOTUS Rule appropriately establishes jurisdiction under the CWA based on Justice Kennedy's significant nexus test. 80 Fed. Reg. at 37,056. While there is substantial uncertainty that the Agencies' adoption of a jurisdictional standard embraced by a single Justice is appropriate, or that extrapolation of that standard beyond wetlands is permissible, the WOTUS Rule fails to satisfy Justice Kennedy's significant nexus test.[7]

[7] The Agencies are likely to argue they are entitled to deference, but the Supreme Court has not extended the Agencies deference in interpreting the scope of their jurisdiction under the CWA in the past. *SWANCC*, 531 U.S. 172-73. Additionally, the inappropriateness of deference here was underscored by the Supreme Court's recent decision not to extend deference to the IRS' interpretation of the Affordable Care Act because the interpretation raises significant questions "central to th[e] statutory scheme." *King v. Burwell*, 135 S.Ct. 2480, 2483 (2015), 576 U.S. __ (2015).

To satisfy the significant nexus test, a water must "alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of a traditional navigable water. *Rapanos*, 547 U.S. at 780. Yet the WOTUS Rule establishes jurisdiction over large swaths of non-navigable waters, regardless of the significance of their effect on the chemical, physical and biological integrity of a traditional navigable water, as per se jurisdictional. *See* 80 Fed. Reg. 37,075-86.

While the Agencies' assertion of per se jurisdiction over "adjacent waters" and the case-by-case assertion of jurisdiction over other waters both fail to limit jurisdiction to waters satisfying Justice Kennedy's significant nexus test, the Rule's assertion of per se jurisdiction over "tributaries" is exemplary of the WOTUS Rule's failings. Under the WOTUS Rule all "tributaries," defined as "a water that contributes flow … to a [primary water] that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark," are per se jurisdicitional. *Id.* at 37,105-106. A water meets this definition regardless of whether its contribution of flow is direct or measurable and even if the required physical indicators are interrupted by man-made or natural breaks "of any length." *Id.*

Under this definition a generally dry geographic feature, miles from a primary water, that bears the indicators of a bed, bank and OHWM for just a few feet before disappearing would be considered jurisdictional if a single drop of water percolating into the ground eventually finds its way to a primary water. *Id.* This is insufficient to establish jurisdiction under the CWA. As Justice Kennedy warned, a significant nexus simply does not exist to establish CWA jurisdiction over "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Rapanos*, 547 U.S. at 781.

The Agencies contend that the presence of the physical indicators of a bed, bank and OHWM ensures that only waters satisfying the significant nexus test will fall within the definition of "tributaries" because "sufficient volume, duration, and frequency of flow are required to create [them]." 80 Fed. Reg. 37,066. However, because the WOTUS Rule allows the indicators of a bed, bank and OHWM to disappear for miles between a remote geographic feature and a primary water, the fact that enough water is periodically present in the remote feature to create indications of a bed, bank and OHWM is irrelevant to determining the significance of the flow contributed to the navigable-in-fact water. Thus, the WOTUS Rule impermissibly extends jurisdiction to waters that do not "significantly affect the chemical, physical, and biological integrity of navigable-in-fact waters" in excess of the Agencies authority under the CWA. *Rapanos*, 547 U.S. at 780.

B. The Agencies Failed to Comply with APA Requirements When Promulgating the WOTUS Rule.

1. The WOTUS Rule Is Arbitrary and Capricious.

A final rule must be "set side" if that rule is "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A); *Gettler v. Lyng*, 857 F.2d 1195, 1198 (8th Cir. 1988). To withstand scrutiny under this standard a rule must be the "product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). The Agencies are required to "examine the relevant data and articulate a satisfactory explanation for its action." *Id.* The WOTUS Rule is arbitrary and capricious because its assertions of jurisdiction are not supported by the scientific evidence the Agencies purport to rely on and the Agencies fail to adequately explain the inconsistent approach to the assertions of jurisdiction within the Rule.

First, the WOTUS Rule asserts per se jurisdiction over "tributaries" and "adjacent waters" based on the Agencies claim that ***all*** waters meeting these definitions have a "significant

nexus" with navigable in fact waters. *See* 80 Fed. Reg. at 37,075 and 37,080. However, because these claims "run[] counter to the evidence before the agency" they cannot support the Rule's assertions of jurisdiction. *Gettler v. Lyng*, 857 F.2d at 1198 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

For example, the Agencies claim that the scientific studies reviewed support a determination that all waters meeting the definition of a tributary "significantly affect the chemical, physical, and biological integrity of [primary waters]" and assert that the Technical Support Document and the scientific literature reviewed by the Agencies supports this determination. 80 Fed. Reg. at 37,075. However, the Technical Support Document does not establish that the scientific studies cited to support this proposition were applying the broad definition of "tributaries" found in the WOTUS Rule. *See* Corps and EPA, *Tech. Supp. Document for the Clean Water Rule: Definition of Waters of the United States*, 244-45 (May 27, 2015). Rather, the Technical Support Document conflates "tributaries" with "streams," a limited subset of the waters that would meet the Rule's definition of "tributaries" suggesting that the science supports a more limited understanding of "tributaries" as satisfying the significant nexus test. *Id.* at 245 ("The incremental effects of individual streams are cumulative across entire watersheds and therefore must be evaluated in context with other streams in the watershed. Thus, science supports that tributaries within a point of entry watershed are similarly situated."). Because the evidence before the Agencies only supports a significant nexus determination for a limited subset of the waters meeting the definition of a tributary, the Agencies determination that all water meeting the definition have a significant nexus is arbitrary and capricious.

Second, the WOTUS Rule inconsistently treats waters, based on arbitrary distances from a primary water, without support from the facts and evidence the Agencies purport to have relied

on. This disparate treatment of similar waters is arbitrary and capricious because the Agencies fail to "treat similar cases in a similar manner unless [they] can provide a legitimate reason for failing to do so." *Indep. Petroleum Assoc. of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996).

For example, waters that are not per se jurisdictional, but are located within 4,000 feet of the OHWM of a primary water, impoundment, or tributary, may be determined to be jurisdictional on a case-specific basis, while identical waters that happen to be 4,001 feet from a primary water, impoundment, or tributary cannot be considered jurisdictional. The Agencies utterly fail to provide any legitimate reason for this disparate treatment. In fact, the Corps' own attorneys have noted this disparate treatment "is not based on any principle of science, hydrology or law." Exhibit A, at 9. Accordingly, the WOTUS Rule is arbitrary and capricious in violation of the APA and must be vacated.

2. The WOTUS Rule Is Not a "Logical Outgrowth" of the Proposed Rule.

The APA requires the Agencies to publish a proposed rule including "the terms or substance of the proposed rule or a description of the subjects and issues involved" and afford "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *See* 5 U.S.C. § 553(b)-(c). Where a final rule adopted differs from the rule proposed, the final rule must be a "logical outgrowth of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). A final rule cannot stand unless reasonable parties "should have anticipated that [the] requirement" could be promulgated from the proposed rule. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

Here, the Agencies improperly made numerous changes to the WOTUS Rule after the close of the public comment period that a reasonable person would not have anticipated based on

the rule as proposed in April 2014. For example, the Agencies have significantly altered the per se jurisdictional reach of the WOTUS Rule based on adjacency in a manner that could not have been reasonably anticipated. Under the WOTUS Rule as proposed and adopted "adjacent waters," which are per se jurisdictional, include waters "neighboring" a primary water, impoundment or tributary. *Compare Proposed Rule: Definition Waters of the United States Under the Clean Water Act*, 79 Fed. Reg. 22,188, 22,262 (April 21, 2014) and 80 Fed. Reg. at 37,105. As proposed, the Rule defined "neighboring" as including "waters within the riparian area or floodplain … or with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a [primary water, impoundment or tributary]. 79 Fed. Reg. at 22,262. However, the Rule, as adopted, defines "neighboring" as including any water which is at least partially "located within 100 feet of the ordinary high water mark [primary water, impoundment, or tributary]" and any water which is at least partially located within 1,500 feet of the OHWM, of a primary water, impoundment, or tributary which is also located within the 100-year floodplain of that water. 80 Fed. Reg. at 37,105.

This drastic divergence from a definition of "neighboring" based on ecological concepts and hydrologic connectivity to a definition based on arbitrary distances could not have been anticipated by a reasonable person. In the preamble to the proposed WOTUS Rule, the Agencies expressed a desire for comments on several options for "establishing additional precision in the definition of neighboring," included the idea of identifying a flood plain interval within which waters would be considered adjacent." Nowhere did the Agencies propose replacing the reference to the riparian area with a hard and fast geographic limit of 100 feet from the OHWM of a primary water, impoundment, or tributary. *See* 79 Fed. Reg. 22,208-09 (seeking input on "establishing specific geographic limits for using ***shallow subsurface or confined surface***

hydrological connections as a basis for determining adjacency" and "placing geographic limits on what water ***outside*** the floodplain or riparian zone are jurisdictional") (emphasis added).

Similarly, nowhere in the proposed rule did the Agencies discuss an arbitrary 1,500 foot limitation on waters within the 100-year floodplain that could be considered "adjacent." *Id.* Just as in *Small Refiners*, where EPA had stated in the proposed rule that it would consider changes to the definition of small refinery, the Agencies vague statement in the proposed Rule that it would consider option for establishing additional precision in the definition of "neighboring" is insufficient. 705 F.2d at 549 (requiring that the rule adopted be articulated in the "range of alternatives being considered with reasonable specificity" in the proposed rule).[8]

C. The Agencies Violated NEPA When Promulgating the WOTUS Rule.

The WOTUS Rule constitutes a "major federal action significantly affecting the human environment" for which the Agencies were required to prepare an Environmental Impact Statement ("EIS"). 42 U.S.C. § 4332. However, the Agencies side-stepped this requirement in promulgating the WOTUS Rule by preparing an Environmental Assessment ("EA") and finding that the WOTUS Rule does not significantly impact the human environment. *See* U.S. Army Corps of Engineers, *Finding of No Significant Impact, Adoption of the Clean Water Rule: Definition of Waters of the United States*, at 2 (May 26, 2015) (the "FONSI"), attached as Exhibit O. This finding is unsupportable—the Agencies decision not to prepare an EIS cannot stand if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Lockhart v. Kenops*, 927 F.2d 1028, 1032 (8th Cir. 1991).

The FONSI is arbitrary and capricious because it is purportedly based on an estimate that the WOTUS Rule will result in up to a 4.65% increase in the jurisdictional reach of the CWA

[8] Similarly, other aspects of WOTUS Rule, including the alterations to the definition of tributary and the alterations to the treatment of waters subject to case-by-case determinations, were not adequately disclosed in the Proposed Rule to be considered a logical outgrowth of the Proposed Rule. *See Small Refiners*, 705 F.2d at 549.

which is not supported by the evidence in the record. As the Corps' own staff recognizes, in arriving at this estimate the EPA failed to "identify the draft language that EPA applied in performing its review … [and] mixes terminology and disparate data sets." *See* U.S. Army Corps of Engineers, *Memorandum Regarding Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of "Waters of the United States"* (May 15, 2015), attached as Exhibit P. Thus Corps staff determined that it "is unable to verify how EPA arrived at its estimate of a 4.65 percent increase in jurisdiction." Despite the inability to verify this estimate, the Corps unquestioningly adopted this estimate and used it as the basis for its FONSI. *See e.g.* FONSI, at 24. This blind adoption of unverifiable data epitomizes the kind of arbitrary and capricious decision making that cannot stand under NEPA. *Lockhart*, 927 F.2d at 1032.

The FONSI is also deficient because the Agencies failed to adequately consider several key factors in determining the significance of the WOTUS Rule. The regulations implementing NEPA provide that in determining whether the Rule has a significant impact on the human environment the Agencies were to consider ten factor, including: "(4) [t]he degree to which the possible effects on the human environment are likely to be highly controversial … [and] (10) [w]hether the action threatens a violation of Federal, State or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27. Failure to adequately consider any one of the ten factors, renders a decision not to prepare an EIS arbitrary and capricious. *Heartwood, Inc. v. U.S. Forest Service*, 380 F.3d 428, 432 (8th Cir. 2004). However, the EA supporting the FONSI glosses over or ignores several factors.

First, the FONSI fails to satisfy NEPA because it does not adequately address the fact that the WOTUS Rule is highly controversial. A federal action is highly controversial when

there is a "substantial dispute as to the size, nature, or effect of the major Federal action rather than the existence of opposition." *Id.* (internal citations omitted). Here, while the FONSI acknowledges the substantial public outrage generated by the Rule, it does not address in any way the substantial disagreement over the extent of the impact of the Rule. *See e.g.* FONSI at 28. Indeed, as discussed above, the Corps own staff disagrees with the estimated jurisdictional impact of the WOTUS Rule. The Agencies were required to prepare an EIS before implementing the Rule, in light of this substantial controversy over its impact. *Heartwood, Inc.*, 380 F.3d at 432; *see also Anderson v. Evans*, 314 F.3d 1006, 1017 (9th Cir. 2002) (internal citations omitted) (holding authorization of a tribal whale hunt without preparing an EIS was arbitrary and capricious because dispute over its impact was "sufficiently uncertain and controversial to require a full EIS protocol").

Second, the FONSI ignores impacts that the WOTUS Rule will have on state and local efforts to protect the environment. As the Declaration of Lynn Helms demonstrates, the Rule will substantially hamper North Dakota's efforts to curb emissions from the production of oil and gas within the state by complicating and delaying the construction of pipelines. *See* Exhibit D at ¶¶ 15-17. These pipelines are necessary for North Dakota to realize its goal of reducing flaring by oil and gas producers within the state. *Id.* These delays also significantly impact North Dakota's ability to protect air quality. Yet the FONSI completely ignores the detrimental impacts of the WOTUS Rule on these and other such state and local efforts to protect the environment in violation of NEPA.

III. THE BALANCE OF HARMS TIP IN FAVOR OF AN INJUNCTION.

The balance of harms weigh in favor of an injunction because the Agencies will not cause the Agencies any harm. As demonstrated above, the States will suffer imminent and irreparable harm from the implementation of the WOTUS Rule. In contrast delaying implementation of the

WOTUS Rule will cause the Agencies no harm. *See e.g. Texas v. United States*, 2015 U.S. App. Lexis 8657, 74-75 (5th Cir. May 2015). The Agencies' stated purpose in promulgating the WOTUS Rule is to "increase CWA program predictability and consistency by clarifying the scope of "waters of the United States." 80 Fed. Reg. at 37,054. But rushing implementation of the WOTUS Rule before its legal sufficiency is established is contrary to this goal. The Corps own attorneys have noted that the Rule fails to "include an adequate provision for … transitioning from the existing rule to the new rule." Ex. A at 7. Thus delaying implementation of the rule will actually benefit the Agencies by providing them an opportunity to develop the tools necessary to implement the Rule. *See e.g.* Exhibit C.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

The public interest will be served by enjoining implementation of the WOTUS Rule until the constitutionality and legality of the Rule have been thoroughly reviewed by the Court. An injunction is warranted because the WOTUS Rule infringes on the sovereign interests of the States in violation of the Tenth Amendment and the "the protection of constitutional rights is always in the public interest." *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 752 (8th Cir. 2008). The public interest also favors an injunction because the WOTUS Rule exceeds the jurisdictional scope of the CWA and the public has an overwhelming interest in ensuring that federal "agencies do not extend their power beyond the express delegation from Congress." *First Premier Bank v. U.S. Consumer Fin. Prot. Bureau*, 819 F. Supp. 2d 906, 922 (D.S.D. 2011) (granting a preliminary injunction against implementation of amendments to a federal regulation). While it is true that "important public interests are served by the [CWA]," delaying implementation of the Rule does not make the CWA disappear. *Rapanos*, 547 U.S. at 777. If the Rule is enjoined, the CWA will continue to be implemented as it has for years. Rather, allowing the rule to go into effect on August 28, 2015, only to be

enjoined at a later date, disserves the public and the purpose of the CWA by creating unnecessary confusion and inconsistent regulatory structures.[9] Thus an injunction is in the public interest.

CONCLUSION

For the foregoing reasons, the States respectfully urge the Court to grant this Motion for Preliminary Injunction.

RESPECTFULLY SUBMITTED this 10th day of August, 2015.

STATE OF NORTH DAKOTA
WAYNE STENEHJEM
ATTORNEY GENERAL

/s/Paul M. Seby
Paul M. Seby
Special Assistant Attorney General
Holland & Hart, LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202-3979
Phone: (303) 295-8430
Fax: (303) 291-9177
pmseby@hollandhart.com

Wayne K. Stenehjem
Attorney General
Jennifer L. Verleger
Margaret I. Olson
Assistant Attorneys General
Office of Attorney General
500 N. 9th Street
Bismarck, ND 58501
Phone: (701) 328-2925
wstenehjem@nd.gov
jverleger@nd.gov
maiolson@nd.gov
Attorneys for State of North Dakota.

STATE OF ALASKA
CRAIG W. RICHARDS
ATTORNEY GENERAL

/s/ Ruth Hamilton Heese (with permission)
Ruth Hamilton Heese
Senior Assistant Attorney General
123 Fourth Street
P.O. Box 110300
Juneau, AK 99811-0300
Telephone: (907) 465-4117
Facsimile: (907) 465-2520
Email: ruth.hamilton.heese@alaska.gov

Attorneys for State of Alaska.

[9] The Agencies are likely to argue that the public interest is also served by delaying consideration of an injunction until after their motion to consolidate and transfer before the MDL panel is heard. *See* United States' Response In Opposition To Motion For Preliminary Injunction, *Georgia et al. v. McCarthy et al.*, Civil No. 2:15-cv-00079-LGW-RSB. However, the confusion and inconsistency of having the rule go into effect, only later to be enjoined, overrides an public interest that may exist in the minimal judicial efficiency that may be gained by consolidation.

STATE OF ARIZONA
MARK BRNOVICH
ATTORNEY GENERAL

/s/ John R. Lopez IV (with permission)
John R. Lopez IV
Solicitor General
Office of the Arizona Attorney General
1275 W. Washington St.
Phoenix, AZ 85007
Telephone: (602) 542-8986
Facsimile: (602) 542-8308
Email: John.Lopez@azag.gov

Attorneys for State of Arizona.

STATE OF COLORADO
CYNTHIA H. COFFMAN
ATTORNEY GENERAL

/s/ Frederick R. Yarger (with permission)
Frederick R. Yarger
Solicitor General
Colorado Attorney General's Office
1300 Broadway, 10th Floor
Denver, Colorado 80203
Telephone: (720) 508-6168
Email: fred.yarger@state.co.us

Attorneys for State of Colorado

STATE OF IDAHO
LAWRENCE G. WASDEN
ATTORNEY GENERAL

/s/ Douglas M. Conde (with permission)
Douglas M. Conde
Deputy Attorney General
Office of the Attorney General
Department of Environmental Quality
1410 N. Hilton, 2nd Floor
Boise, ID 83706
Telephone: (208) 373-0494
Facsimile: (208) 373-0481
Email: douglas.conde@deq.idaho.gov

Attorneys for State of Idaho.

STATE OF MISSOURI
CHRIS KOSTER
ATTORNEY GENERAL

/s/ J. Andrew Hirth (with permission)
J. Andrew Hirth
Deputy General Counsel
PO Box 899
Jefferson City, MO 65102
Telephone: (573) 751-0818
Facsimile: (573) 751-0774
Email: andy.hirth@ago.mo.gov

Attorneys for State of Missouri.

STATE OF MONTANA
TIM FOX
ATTORNEY GENERAL

/s/ Alan Joscelyn (with permission)
Alan Joscelyn
Chief Deputy Attorney General
215 North Sanders
PO Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-3442
Facsimile: (406) 444-3549
Email: AlanJoscelyn@mt.gov

STATE OF NEBRASKA
DOUGLAS J. PETERSON
ATTORNEY GENERAL

/s/ Justin D. Lavene (with permission)
Justin D. Lavene
Assistant Attorney General
Dave Bydalek
Deputy Attorney General
2115 State Capitol Building
PO Box 98920
Lincoln, NE 68509-8920
Telephone: (402) 471-2682

Attorneys for State of Montana.

Facsimile: (402) 471-3297
Email: justin.lavene@nebraska.gov

Attorneys for State of Nebraska.

STATE OF NEVADA
ADAM PAUL LAXALT
ATTORNEY GENERAL

/s/ Lawrence VanDyke (with permission)
Lawrence VanDyke
Solicitor General
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701
Telephone: (775) 684-1100
Email: LVanDyke@ag.nv.gov

Attorneys for State of Nevada.

STATE OF SOUTH DAKOTA
MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ Charles D. McGuigan (with permission)
Charles McGuigan
Chief Deputy Attorney General
Office of the Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Facsimile: (605) 773-4106
Email: Charles.McGuigan@state.sd.us

Attorneys for State of South Dakota.

STATE OF WYOMING
PETER K. MICHAEL
ATTORNEY GENERAL

/s/ Peter K. Michael (with permission)
Peter K. Michael
Attorney General
James Kaste
Deputy Attorney General
David Ross
Senior Assistant Attorney General
Wyoming Attorney General's Office
123 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-6946
Facsimile: (307) 777-3542
Email: peter.michael@wyo.gov
james.kaste@wyo.gov
dave.ross@wyo.gov

Attorneys for State of Wyoming.

NEW MEXICO ENVIRONMENT
DEPARTMENT

/s/ Jeffrey M. Kendall (with permission)
Jeffrey M. Kendall
General Counsel
Kay R. Bonza
Assistant General Counsel
1190 St. Francis Drive, Suite N-4050
Santa Fe, NM 87505
Telephone: (505) 827-2855
Facsimile: (505) 827-1628
Email: jeff.kendall@state.nm.us

Attorneys for New Mexico Environment Department.

NEW MEXICO STATE ENGINEER

/s/ Gregory C. Ridgley (with permission)
Gregory C. Ridgley
General Counsel
Matthias L. Sayer
Special Counsel
130 South Capitol Street
Concha Ortiz y Pino Building
P.O. Box 25102
Santa Fe, NM 57504-5102
Telephone: (505) 827-6150
Facsimile: (505) 827-3887
Email: greg.ridgley@state.nm.us
matthiasl.sayer@state.nm.us

Attorneys for New Mexico State Engineer.

STATE OF ARKANSAS
LESLIE RUTLEDGE
ATTORNEY GENERAL

/s/ Jamie Leigh Ewing *(with permission)*
Jamie Leigh Ewing
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
Direct Dial: (501) 682-5310
Fax: (501) 682-3895
Email: jamie.ewing@arkansasag.gov

Attorneys for State of Arkansas.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2015, I electronically filed the foregoing **STATES' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Paul M. Seby

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