IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

States of West Virginia, North Dakota, Georgia, Iowa, Alabama, Alaska, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska,	)	**ORDER GRANTING PLAINTIFFS' MOTION FOR P**

Commanding General, U.S. Army Corps of Engineer,	)
Defendants,	)
and	)
Chickaloon Village Traditional Council, Rappahannock Tribe, Tohono O'odham Nation, and White Earth Band of Minnesota Chippewa Tribe,	)
Intervenor-Defendants.	)

Now before the Court is the Plaintiffs' "Motion for Preliminary Injunction" filed on February 21, 2023. See Doc. No. 44. The Plaintiffs seek the entry of a preliminary injunction prohibiting the Defendants from

- wetlands adjacent to paragraph (a)(1) waters, wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments, wetlands adjacent to tributaries that meet the relatively permanent standard, and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard ("jurisdictional adjacent wetlands"); and

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After the Applicability Date Rule was vacated in August 2018, the 2015 Clean Water Rule went back into effect, except in those jurisdictions where the rule had been enjoined. Pursuant to the North Dakota district court's preliminary injunction, the 2015 Clean Water Rule did not go into effect in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. North Dakota v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015). As the result of another preliminary injunction, the 2015 Clean Water Rule also did not go into effect in Alabama, Georgia, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. Georgia v. Pruitt, 326 F. Supp. 3d 1356 (S.D. Ga. 2018). In these 24 states, the EPA continued to implement the pre-2015 regulatory regime following vacatur of the Applicability Date Rule.

In September 2018, three more states obtained a preliminary injunction against the 2015 Clean Water Rule—Texas, Louisiana, and Mississippi—and the North Dakota district court expanded the scope of its preliminary injunction to cover the state of Iowa. The result was there were 28 states in which the 2015 Clean Water Rule was

The EPA implemented the pre-2015 regulatory regime nationwide until the 2020 Navigable Waters Protection Rule ("NWPR") went into effect on June 22, 2020, in all states except Colorado. 85 Fed. Reg. 22250 (Apr. 21, 2020). In Colorado, the 2020 NWPR was subject to a preliminary injunction issued by the United States District Court for the District of Colorado. Colorado v. EPA, 445 F. Supp. 3d 1295 (D. Colo. 2020); see also California v. Wheeler, 467 F. Supp. 3d 864 (N.D. Cal. 2020) (denying motion for preliminary injunction as to other states). The Tenth Circuit later reversed the Colorado district court's order on appeal; and, as a result, the 2020 NWPR went into effect in Colorado on April 26, 2021. Colorado v. EPA, 989 F.3d 874 (10th Cir. 2021); Colorado v. EPA, No. 20-1238, ECF No. 010110512604 (Doc. 10825032) (10th Cir. Apr. 26, 2021).

Following the reversal of the Colorado district court's preliminary injunction against the 2020 NWPR, the EPA implemented the 2020 NWPR nationwide until the rule was vacated on August 30, 2021, by the United States District Court for the District of Arizona. Pascua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949 (D. Ariz. 2021). The EPA then returned to implementing the pre-2015 regulatory regime nationwide. See U.S. EPA, "Current Implementation of Waters of the United States," https://www.epa.gov/wotus/current-implementation-waters-united-states. Another court issued an order vacating the 2020 NWPR on September 27, 2021. Navajo Nation v. Regan, 563 F. Supp. 3d 1164 (D.N.M. 2021).

On January 20, 2021, President Biden signed Executive Order 13990, which revoked the earlier Executive Order that had initiated the 2020 NWPR. The EPA then decided to revise the Rule that is the subject of this litigation. That Rule took effect on March 30, 2023. Congress passed a resolution overturning the Rule. H.R.J.Res. 27, 118th Congress (2023). The joint resolution was designed to nullify the new 2023 Rule. The resolution was vetoed by the President on April 6, 2023, with the following message.

achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except if done in compliance with certain specified sections of the Act. 33 U.S.C. § 1311(a) and 33 U.S.C. § 1362(12)(a). In most cases that means compliance with and obtaining a permit under Sections 402 or 404 of the Clean Water Act.

The Clean Water Act defines the term "discharge of a pollutants as" "any addition of any pollutants to navigable waters from any point source" and further provides that "[t]he term waters" [illegible] the United States, including the territorial seas." 33 U.S.C. § 1362(7). See also 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s). The term "pollutant" includes traditional contaminants as well as solids such as "dredged soil,…rock, sand, [and] cellar dirt." 33 U.S.C. § 1362(6).

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In the past the Supreme Court has been critical of the agency's interpretation of "waters of the United States." For example, in *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001), the Supreme Court rejected the Corps' interpretation of isolated sand and gravel pits that "seasonably ponded" as falling within the definition of "waters of the United States." 531 U.S. 159, 164, 172-74. This was an effort by the EPA and the Corps to reach "nonnavigable, isolated, interstate waters" that migratory birds used as habitat. The Supreme Court said such efforts raised significant constitutional questions that en0Ö

of the scope of the Clean Water Act to be "inconsistent with the Act's text, structure, and purpose[,]" and he presented a different standard for evaluating jurisdiction over wetlands and other water bodies. Justice Kennedy concluded that wetlands are "waters of the United States" "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and bio[illegible]eeval×

those waters which are "navigable in fact or that could reasonably so be made" and secondary waters with a 'significant nexus" to those waters. Id. at 759.

In October 2022, the Supreme Court heard oral arguments in *Sackett v. EPA*, 142 S. Ct. 896 (2022), which is a case on appeal from the Ninth Circuit Court of Appeals. In *Sackett*, the Ninth Circuit applied Justice Kennedy's "significant nexus" test to evaluate whether the EPA has jurisdiction to regulate wetlands. Sackett v. United States EPA, 8 F.4th 1075 (9th Cir. 2021). The issue currently before the Supreme Court is whether the Ninth Circuit set forth the proper test to determine whether wetlands are "waters of the United States" under the Clean Water Act. All parties expect the *Sackett* case will be decided by the end of the term. The issues presented in *Sackett* go to the heart of this lawsuit.

IV. LEGAL DISCUSSION

A. STANDING

The EPA contends the PLEE4VÖVçG2$TSEments"EE4VÖVçG2$TSEments"EE4VÖVçG2$TSEments

> (3) a likelihood – as opposed to a mere speculation – that a favorable decision will redress the injury.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); Nat'l Parks Conservation Ass'n v. E.P.A., 759 F.3d 969, 973 (8th Cir. 2014); see also Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171 (8th Cir. 2021).

As to the issue of the State's standing, it is well-established that "States are not normal litigants for the purposes of invoking federal jurisdiction" and are owed "special solicitude." Massachusetts v. EPA, 549 U.S. 497, 518-20 (2007). "When special solicitude is appropriate, a state can establish standing 'without meeting all the normal standards for redressability and immediacy.'" Texas v. United States (DACA), 50 F.4th 498, 514 (5th Cir. 2022) (quoting Massachusetts, 549 U.S. at 517-18).

The EPA argues the States lack standing because "federal regulation of water or land for the purpose of pollution control is not a cognizable harm to 'state sovereignty.'" See Doc. No. 92, p. 23. However, this argument is rejected for the same reasons articulated by Judge Jeffrey Brown in the case of *Texas v. United States Env't Prot. Agency*, No. 3:23-cv-17, 2023 WL 2574591 (S.D. Tex. Mar. 19, 2023). As noted by Judge Brown:

> The defendants have challenged the States' and Associations' standing. Because the court has determined that the States have standing, it need not determine whether the Associations do. See Laroe Ests., Inc., 584 U.S. 439. The defendants first argue the States lack standing because 'federal regulation of water or land for the purpose of pollution control is not a cognizable harm to state sovereignty.'

Texas, 2023 WL 2574591, at *5. The federal district court in Texas concluded that "the States have constitutional standing." Id. at *6. The Court is of the opinion the States in this litigation also have Article III standing.

The Clean Water Act clearly contemplates a state and federal enforcement scheme. States must establish water quality standards for "waters of the United States" within their borders, subject to EPA approval. 33 U.S.C. §§ 1313(a) and 1342. States administer the National Pollution Discharge Elimination System. The intent of the Clean Water Act is not to impede state's rights and responsibilities in governing pollution, land use, and water use. 33 U.S.C. § 1251(b).

The numerous declarations filed in this case by state officials outline in detail the specific costs of state compliance with the EPA's new 2023 Rule, as well as the significant infringement on state sovereignty that confers standing on the named plaintiffs. See Doc. Nos. 44-2 through 44-11. The 2023 Rule does cause injury to States because they are the direct object of its requirements. And the States are also landowners with direct obligations under the Clean Water Act. There is not a mere possibility the new regulations will impact the States - it is a given. The irreparable harm to the states that occurs with the implementation of the new 2023 Rule is clear and undisputed, and is outlined in more detail in this Order at pages 29-41. More important, the 2023 Rule arguably asserts jurisdiction over interstate waters not covered by the Clean Water Act as well as intrastate waters that may have some "significant nexus" to non-jurisdictional waters. See Doc. Nos. 44-2, ¶¶ 10-11; 44-3, ¶¶ 3 and 5; 44-6, ¶ 3; 44-7, ¶ 7-8; 44-9, ¶ 7; 44-10, ¶ 14, and 44-11, ¶ 7.

These declarations reveal the new stringent compliance requirements of the Rule (and associated costs) will result in the significant expenditure of additional state funds. This also confers standing on the impacted states under the current state of the law in the Eighth Circuit. See City of Kennett, Missouri v. Env't Prot. Agency, 887 F.3d 424, 431 (8th Cir. 2018).

The Court

Rule's significant-nexus test instead asks whether waters 'either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.' *Id.* at 3006. And the Rule's relatively-permanent test would empower the Agencies to regulate 'relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters.' *Id.*

. . .

The 2023 Rule's significant-nexus standard identifies 'waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity **of traditional navigable waters, the territorial seas, or interstate waters.**' 88 Fed. Reg. at 3006 (emphasis added). Justice Kennedy's test would not extend federal jurisdiction to nontraditional waters unless the water 'either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity of **other covered waters more readily understood as 'navigable.''** *Rapanos*, 547 U.S. at 780, (Kennedy, J., concurring) (emphasis added).

The Agencies' construction of the significant-nexus test ebbs beyond the already uncertain boundaries Justice Kennedy established for it. Specifically, by extending the significant-nexus test to 'interstate waters,' and not just to those 'waters ... understood as 'navigable,' 'the Rule disregards the Act's 'central requirement'—'the word 'navigable.'' *Id.* at 778. As explained more thoroughly below, linking the significant-nexus test to 'interstate waters' greatly expands its breadth

(a) The EPA Has Arguably Acted Beyond Statutory Authority

Congress prescribed that the EPA's authority under the Clean Water Act to extend to "navigable waters," which is defined as "the waters of the United States." 33 U.S.C. § 1362(7). Congress used the word "navigable" to show "what [it] had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could

88 Fed. Reg. at 3075. As a result, even waters that have "no outlet or hydrologic connection to the tributary network" may now be considered jurisdictional impoundments if some hydro-history can show the waters previously would have qualified as WOTUS under the new 2023 Rule. Id. at 3077-78. The Court is skeptical that Congress intended the Clean Water Act to empower the EPA to regulate impounded waters merely because they were once "waters of the United States." The EPA states that improvements typically do have a hydrologic connection to a navigable water, but that is not always the case.

The treatment of tributaries under the new 2023 Rule is suspect. The rule's definition of a "tributary" is extremely broad; a watercourse can qualify as a tributary so long as it makes its way, "directly or indirectly," to a traditional navigable water, territorial sea, or interstate water by any wet *or dry* waterway, such as wetlands or ditches. 88 Fed. Reg. at 3080. Thus, any water that eventually gets to a traditional navigable water, territorial sea, or interstate water may qualify. Id. Even tributaries that "may run dry [for] years" can be treated as relatively permanent. Id. at 3085. Ephemeral and intermittent streams can also become "waters of the United States." Judge Ralph Erickson of this Court enjoined the 2015 Rule for doing exactly the same thing. See North Dakota, 127 F. Supp. 3d at 1056 (noting the "breadth of the definition of a tributary … 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").

The Court notes that the treatment of wetlands is plagued with uncertainty. "Adjacent" wetlands are covered if they bear a "continuous surface connection" with "relatively permanent" impoundments or tributaries. 88 Fed. Reg. at 3095. The EPA has redefined "continuous surface connection" to cover waters that lack even minimal "constant hydrologic connection." Id. The EPA now lumps together waters "in the region" that are "reasonably close" and may have a "material"

what it means to be "similarly situated," nor does it define what constitutes "in the region," or what is the standard to measure a "significant affect," or what "chemical, physical, or biological integrity" means.

The 2023 Rule does go on to define "significantly affect" as a "material influence on the chemical, physical, or biological integrity" of a paragraph (a)(1) water. 88 Fed. Reg. 3143. However, the EPA then looks to vague factors such as "distance from a paragraph (a)(1) water," "hydrologic factors," the waters that have been determined to be "similarly situated," and "climatological variables." Id. These murky definitions are unintelligible and provide little guidance to parties impacted by the regulations.

Finally, and even more troublesome, is the fact the 2023 Rule allows for case-specific assertions of jurisdiction by the EPA over a broad category of "waters." 88 Fed. Reg. 3024. The "paragraph (a)(5) waters" category encompasses intrastate, non-navigable features that were previously considered to be "isolated" and not within the Clean Water Act's jurisdiction. See SWANCC, 531 U.S. at 167, 171.

The EPA's 2023 Rule will require States, landowners, and countless other effected parties to undertake expensive compliance efforts when their property may implicate navigable waters in ill-defined ways. The phrase "waters of the United States", a term that has been hopelessly defined for decades, remains even more so under the 2023 Rule. It is doubtful Congress endorsed the current efforts to expand the limits of the Clean Water Act. The joint resolution passed by

about the 2023 Rule and the broad scope of its jurisdiction. The EPA's interpretation of the 2023 Rule does not provide any clarity nor equate with an intelligible principle to which the States can

The EPA apparently reached this conclusion because it thought the 2023 Rule was consistent with the pre-2015 enforcement regime. However, the 2023 Rule and the EPA's pre-2015 practice are at odds in several key ways.

The States contend the EPA did not comply with important procedural requirements. The APA requires administrative rules to be procedurally sound. See 5 U.S.C. § 706(2)(D) (a final agency action shall be held "unlawful and set aside" if found to be "without observance of procedure required by law"). The Regulatory Flexibility Act "requires an agency undergoing informal rulemaking to prepare and publish a regulatory flexibility analysis that details, among other things, the rule's 'significant economic impact on small entities' and the steps the agency has taken to minimize that impact." Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health & Hum. Servs., 14 F.4th 856, 876 (8th Cir. 2021) (quoting 5 U.S.C. § 604). An agency can only skip that analysis if the "head of the agency certifies that the rule will not ... have a significant impact on a substantial number of small entities." Id. at 876. A "cursory explanation" for this decision to certify is not enough. Id. at 877. The EPA summarily concluded the 2023 Rule would not significantly impact small entities. 88 Fed. Reg. at 3140. From the declarations filed in this case by state officials, it appears the 2023 Rule directly affects many States/landowners who now find themselves potentially subject to federal jurisdiction and permitting requirements. These landowners will need to undertake expensive assessments or forego their activities.

It is also unclear whether the EPA provided full notice and comment on all relevant aspects of the new 2023 "T nstimy PA s netice

afoul of the notice requirement. See, e.g., North Dakota, 127 F. Supp. 3d at 1058 (finding that definition of "neighboring" in 2015 WOTUS rule was not a logical outgrowth of the proposed rule); see also Texas v. EPA, 389 F. Supp. 3d 497, 504-06 (S.D. Tex. 2019) (detailing the 2015 Rule's violations of notice-and comment requirements). The States argue that several new elements that are not "logical outgrowths" of the proposed rule appeared for the first time in the 2023 Rule. The new terms and definitions include the use the idea of a "wetland mosaic" to explain how the EPA will identify adjacent wetlands, the redefinition of "significant nexus" to mean any "material influence," and defining tributaries in with similar tributaries in their same "catchment." These terms and definitions are found in the 2023 Rule but were not included in the proposed rule, raising serious concerns about whether proper procedures were followed.

(c) Constitutional Concerns

The APA will not permit a rule to stand if it is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). The States contend the 2023 Rule conflicts with at least three different constitutional limitations. See Doc. No. 44-1, pp. 19-21.

Specifically, the States outline the following constitutional concerns:

> 1. The Final Rule impermissibly reaches land and waters without requiring that they bear a direct connection to navigable waters or otherwise bear some substantial relationship with (or otherwise substantially affect) interstate commerce. In fact, the Final Rule removes portions of the 1986 Regulations that spoke directly to interstate commerce, replacing that category with the catch-all "other waters" category that does not carry with it any meaningful connection with commerce. It did so even though "Clean Water Act jurisdiction is not co-extensive with Congress' Commerce Clause authority." *Am.*

2. The Tenth Amendment presents yet another constitutional obstacle for the Final Rule. That amendment says that "[t]he powers not delegated to the United States by the Constitution ...are reserved to the States respectively, or the people." U.S. CONST. amend. X. In applying this prescription, a court should ask whether a federal act "invades

jurisdiction. The definitions of WOTUS involve the regulation of a significant portion of American land mass, water, and economy. However, a grant of general authority to the EPA is not without limits, and there exist serious questions whether Congress intended to allow the EPA to make such major policy decisions as are codified in the 2023 Rule through the rulemaking process. As the Supreme Court said in *West Virginia v. EPA*, 142 S.Ct. 2587, 2608-09 (2022), federal agencies are not permitted to exercise regulatory power "over a significant portion of the American economy" or "make a radical or fundamental change to a statutory scheme" through rulemaking without clear authorization by Congress. Id. Instead, the Court presumes that "Congress intends to make major policy decisions itself, and not leave those decisions to agencies." Id. at 2609.

2. IRREPARABLE HARM

The Plaintiffs contend that with respect to the *Dataphase* factor of irreparable harm, the loss of the State's sovereignty is an irreparable harm which rises to the need for preliminary equitable

Dist. v. Herrmann, 569 U.S. 614, 631 (2013). *See*, *e.g.*, Exs. A, ¶¶ 3-4; F, ¶¶ 11-13; G, ¶¶ 4-6; H, ¶¶ 12-14; and I, ¶¶ 8-14. That loss is irrecoverable.

Second, expanded federal jurisdiction swells the States' obligations under several CWA programs. When it comes to water quality standards, for instance, States must identify newly jurisdictional waters within their borders, assess their uses, and determine if they meet an already existing standard or establish a Total Maximum Daily Load if they do not. *See* ECF 1, ¶¶ 55-56. The States must also evaluate, issue, and enforce new National Pollution Discharge Elimination System permits for businesses

see also Bowen v. Massachusetts, 487 U.S. 879, 893 (1988) (sovereign

12. Ascertaining the extent of the Final Rule is important for my Division to fulfill its obligations to the public, who are subject to civil and criminal penalties if they do not obtain a permit.

See Doc. No. 44-2, ¶¶ 11-12.

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commenced in the prairie pothole region that previously would not have been jurisdictional. 88 Fed. Reg. 3,097 (Jan. 18, 2023) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120).

9. The Final Rule creates a case-by-case jurisdictional determination for waters within the 100-year floodplain and waters within 4,000 feet of the ordinary high water mark (OHWM) of a tributary. Federal Emergency Managements Agency has only delineated the 100-year floodplain around major metropolitan areas. The OHWM has not been surveyed along the majority of navigable waters, which are only a small fraction of the waters covered by the Final Rule. As such, Garrison Diversion needs to affirmatively study jurisdiction in detail to determine the applicability of the Final Rule to waters covered by the agency.

6. The Department is concerned that the Final Rule will increase the federal government's jurisdiction over waters that have traditionally been under the sole jurisdiction of the state. Under the Final Rule, once a water is determined to be WOTUS, it is within federal authority and North Dakota's regulation of that water is subject to EPA's oversight. Any expansion of federal jurisdiction infringes on the Department's enforcement authority and ability to exercise its discretion in managing state water quality.

7. The Final Rule imposes significant burdens upon North Dakota by forcing it to shift attention and resources to the federal scheme to the disadvantage of local, state-based programs.

8. The Department will have to expend its limited resources to immediately determine which waters were added to federal jurisdiction under the Final Rule so that it can understand the impact on the Department's various water pollution control programs. Determining the scope of the Final Rule is especially difficult in North Dakota due to the many areas with intermittent moisture, particularly in the prairie pothole region. For example, when determining if a prairie pothole is WOTUS, the Department will need to consider whether the waterbody, together with any otherwaters in an ill-defined "region," will have a "material" effect on an aspect of a traditional navigable or interstate water.

9. Since the Department, with its staff of engineers and scientists, strugCÒÀrWFðit

sense of the ever-changing federal regime is an hour that cannot be spent addressing other pressing environmental issues in North Dakota.

See Doc. No. 44-8, ¶¶ 6-11.

The North Dakota Department of Agriculture has further shown how that state agency will be significantly impacted by the 2023 Rule.

> 4. North Dakota has well over 26,000 farms and ranches, comprising nearly 39.3 million acres, or approximately 90 percent of the total land area in North Dakota. North Dakota agriculture contributes considerably over 30 billion dollars in economic activity annually to the state. As a prime exporter of agricultural products, North Dakota is often cited as the "breadbasket of the world." North Dakota is the country's 10th largest agricultural exporting state. North Dakota produces over 50 different commodities. North Dakota farmers lead the nation in the production of more than a dozen important commodities, among them spring and durum wheat, rye, food grains, assorted beans, barley, flaxseed, canola, honey, sunflowers, pulse crops and more. Of North Dakota's approximately 775,000 residents, only about three percent are farmers and ranchers. Nonetheless, agriculture broadly supports nearly 25 percent of the state's workforce, which is higher than the national average of 19 percent. Agriculture remains the leading industry in North Dakota.
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> 5. Our mission statement at the Department is to "[s]erve, advocate, protect and promote agriculture to benefit everyone." In furtherance of that mission, we promote agriculture to protect both the value and use of agricultural lands, protect agricultural capacity and output, and promote rural economic development and agricultural industries.
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> 6. I have the personal knowledge and experience to understand how the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (the Corps) final rule entitled "Revised Definition of 'Waters of the United States'" (Final Rule), 88 Fed. Reg. 3004 (Jan. 18, 2023) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120) that becomes binding on March 20, 2023, will affect the Department and agriculture in North Dakota.
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> 7. As Agriculture Commissioner, I am greatly concerned about the substantial negative impact of the WOTUS Rule. The WOTUS Rule will unnecessarily negatively impact and irreparably harm North Dakota, the Department, North Dakota agriculture, and North Dakota farmers and ranchers. In my opinion, the Final Rule would have the following adverse effects on the State of North Dakota, the Department, North Dakota residents, and our agricultural industry:
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> a. North Dakota Pr

8. The EPA statement in the Final Rule that it currently intends to exempt "normal farming and ranching practices" provides little comfort to North Dakota farmers and

6. “Waters of the state” is defined broadly for purposes of N.D. Cent. Code ch. 61-28 to include almost all waters above and below the ground surface. N.D. Cent. Code § 61-28-02(15). It means “all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering u

served. Future planned SWPP projects include expanding the treatment plant capacity, intake capacity, raw water transmission capacity, and distribution capacity expansion, including rural expansion into underserved areas, with over $261 million estimated in construction costs. The state will now be forced to undertake an expensive jurisdictional analysis for these construction projects to determine if the projects impact WOTUS under the expanded definition in the Final Rule and are thus subject to CWA Section 404 permitting requirements and NEPA. This additional burden infringes upon the sovereign capacity of North Dakota to plan for the provision of water to its citizens. The uncertainty the Final Rule places on partially completed projects impacts North Dakota's already shortened construction seasons. While previous jurisdictional determinations will supposedly remain valid, many of the current construction projects interact with waters that, while waters of the state and subject to state water quality regulations, do not have jurisdictional determinations because they were not previously federally regulated.

12. The NAWS project also intends to bring water to under-served North Dakota citizens in the prairie pothole region. Many cities and rural areas in the NAWS project area have domestic water supplies that do not meet minimum drinking water standards. The benefits of NAWS include not only a clean and abundant supply of water for the residents of North Dakota, but more opportunities for potential industries and a stronger economy. The Final Rule may compel the Corps or EPA to review previous jurisdictional studies to determine whether portions of the project require further CWA Section 404 analysis because of their presence in the prairie pothole region, causing sovereign injury to the state in its capacity to allocate waters of the state to serve the public. NAWS projects potentially adversely impacted by this Final Rule would include approximately $100 million worth of investment, including two reservoirs, multiple pump stations, and treatment and intake facilities. NAWS is anticipated to serve approximately 81,000 North Dakotans upon project completion.

13. There are approximately 3,200 known dams in North Dakota used for fish and wildlife, recreation, flood control, livestock, irrigation, water supply, etc. Of these dams, approximately 105 are owned, operated, and maintained by the state. Though no study has been conducted to analyze the impacts of the Final Rule, the majority of these dams were not previously covered by the CWA but may now be jurisdictional under the Final Rule. None of the ongoing dam rehabilitation and repair projects have been federally regulated. However, given the uncertainty regarding the impact of the Final Rule and the fact that the dams may be jurisdictional under the Final Rule, further construction will now be uncertain and potentially subject to federal permitting requirements. It is also unknown what adverse impacts such uncertainty could have on dam safety.

14. In sum, the Final Rule will immediately interfere with and disrupt North Dakota's governance of the lands and waters within its borders. The Final Rule will adversely affect laws and regulations that are vital to the overall health and welfare

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it takes, on average, approximately $160,000 to $560,000 per project, depending on the size of the project, to prepare materials for the AJD. The Rule will significantly increase the resources required from WVDOT to assess new jurisdictional waters under the Rule.

6. The Rule also expands federal jurisdiction in a way that will significantly increase the amount of mitigation required to deliver projects. WVDOT has used at least 24 third-party mitigation banks in West Virginia to satisfy compensatory mitigation requirements. While the number of banks has increased significantly in the last 5 to 7 years, the number of available credits in certain parts of the state has not, largely because pending banks are not receiving timely approval, and USACE has not been releasing enough credits to satisfy demand in certain service areas.

7. The Rule will also cause WVDOT to seek federal agency guidance regarding jurisdiction on a burdensome and time-consuming project-by-project and case-by-case basis. Guidance from USACE headquarters following a rule change is typically slow, and it is common to hear inconsistent answers from the USACE at the district level because they have not been provided with the appropriate guidance regarding the implementation of the new rule. This inconsistency adds additional labor hours and expense to the process of conducting WVDOT's environmental assessments and consulting with USACE, thus increasing project costs and creating delays for transportation projects. As to the thousands of miles
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States,’” 88 Fed. Reg. 3004 (Jan. 18, 2023). The coalition of 24 States have established the *Dataphase* factors all weigh strongly in favor of granting injunctive relief. The Plaintiffs’ motion for preliminary injunction (Doc. No. 44) is **G**