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

STATE OF NORTH DAKOTA, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 3:15-cv-00059-RRE-ARS
	§	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	§	
	§	
	§	
Defendants.	§	

AMICUS CURIAE BRIEF OF BCCA APPEAL GROUP

TO THE HONORABLE UNITED STATES JUDGE:

BCCA Appeal Group is a non-profit Texas corporation whose mission includes supporting the goals of environmental protection and a strong economy. BCCA Appeal Group members own and operate industrial facilities in Texas and elsewhere in the Unites States, including refineries, petrochemical plants, power plants, and pipelines. BCCA Appeal Group members will be affected by jurisdictional determinations on whether areas on and adjacent to their current facilities or planned future facilities are considered "waters of the United States" under the Clean Water Act. BCCA Appeal Group has no parent corporation, has no shareholders and issues no stock.

Nearly all of BCCA's members are affiliated with national trade groups that are challenging the Clean Water Rule: Definition of Waters of the United States, 80 Fed. Reg. 37,054 (June 29, 2015) (the "WOTUS Rule") adopted by the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps"). BCCA Appeal Group files this amicus brief not to pursue the regulatory challenge to the WOTUS Rule,

but rather to support the Plaintiffs' request for relief, particularly in light of EPA's inappropriate response to this Court's injunction. EPA should not be allowed to arbitrarily translate this Court's decision—that a nationwide rule must be enjoined—into a determination that an invalid rule may still be applied in thirty-seven states. That translation is wrong.

This Court's injunction of the WOTUS Rule should not merely restrict application of the rule to the geographic areas governed by the Plaintiff states. To allow EPA and the Corps to impose geographic boundaries around a rule they support for *federal* application results in patchwork of regulation—exactly the sort of piecemeal framework that federal environmental laws such as the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act were designed to avoid. *See* Jonathan H. Adler, When Is Two a Crowd - The Impact of Federal Action on State Environmental Regulation, 31 Harv. Envtl. L. Rev. 67, 67-68 (2007). Yet, EPA's press-released position clearly results in patchwork regulation, especially for a state like Texas, which borders two states where the WOTUS Rule will not apply (Arkansas and New Mexico) and two states where it will apply (Oklahoma and Louisiana). A project pipeline constructed from Texas to New Mexico would enjoy the Court's injunction of the WOTUS Rule in New Mexico, but at the Texas state line, a completely different federal rule would suddenly apply. Of the forty-eight multi-state watersheds in New Mexico, twenty-three cross the border to Texas, a state not party to this case and thus a state where EPA and the Corps say the WOTUS Rule is in effect. The patchwork regulatory scheme for watersheds like the Monument-Seminole Draws Watershed in southeast New Mexico, a major oil and gas producing region where numerous Texas companies operate, poses serious concerns about whether per-se-jurisdictional ephemeral streams subject to the WOTUS Rule in Texas will trigger increased permitting requirements in upstream, ephemeral waters in New Mexico that are part of the same

watershed. Likewise, companies operating near the Texas-Arkansas border face the same conflict associated with projects spanning that border into Texas. This uncertainty creates unnecessary hardship on Texas industry.

Apart from its illogical practical consequences, the position EPA articulates in its press release lacks sound legal foundation. This Court enjoined the WOTUS Rule after finding that EPA and the Corps failed to comply with Administrative Procedure Act ("APA") prerequisites and likely acted arbitrarily and capriciously. *See* 5 U.S.C. § 706(2)(A) ("The reviewing Court shall...hold unlawful and *set aside* agency action...not in accordance with the law") (emphasis added). The APA's directives extend beyond state borders. And where "agency action" concerns adoption of a rule of broad applicability, and a challenger prevails, the result is that *the rule is invalidated*, not simply that the court forbids its application to a particular individual or geographic area. *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain 'programmatic' relief that affects the rights of parties not before the court.") (citation omitted); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

To claim, as EPA does, that a federal court's injunction applies only in thirteen states creates an unworkable regulatory patchwork out of a supposedly nationwide program and contradicts the APA, which allows a Court—as this Court did—to "set aside" agency action that fails to comply with the law.

Date: September 2, 2015

Respectfully submitted,

BAKER BOTTS, L.L.P.

By: /s/ Van H. Beckwith

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing was on this date automatically accomplished on all known filing users through the Notice of Electronic Filing Service and/or in accordance with the Federal Rules of Civil Procedure on this 2nd day of September, 2015.

/s/ Van H. Beckwith
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