UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants.	Case No. 4:15-cv-00381-CVE-FHM
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants.	Case No. 4:15-CV-0386-CVE-PJC

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING A RULING FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON SUBJECT-MATTER JURISDICTION

In less than a month the United States Court of Appeals for the Sixth Circuit will hear oral argument on the critical, threshold issue of whether jurisdiction to review the Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015) (the rule that Plaintiffs seek review of in these cases), lies exclusively in the courts of appeals under 33 U.S.C. § 1369(b)(1). Defendants ("Federal Agencies" or "Agencies") seek a limited stay of proceedings in this case until the Sixth Circuit issues its ruling on the jurisdictional issue. This stay of limited duration is in the interest of judicial economy and efficiency, will not harm Plaintiffs, and would prevent potential hardship to the Federal Agencies.

BACKGROUND

As noted in the Federal Agencies' motion to stay, the petitions for review of the Clean Water Rule have been consolidated in the Sixth Circuit, and the Sixth Circuit set a streamlined briefing schedule for motions that challenged that court's jurisdiction under 33 U.S.C. § 1369(b)(1). *See, e.g.*, Case No. 4:15-cv-381, Dkt. No. 25 at 1-2. On October 20, 2015, the Sixth Circuit noticed oral argument on the pending jurisdictional motions for December 8, 2015. Case No. 15-3751 (Sixth Circuit, lead case), Dkt. No. 53. The Eleventh Circuit has also received briefing on the issue of the court of appeals' exclusive jurisdiction to review the Clean Water Rule under 33 U.S.C. § 1369(b)(1), and that court has tentatively set oral argument for the week of February 22, 2016.[1] *Georgia v. McCarthy*, Case No. 15-14035 (11th Cir.), Order of Oct. 28, 2015.

ARGUMENT

Through the Clean Water Act's judicial review provision in 33 U.S.C. § 1369(b)(1), Congress "establish[ed] a clear and orderly process for judicial review." *See* H.R. Rep. No. 92-911 at 136 (1972), reprinted in 1 Legislative History of the Water Pollution Control Act of 1972 at 823 (Comm. Print 1973); *see also* S. Rep. No. 92-414 at 3751 (1971) (noting the need for "even and consistent" application of nationwide administrative actions). Where judicial review is available under 33 U.S.C. § 1369(b)(1), review occurs in the courts of appeals and "it is the exclusive means of challenging actions covered by the statute." *Decker v. NEDC*, 133 S. Ct. 1326, 1334 (2013). When multiple petitions for review of the same agency action are filed in

[1] Plaintiffs in *Georgia v. McCarthy*, Case No. 2:15-cv-79 (S.D. Ga.), appealed the Southern District of Georgia's denial of the *Georgia* plaintiffs' motion for preliminary injunction for lack of subject matter jurisdiction. *See Georgia v. McCarthy*, Case No. 2:15-cv-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015) (appeal pending).

two or more circuit courts of appeals within ten days after issuance of the agency action, those petitions are consolidated before one court of appeals. 28 U.S.C. § 2112(a)(3).

As noted above, those circumstances are presented here and the Sixth Circuit was selected to hear all of the petitions for review, including the petitions filed by Plaintiffs. Briefing in the Sixth Circuit on the issue of subject matter jurisdiction to review the Clean Water Rule is complete and that court will hear oral argument on December 8. In light of the expedited schedule established by the Sixth Circuit for briefing and oral argument, a ruling from the Sixth Circuit on the jurisdictional issue can be expected soon. Thus, the limited stay requested by the Federal Agencies is not "immoderate." *Landis v. North Am. Co.*, 299 U.S. 248, 256 (1936).

Plaintiffs oppose the limited stay requested by the Agencies and argue that the Court should instead set a briefing schedule to address this Court's jurisdiction and the merits of Plaintiffs' claims. *See* Case No. 4:15-cv-386, Dkt. No. 45 at 10-12; Case No. 4:15-cv-381, Dkt. No. 32 at 1 (adopting and incorporating the Chambers' argument). Plaintiffs argue at length that a decision by the Sixth Circuit will not bind this Court. *See* Case No. 4:15-cv-386, Dkt. No. 45 at 4-7. However, the Court need not decide in the context of this motion for a stay of the proceedings in these cases whether the Sixth Circuit's decision has binding effect because, at a minimum, the Sixth Circuit's decision (and its reasoning) will be highly informative. As the Southern District of New York noted in a challenge to a different Clean Water Act regulation, "there is much to be gained from knowing whether the [circuit court] considers itself to have exclusive jurisdiction over review of the final agency action." *Riverkeeper, Inc. v. EPA*, No. 06 CIV. 12987 PKC, 2007 WL 4208757, at *2 (S.D.N.Y. Nov. 26, 2007).[2]

[2] Plaintiffs misconstrue Defendants' acknowledgement of the Eleventh Circuit's *appellate* jurisdiction over the trial court's decision in *Georgia v. McCarthy* as a "concession" that the Sixth Circuit's decision will lack binding effect on its sister circuit. Defendants' appellate brief

Plaintiffs are dismissive of the principle of comity among the federal courts and the judiciary's interest in avoiding duplicative litigation. *See* Case No. 4:15-cv-386, Dkt. No. 45 at 7-9. Comity, however, is a well-established judicial principle that has particular significance in these circumstances because it is intended "to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result." *See W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24, S. Atl. & Gulf Coast Dist. of ILA, AFL-CIO*, 751 F.2d 721, 729 (5th Cir. 1985) (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818-20 (1976)). Unlike the cases cited in Plaintiffs' opposition, where different parties pursued similar claims in different courts, *see* Case No. 4:15-cv-386, Dkt. No. 45 at 8, Plaintiffs' dual actions here and in the Sixth Circuit present the same issue of subject matter jurisdiction in two different courts. *See Burger v. Am. Mar. Officers Union*, 170 F.3d 184 (5th Cir. 1999) (noting that "the same policy concerns for avoiding duplicative litigation and comity exist when a similar matter is pending in a federal district court and a federal court of appeals in a different circuit."); *cf. Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011) ("By spreading claims around in multiple lawsuits in other courts or before other judges, parties waste 'scarce judicial resources' and undermine 'the efficient and

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in that case concedes neither that subject matter jurisdiction was proper in the district court nor that the Eleventh Circuit may ultimately disregard the Sixth Circuit's jurisdictional ruling. *See Cohens v. State of Virginia*, 19 U.S. at 398 (1921) ("[W]here the words admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in another Court."); Jeffrey C. Dobbins, Structure and Precedent, 108 Mich. L. Rev. 1453, 1470 (2010) ("[I]f the decision on the consolidated petitions was not binding, what would the point be of consolidating at all?"). This Court need not reach such questions to resolve the present motion for stay, which can be decided solely on the factors set forth in *Landis*.

comprehensive disposition of cases.'") (quoting *Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982, 985 (10th Cir. 2002)).

As this Court has previously stated in this proceeding, "it would undoubtedly be a waste of judicial resources for plaintiffs' cases to proceed if it is ultimately determined that jurisdiction is appropriate only in a federal circuit court of appeal."[3] Case No. 4:15-cv-381, Dkt. No. 22 at 8. The United States District Court for the Southern District of Ohio agreed with that reasoning when it similarly concluded that "[i]t would be a waste of judicial resources for this case to proceed here if it is ultimately determined that it is the Sixth Circuit – or another circuit court –

[3] On November 11, 2015, the *Chamber* Plaintiffs filed a notice with this Court about a recent magistrate order entered in the United States District Court for the District of North Dakota denying a similar request to stay proceedings in a case before that court. Case No. 4:15-cv-386, Dkt. No. 46. The procedural history in the case before the District of North Dakota is notably different from the procedural history in the cases before this Court. Most significantly, the District of North Dakota denied the Agencies' initial request for a stay of the proceedings in that case, and subsequently, held that it had subject matter jurisdiction to review the Clean Water Rule and entered a preliminary injunction which it later clarified applied only to the States in that case. *North Dakota v. EPA*, No. 3:15-cv-59, (D. N.D.), Dkt. Nos. 55, 70, 79. The District of North Dakota stands alone as the only district court to deny the Agencies' request for a stay of proceedings and the only district court to conclude that jurisdiction to review the Clean Water Rule lies in district court rather than the courts of appeals. *Compare North Dakota v. EPA*, No. 3:15-cv-59, 2015 WL 5060744 (D. N.D. Aug. 27, 2015) *with Georgia v. McCarthy*, No. 2:15-cv-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015) (appeal pending); *Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015). *See also Ohio v. EPA*, No. 2:15-cv-2467 (S.D. Ohio), Dkt. No. 27; *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.) Dkt. No. 15; *Am. Farm Bureau v. EPA*, No. 3:15-cv-165 (S.D. Tex.), Dkt. No. 22; *Se. Legal Found., Inc. v. EPA*, 1:15-cv-2488 (N.D. Ga.), Dkt. Nos. 5, 12; *Wash. Cattlemen's Ass'n v. EPA*, No. 1:15-cv-3058 (D. Minn.), Dkt. No. 14; *Waterkeeper Alliance, Inc. v. EPA*, No. 3:15-cv-3927 (N.D. Cal.), Dkt. Nos. 9, 12; *Puget Soundkeeper v. McCarthy*, No. 2:15-cv-1342 (W.D. Wash.), Dkt. Nos. 14, 19; *NRDC v. EPA*, No. 1:15-cv-1324 (D.D.C.), minute orders of Sept. 10 and Oct. 16, 2015; *Arizona Mining Ass'n v. EPA*, Case 2:15-cv-01752, Dkt. Nos. 16, 20 (each granting Federal Agencies' motions to stay district court proceedings).

that is the appropriate court to consider plaintiffs' claims." *Ohio v. EPA*, Case. No. 2:15-cv-2467, 2015 WL 5117699, at *3 (S.D. Ohio Sept. 1, 2015).

Plaintiffs' contentions that they would be harmed if prevented from seeking preliminary injunctive relief from this Court because the Sixth Circuit's stay of the Clean Water Rule would expire if that court determines it lacks jurisdiction, *see* Case No. 4:15-cv-386, Dkt. No. 45 at 9-10; Case No. 4:15-cv-381, Dkt. No. 32 at 3-4, is pure speculation, and it is not a sound reason to deny the Federal Agencies' motion for a limited continuance of the stay of the proceedings in these cases. First, if the Sixth Circuit affirms its jurisdiction, the stay of the Rule is likely to remain in place (and this Court would not have jurisdiction to grant preliminary relief in any event). Second, even if the Sixth Circuit's stay of the Rule were lifted, Plaintiffs have already lodged motions for a preliminary injunction that could quickly be taken up by this Court. *See* Case No. 4:15-cv-381, Dkt. Nos. 17-18; Case No. 4:15-cv-386, Dkt. No. 27. Third, the Sixth Circuit's stay of the Clean Water Rule would not "be gone in an instant," as alleged by the State, Case No. 4:15-cv-381, Dkt. No. 32 at 4, if the Sixth Circuit were to conclude that it lacked subject matter jurisdiction. Instead, the Sixth Circuit's stay of the Rule would continue until the Sixth Circuit issued a mandate making that jurisdictional ruling final.[4]

Moreover, Plaintiffs' claims of irreparable harm from the implementation of the Clean Water Rule lack merit. Plaintiffs made similar arguments in opposing the Federal Agencies' request for a stay of proceedings pending a ruling from the Judicial Panel for Multidistrict

[4] A court of appeals mandate ordinarily does not issue for at least 52 days after entry of judgment. *See* Fed. Rules of App. Proc. 40 and 41. If the Sixth Circuit were to conclude that it lacked jurisdiction under 33 U.S.C. § 1369(b)(1) to review the Rule, the Agencies would not oppose a request by these Plaintiffs for the Sixth Circuit's stay to remain in place pending issuance of the mandate.

Litigation. *See* Case No. 4:15-cv-381, Dkt. No. 16 at 9-12; Case No. 15-cv-386, Dkt. No. 28 at 10-13. This Court examined Plaintiffs' claims and concluded that "[t]he State has not shown that a limited stay of these cases will cause irreparable harm," and "a limited stay will not cause immediate harm to the planned use[s] of any person's property." Case No. 4:15-cv-381, Dkt. No. 22 at 7-8. The State also presented its arguments of harm to the Sixth Circuit when it requested that that court stay the Clean Water Rule, and that court was unpersuaded. The Sixth Circuit found that "[t]here is no compelling showing that any of the petitioners will suffer immediate irreparable harm—in the form of interference with state sovereignty, or in unrecoverable expenditure of resources as they endeavor to comply with the new regime—if a stay is not issued pending determination of this court's jurisdiction." *In re: EPA*, Case No. 15-3799, 2015 WL 5893814, at *3 (6th Cir. Oct. 9, 2015).

In contrast, the Federal Agencies would be burdened if required to engage in motion practice while the Sixth Circuit is considering its jurisdiction. Plaintiffs' suggestion that the Federal Agencies could simply make minor edits to its prior filings, such as the 49 page jurisdictional brief filed in the Sixth Circuit, and re-file them in this Court, *see* Case No. 4:15-cv-386, Dkt. No. 45 at 9, is disingenuous because the jurisdictional issue is likely to be moot once the Sixth Circuit issues its decision, and because the four elements for a preliminary injunction would still have to be briefed. This Court, too, would be unnecessarily burdened if required to expend its resources on this duplicative litigation prior to the Sixth Circuit's ruling on whether jurisdiction to review the Rule lies exclusively in that court under 33 U.S.C. § 1369(b)(1).

Accordingly, a limited stay of the proceedings in this case is warranted because it is in the interests of justice and judicial economy. *See Landis v. North Am. Co.*, 299 U.S. 248, 254-56 (1936).

CONCLUSION

For the foregoing reasons and the reasons set forth in Federal Defendants' opening memorandum, Federal Defendants respectfully request that this Court exercise its inherent authority to temporarily stay all proceedings in this action pending a decision by the Sixth Circuit on whether it has exclusive jurisdiction under 33 U.S.C. § 1369(b)(1) to hear all challenges to the Clean Water Rule.

Dated: November 12, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2015, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon counsel of record.

s/ Amy J. Dona
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