IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

(2) NATIONAL FEDERATION OF INDEPENDENT BUSINESS,

(3) STATE CHAMBER OF OKLAHOMA,

(4) TULSA REGIONAL CHAMBER, and

(5) PORTLAND CEMENT ASSOCIATION,

Plaintiffs,

v.

(1) UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

(2) GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

(3) UNITED STATES ARMY CORPS OF ENGINEERS, and

(4) JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works),

Defendants.

No. 4:15-cv-386-CVE-PJC
(Related: No. 4:15-cv-381-CVE-FHM)

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

The Chamber of Commerce of the United States of America, National Federation of Independent Business, State Chamber of Oklahoma, Tulsa Regional Chamber, and Portland Cement Association ("Plaintiffs"), hereby provide notice of supplemental authority in support of the arguments made in their Response in Opposition to Defendants' Motion to Stay Proceedings Pending a Ruling from the United States Court of Appeals for the Sixth Circuit on Subject-

Matter Jurisdiction [Dkt. No. 45]. Since the filing of said Response, the United States District Court for the District of North Dakota denied an identical request for a stay sought by the Federal Defendants (the same defendants in this litigation) pending the United States Court of Appeals for the Sixth Circuit's determination whether initial jurisdiction to review the legality of the Federal Defendants' waters of the United States rule lies with the district courts or the courts of appeals. *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D. Nov. 11, 2015). In its ruling, the court stated that "[c]onsidering potential prejudice to the plaintiffs resulting from a stay, potential hardship and inequity to the defendants if the action is not stayed, and the judicial resources that would be saved by granting a stay, the court concludes that defendants have not established that a stay is warranted." *Id.* at 6. A copy of the North Dakota order is attached hereto as Exhibit "A."

Dated: November 11, 2015

Respectfully submitted,

By: */s/ Mary E. Kindelt*

Steven P. Lehotsky
Warren Postman
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337
Email: slehotsky@uschamber.com
Email: wpostman@uschamber.com

Counsel for Plaintiff Chamber of Commerce of the United States of America

James P. McCann, OBA No. 5865
John J. Carwile, OBA No. 10757
Mary E. Kindelt, OBA No. 21728
MCDONALD, MCCANN, METCALF & CARWILE, LLP
15 E. Fifth Street, Suite 1400
Tulsa, OK 74103
Tel: (918) 430-3700
Email: jmccann@mmmsk.com
Email: jcarwile@mmmsk.com
Email: mkindelt@mmmsk.com

Karen R. Harned
Luke A. Wake
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 314-2048

William S. Consovoy
Thomas R. McCarthy
J. Michael Connolly
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201

Email: karen.harNed@nfib.org
Email: luke.wake@nfib.org

Andrew D. Herman
MILLER & CHEVALIER CHARTERED
655 Fifteenth Street, NW, Suite 900
Washington, DC 20005
Tel: (202) 626-5869
Email: aherman@milchev.com

Counsel for Plaintiff National Federation of Independent Business

Tel: (703) 243-9423
Email: will@consovoymccarthy.com
Email: tom@consovoymccarthy.com
Email: mike@consovoymccarthy.com

Michael H. Park
CONSOVOY MCCARTHY PARK PLLC
3 Columbus Circle, 15th Floor
New York, NY 10019
Tel: (212) 247-8006
Email: park@consovoymccarthy.com

Counsel for Plaintiffs Chamber of Commerce of the United States of America, National Federation of Independent Business, State Chamber of Oklahoma, Tulsa Regional Chamber, and Portland Cement Association

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2015, I electronically served the foregoing pleading with the Clerk of Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants that was sent to the following CM/ECF registrants:

Cathryn McClanahan
Andrew James Doyle
Amy Jeanne Dona

/s/ Mary E. Kindelt
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EXHIBIT “A”

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

States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, and New Mexico State Engineer, Plaintiffs, vs. 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, Jo Ellen Darcy, in her official capacity as Assistant Secretary of the Army (Civil Works), Defendants.	Case No. 3:15-cv-59 **ORDER**

Plaintiffs—twelve states and two agencies of a thirteenth state—challenge implementation of a final regulation promulgated under the Clean Water Act (CWA). Defendants—the United States Environmental Protection Agency (EPA), the United States Army Corps of Engineers (ACOE), and the chief administrators of those two agencies—seek a stay. Plaintiffs oppose the request for a stay, and move for entry of a scheduling order so that the case can proceed.

Summary

The regulation at issue is the Clean Water Rule: Definition of Waters of the United States, 80 Fed. Reg. 37,054 (June 29, 2015) (WOTUS Rule). The parties dispute whether judicial review of the WOTUS Rule is within the jurisdiction of the district courts or of the courts of appeal. Defendants seek a stay pending a court of appeals determination of that jurisdictional question.

In this court's opinion, defendants have not met their burden of establishing need for a stay, and the motion will therefore be denied. A schedule for progression of the case will be ordered.

Facts and Procedural History

Plaintiffs challenge the WOTUS Rule on grounds that it exceeds the statutory authority of the federal agencies under the Commerce Clause, that the EPA and the ACOE did not comply with the Administrative Procedures Act in promulgating the regulation, and that the regulation infringes on the rights of the plaintiff states in violation of the Tenth Amendment and principles of federalism. Plaintiffs seek declaratory and injunctive relief.

This court denied defendants' first motion for a stay. (Doc. #55). Subsequently, the district judge issued a preliminary injunction, enjoining enforcement of the WOTUS Rule in the thirteen states that are involved in this case. (Doc. #70; Doc. #79).

This case is one of many—filed in federal district courts across the country—to challenge the WOTUS Rule. The defendants moved to centralize proceedings in those cases, but, on October 13, 2015, the Judicial Panel on Multidistrict Litigation (MDL Panel) denied defendants' motion. In re: Clean Water Rule: Definition of "Waters of the United States", MDL No. 2663, Doc. #163 (J.P.M.L. Oct. 13, 2015). Defendants' second motion for a stay in this case was therefore denied as moot. (Doc. #94). This order addresses defendants' third motion for a stay.

The parties dispute whether original jurisdiction to review the WOTUS Rule lies in the district court, or in the court of appeals under the CWA's bifurcated system for judicial review of regulations. Pursuant to 33 U.S.C. § 1369(b)(1) of the CWA, judicial

review of certain administrative actions concerning "any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business." Though the statute uses the term "may," it has been interpreted as providing the circuit courts with exclusive jurisdiction to review CWA regulations encompassed by § 1369(b)(1).

In issuing the preliminary injunction, the district judge concluded that original jurisdiction lies in the district court:

> If the exceptionally expansive view advocated by the government is adopted, it would encompass virtually all EPA actions under the Clean Water Act. It is difficult to imagine any action the EPA might take in the promulgation of a rule that is not either definitional or regulatory. This view of §1369(b)(1)(F)'s grant of jurisdiction would run precisely contrary to Congress' intent in drafting the court of appeals jurisdictional provision as recognized in the Supreme Court in National Cotton Council of America v. U.S. E.P.A..
>
> The relationship between issuing or denying a permit and the Rule at issue is tangential to issuance or denial of a permit—a classic red herring. Under these circumstances, original jurisdiction lies in this court and not the court of appeals.

(Doc. #70, pp. 5-6) (citations omitted). The defendants did not seek interlocutory appeal of the order granting a preliminary injunction.

In addition to the district court challenges, petitions for review of the WOTUS Rule were filed in three federal circuit courts.[1] Under 28 U.S.C. § 2112(a), the various circuit court petitions were assigned to the Sixth Circuit Court of Appeals. In re Final

[1] Plaintiffs are among those who filed for review in the court of appeals. (Doc. #12-1, p. 2), but plaintiffs later moved to dismiss their petition for review in the Sixth Circuit based on lack of jurisdiction. North Dakota et al.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction, North Dakota v. U.S. Envtl. Prot. Agency, No. 15-3831 (6th Cir. Oct 2, 2015), ECF No. 55.

Rule: Clean Water Rule: Definition of "Waters of the United States," MCP No. 135 (J.P.M.L. July 28, 2015). On October 9, 2015, the Sixth Circuit issued an order staying implementation of the WOTUS Rule nationwide, pending further order of that court.

The Sixth Circuit has not yet ruled on the question of its exclusive jurisdiction under § 1369(b)(1). In the instant motion, Defendants request that the case be stayed pending a ruling of the Sixth Circuit on that question. (Doc. #90). Defendants advise the court that oral argument before the Sixth Circuit is scheduled for December 8, 2015.

Law and Discussion

A court may, in its discretion, grant a stay when it serves the interest of judicial economy and efficiency. Defendants, as moving parties, have the burden to establish the basis for a stay. Landis v. N. Am. Co., 299 U.S. 248, 255 (1936).

In exercising its discretion, the court must balance three factors: (1) potential prejudice to the non-moving party; (2) hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by granting a stay. Buie v. Blue Cross & Blue Shield of Kan. City, Inc., No. 05-0534-CV-W-FJG, 2005 WL 2218461, at *1 (W.D. Mo. Sept. 13, 2005) (citing Rivers v. Walt Disney Co., 980 F. Supp. 1358, 1360 (C.D. Cal. 1997)); see also St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc., 774 F. Supp. 2d 596, 600 (D. Del. 2011); Cajun Offshore Charters, LLC v. BP Prods. N. Am. Inc., No. 10-1341, 2010 WL 2160292, at *1 (E.D. La. May 25, 2010).

Defendants assert that a short stay would conserve judicial resources, and that, since implementation of the WOTUS Rule has been enjoined, the requested stay would not harm plaintiffs. Plaintiffs respond that the only actions required at this time concern filing of the administrative record and resolving questions about the completeness of that

record. Defendants counter that decisions by this court about completeness of the record might not be applicable to other cases challenging the WOTUS Rule. (Doc. #95, p. 3).

There is no dispute that the administrative record will need to be compiled for review by a court. At this stage of the litigation, what is required of defendants is that they file a certified index to the administrative record, so that any questions about completeness of the record may then be addressed. Defendants have not demonstrated sufficient reason why that process should not begin. A delay in that process is not likely to conserve significant judicial resources, and defendants have not demonstrated that beginning that process would cause them hardship or inequity.

Defendants suggest that, if the Sixth Circuit determines that it has exclusive jurisdiction, this case must necessarily be dismissed. (Doc. #90, p. 4). Plaintiffs disagree, contending that any decision by the Sixth Circuit would not be binding on a district court in the Eighth Circuit.

Defendants cite Riverkeeper, Inc. v. E.P.A., No. 06 CIV.12987(PKC), 2007 WL 4208757, at*2 (S.D.N.Y. Nov. 26, 2007), where the district court concluded it had jurisdiction to review a different CWA regulation. A few days after entering an order to that effect, the district court certified the question for interlocutory review, and stayed the district court case pending the circuit court's ruling on the jurisdictional question, noting that the decision on the jurisdictional issue was "not free from doubt." Id. The court also noted the "advanced state of proceedings in the [circuit court]," a factor not present in the instant case. Id.[2]

[2] The defendants also cite Mo. ex rel. Nixon v. Prudential Health Care Plan, Inc., 259 F.3d 949, 953 (8th Cir. 2001), but that case is easily distinguished from the instant

If the Sixth Circuit determines that it has exclusive jurisdiction, defendants may move to dismiss this case. The reasoning of the Sixth Circuit's decision may well inform a decision on a motion to dismiss this case. But, any binding effect of the Sixth Circuit's ruling will be decided if there is a motion to dismiss this case, and need not be addressed now.

Considering potential prejudice to the plaintiffs resulting from a stay, potential hardship and inequity to the defendants if the action is not stayed, and the judicial resources that would be saved by granting a stay, the court concludes that defendants have not established that a stay is warranted.

Plaintiffs' Request for Scheduling Order

In light of denial of a stay, it is necessary to establish a schedule for progress of the litigation. The court therefore orders:

(1) By November 20, 2015, defendants shall file a certified index of the administrative record. As to any documents over which privilege is asserted, defendants shall identify the nature of each document in a manner that, without revealing information itself privileged or protected, will enable plaintiffs to assess the claim of privilege.

(2) Any motions to supplement the administrative record shall be filed by December 4, 2015.

(3) Plaintiffs shall file a motion for summary judgment on or before January 4, 2016.

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case because it involved two district court cases against the same defendant pertaining to the same contract dispute. Burger v. Am. Mar. Officers Union, 170 F.3d 184 (5th Cir. 1999) (per curiam), is also distinguishable, since it involved two cases filed by the same plaintiff in two different district courts.

(4) Defendants shall file a combined motion for summary judgment, and opposition to plaintiffs' motion for summary judgment, on or before February 15, 2016.

(5) Plaintiffs shall file a combined response to defendants' motion for summary judgment and reply to defendants' opposition to plaintiffs' motion for summary judgment on or before February 29, 2016.

(6) Defendants shall file any reply brief on or before March 21, 2016.

(7) The parties must jointly prepare and file an appendix, containing those portions of the administrative record that are cited or otherwise relied upon in any memorandum in support of or opposition to the motions for summary judgment, on or before April 1, 2016.

The court recognizes that, in the event motions to supplement the administrative record are filed, it may be necessary to amend this scheduling order.

Conclusion

For the reasons discussed above, defendants' motion for a stay, (Doc. #90), is **DENIED**, and plaintiffs' motion for entry of a scheduling order, (Doc. #82), is **GRANTED**.

IT IS SO ORDERED.

Dated this 10th day of November, 2015.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge