

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

STATE OF NORTH DAKOTA, *et al.*,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Defendants.

Case No. 3:15-cv-00059-RRE-ARS

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

Defendant Federal Agencies (“Agencies”) hereby move the Court to stay proceedings in this case pending a ruling from the United States Court of Appeals for the Sixth Circuit on the issue of whether exclusive jurisdiction to review the Clean Water Rule lies in the courts of appeals under 33 U.S.C. § 1369(b)(1). Although this Court has already addressed that issue, the Sixth Circuit is poised to do so as well; briefs in that court will be fully submitted and the issue ripe for decision by November 4, 2015. *In re Final Rule: Clean Water Rule: Definition of “Waters of the United States,”* Sixth Circuit No. 15-3799 (lead case), Doc. No. 24-2 (Sept. 16, 2015). If the Sixth Circuit has exclusive jurisdiction over Plaintiffs’ challenge to the Clean Water Rule, then district courts lack jurisdiction.

BACKGROUND

As explained in prior pleadings, the Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015), is a nationally-applicable rulemaking defining the scope of “waters of the United States” subject to regulatory jurisdiction under the Clean Water Act (“CWA” or the “Act”), 33 U.S.C. §§

1251-1387. To date, nearly 90 parties have filed sixteen petitions for review of the Clean Water Rule in the courts of appeals under 33 U.S.C. 1369(b)(1). On July 28, 2015, the United States Judicial Panel on Multidistrict Litigation (“MDL Panel”) transferred all of the petitions for review to the Sixth Circuit pursuant to the neutral circuit selection procedures under 28 U.S.C. § 2112(a)(3).¹ *In re Final Rule: Clean Water Rule: Definition of “Waters of the United States,”* MCP No. 135 (J.P.M.L.), Doc. 3; Sixth Circuit No. 15-3799 (lead case).

On September 9, 2015, 18 States, not including the Plaintiffs in this case, filed a motion in the Sixth Circuit asking that court to dismiss their own petitions and thereby resolve whether the Sixth Circuit has exclusive jurisdiction under 33 U.S.C. § 1369(b)(1). *See* Sixth Circuit No. 15-3799 (lead case), Doc. No. 23. The Sixth Circuit shortly thereafter entered an order establishing a streamlined schedule under which briefing will be fully submitted by November 4, 2015. *See* Sixth Circuit No. 15-3799 (lead case), Doc. No. 26. In compliance with this order, by October 2, 2015, various parties, including the Plaintiffs in this case, filed a total of eight motions to dismiss asserting that the Sixth Circuit lacks jurisdiction over fifteen pending petitions for review. On October 23, 2015, the Agencies will file their response, explaining why they believe exclusive jurisdiction resides in the Sixth Circuit.

In a second motion filed on September 9, those same 18 States moved for a nationwide stay of the Clean Water Rule pending judicial review. *See* Sixth Circuit No. 15-3799 (lead case), Doc. No. 24, at 2. On October 9, 2015, after the issue was fully briefed, the Sixth Circuit stayed

¹ Plaintiffs in this case filed a petition for review of the Clean Water Rule in the Eighth Circuit. *North Dakota v. EPA*, Case No. 15-2552 (8th Cir.). That petition was transferred to the Sixth Circuit under the MDL Panel’s July 28, 2015 order, and is now captioned as *North Dakota v. EPA*, Case No. 15-3831 (6th Cir.).

the Clean Water Rule pending further order of that court. *See* Sixth Circuit No. 15-3799 (lead case), Doc. No. 64.

Also on September 9, the Agencies renewed their motion in this Court to stay proceedings pending a decision by the MDL Panel, under 28 U.S.C. § 1407, to consolidate all of the district court actions in a single district court. On October 13, 2015, the MDL Panel entered an order denying the motion to consolidate. *In re: Clean Water Rule: Definition of “Waters of the United States,”* MDL No. 2663 (J.P.M.L.), Dkt. No. 163. The Agencies’ September 9 renewed motion is therefore moot. However, as explained below, a stay of proceedings pending a decision by the Sixth Circuit is appropriate.

ARGUMENT

This Court has “broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1417 (5th Cir. 1995). The Court may grant a stay where it would serve “economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). As part of this broad discretion, a district court may stay a suit that is duplicative of another federal court suit. *See, e.g., Greco v. Nat’l Football League*, No. 3:13-CV-1005-M, 2015 WL 4475663, at *15-16 (N.D. Tex. July 21, 2015) (staying district court proceedings pending review of related issues in appellate case); *Chrubby v. Global Tel Link Corp.*, No. 1:14-CV-456 GBL/TRJ, 2015 WL 4740633, at *2-3 (E.D. Va. Jan. 14, 2015) (same); *Meijer, Inc. v. Abbott Labs.*, No. C 07-5470 CW, 2009 WL 723882, at *2-5 (N.D. Cal. Mar. 18, 2009) (same); *Riverkeeper, Inc. v. EPA*, No. 06 CIV. 12987 PKC, 2007 WL 4208757, at *2 (S.D.N.Y. Nov. 26, 2007) (staying district court proceedings pending court of appeal’s determination of its jurisdiction to review a CWA rule under 33 U.S.C. § 1369(b)(1)).

“[I]n determining whether a stay is proper, courts consider the interests of the parties and potential conservation of judicial resources.” *Greco*, 2015 WL 4475663, at *15 (citing *Landis*, 99 U.S. at 254–55). Here, the Court should grant a stay pending a ruling from the Sixth Circuit on the question of that court’s jurisdiction to hear challenges to the Clean Water Rule because a stay: (1) would conserve the resources of the Court and the parties by allowing the Sixth Circuit to rule on its own jurisdiction; and (2) would not harm Plaintiffs, who have already obtained the protection provided by this Court’s order preliminarily enjoining the Clean Water Rule.

First, a stay of proceedings would conserve resources by avoiding the prospect of the Agencies simultaneously defending litigation in this Court and in the Sixth Circuit Court of Appeals. Although this Court has already addressed its jurisdiction in the context of Plaintiffs’ motion for a preliminary injunction, the Sixth Circuit has not yet done so. If the Sixth Circuit finds, as did the district courts in the Southern District of Georgia and the Northern District of West Virginia,² that exclusive jurisdiction lies in the courts of appeals, then the Agencies would suggest that this case must be dismissed. *See, e.g., Oklahoma v. EPA*, No. 15-CV-0381 (N.D. Okl., July 31, 2015) at 6 (“If the Sixth Circuit finds that appellate jurisdiction is appropriate, that will mean that these cases never should have been filed in district court and that this Court does not have jurisdiction over plaintiffs’ claims.”) As the court designated to hear all of the petitions for review, the Sixth Circuit’s decision on whether it has jurisdiction under 33 U.S.C. § 1369(b)(1) will have a direct bearing on the question of district court jurisdiction, and its schedule for briefing of this issue allows for prompt resolution. Therefore, this Court should enter a stay of proceedings until the Sixth Circuit decides this issue. *Riverkeeper, Inc. v. EPA*,

² *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).

No. 06 CIV. 12987 PKC, 2007 WL 4208757, at *2 (S.D.N.Y. Nov. 26, 2007) (“there is much to be gained from knowing whether the Fifth Circuit considers itself to have exclusive jurisdiction over a review of the final agency action. If this Court were to charge ahead . . . to final judgment and it were later determined that this Court lacked jurisdiction, it may have served to delay a final adjudication in the proper court and would have wasted resources of the parties and the Court.”).³

Second, a stay of proceedings in this case would not harm Plaintiffs. The Rule is already enjoined with respect to Plaintiffs (as well as nationwide, under the Sixth Circuit’s order). The Agencies seek only a temporary stay of proceedings in this Court until the Sixth Circuit decides whether it has jurisdiction under 33 U.S.C. § 1369(b)(1). Briefing on the jurisdictional question – including Plaintiffs’ own motion to dismiss their petition for review – will be completed by November 4, 2015. Therefore, a stay of proceedings until the Sixth Circuit rules on such motions is of limited duration, and is not “immoderate.” *Landis*, 299 U.S. at 256.

³ The Sixth Circuit previously addressed the issue of jurisdiction under § 1369(b)(1) in *National Cotton Council of America v. EPA*, and held that jurisdiction to review a nationwide CWA regulation that relates to permitting procedures was proper in the Sixth Circuit, “at a minimum, [under] § 1369(b)(1)(F).” 553 F.3d 927, 933 (6th Cir. 2009). *National Cotton Council* is instructive to the circumstances here. In *National Cotton Council*, environmental and industry petitioners had filed petitions for reviews of a CWA regulation in eleven circuit courts of appeals, and the Sixth Circuit was randomly selected by order of the MDL Panel as the circuit for consolidation. *Id.* at 932. A subset of the environmental petitioners had also filed a complaint in the Northern District of California to preserve review in the event that the Sixth Circuit concluded that it did not have jurisdiction. *Id.* The Northern District of California District Court granted EPA’s request for a stay until the Sixth Circuit resolved the jurisdictional question of whether the circuit court had exclusive jurisdiction over the challenges to the regulation at issue there. *See Baykeeper, v. EPA*, 3:07-cv-725-SI (N.D. Cal.), Dkt. No. 9. The Sixth Circuit subsequently resolved the jurisdictional question, holding that original jurisdiction was in the court of appeals. The district court case was then dismissed. *Id.*, Dkt. Nos. 21, 22.

CONCLUSION

For the foregoing reasons, the Agencies 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: October 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2015, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Stacey Bosshardt