

**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, 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 pending a decision on their motion for consolidation of this case and various other district court cases by the Judicial Panel on Multidistrict Litigation (MDL Panel).

Also pending is plaintiffs’ motion for a preliminary injunction. The motion for a preliminary injunction is not yet fully briefed, and there has not yet been a decision on plaintiffs’ request for a hearing on that motion.

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), which is scheduled to take effect on August 28, 2015. The parties dispute whether judicial review of the WOTUS Rule is within the jurisdiction of the district courts or of the courts of appeal.

Plaintiffs contend that, if a stay were granted, they would be severely prejudiced because they would not be able to pursue their motion for a preliminary injunction prior to the date the regulation will take effect, since the MDL Panel's decision on the defendants' motion for consolidation will not be made before the effective date of the WOTUS Rule. Defendants assert that plaintiffs could seek preliminary relief in the court of appeals, and that the WOTUS Rule does not require any immediate action by the plaintiff states.

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

Facts

The WOTUS Rule, which was promulgated jointly by the EPA and the ACOE, defines the scope of "waters of the United States" which are subject to federal regulatory jurisdiction under the CWA, 33 U.S.C. §§ 1251-1388. Defendants describe the rule as "intended to provide clarity and certainty to the regulated community about what waters are within federal CWA jurisdiction and what waters are outside of CWA jurisdiction." (Doc. #12-1, p. 1). Plaintiffs describe the rule as making "sweeping changes for the determination of [CWA] jurisdiction, drastically altering the administration of water quality programs implemented by [plaintiffs], EPA, and the ACOE." (Doc. #24, p. 2).

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 case is one of ten cases challenging the WOTUS Rule which have been filed in federal district courts across the country; the ten cases collectively include seventy-one plaintiffs. A total of thirty-one states are involved as plaintiffs; a number of industry groups and a few private entities are also involved as plaintiffs.¹ Among the district court actions, the instant case involves the largest number of states. In each of the ten cases, both the EPA and the ACOE are defendants.

Defendants have filed for stays in all of the district court actions; five district courts have granted stays, some without opposition. (Doc. #34, p. 2). Plaintiffs have moved for preliminary injunctions in five of the other district court actions; decisions have not yet been made on any of those motions. (Doc. #34, p. 4). One court, the Northern District of Oklahoma, granted a stay while a motion for a preliminary injunction was pending. Oklahoma ex rel. Pruitt v. U.S. Evtl. Prot. Agency, Chamber of Commerce of the U.S. v. U.S. Evtl. Prot. Agency, Nos. 15-CV-0381-CVE-FHM, 15-CV-0386-CVE-PJC, 2015 WL 4607903, at *4 (N.D. Okla. July 31, 2015). In another court, the Southern District of Georgia, the docket reflects that the court recently held a hearing on the plaintiffs' motion for a preliminary injunction, while a motion for a stay is pending. The docket does not yet reflect that court's decision on either the motion for a preliminary injunction, or on the motion for a stay. See State of Georgia v. McCarthy, S.D. Ga.

¹ Agencies of some states, rather than the states themselves, are plaintiffs in some of the cases. For example, in this case, twelve states are plaintiffs, and two agencies of a thirteenth state—New Mexico—are plaintiffs.

No. 2:15-CV-00079-LGW-RSB. In another district in which there is also a motion for a stay pending, a hearing on plaintiffs' motion for a preliminary injunction is scheduled for August 24, 2015. Murray Energy Corp. v. U.S. Env'tl. Prot. Agency, N.D.W. Va. No. 1:15-CV-00110-IMK, Doc. #16.

Plaintiffs advise the court that the earliest date on which the MDL Panel will consider the petitions for consolidation of the district court actions is October 1, 2015, and that if the panel cannot consider the motion on that date, the next available date is December 3, 2015. (Doc. #24, p. 2 n.2). See also Hearing Information, United States Judicial Panel on Multidistrict Litigation, <http://www.jpml.uscourts.gov/hearing-information> (last visited Aug. 18, 2015). Plaintiffs assert that the MDL's decision on the consolidation motion may not be made for some months after a hearing, so a decision on consolidation may be several months away.

In addition to the district court challenges, petitions for review of the WOTUS Rule were filed in three federal circuit courts. Plaintiffs are among those who filed for review in the court of appeals. (Doc. #12-1, p. 2). Plaintiffs describe their filing as having been done protectively, despite their position that the WOTUS Rule is not within the scope of the circuit courts' original jurisdiction under the CWA. (Doc. #24, p. 15).

The process for consolidation of circuit court reviews of agency actions is different from the process for consolidation of district court matters. Under 28 U.S.C. § 2112(a), if petitions for review of an agency action are filed in two or more courts of appeal, one circuit is randomly designated to hear the matter, and that designation is made within ten days of the request. Pursuant to § 2112(a), the circuit court petitions involving review of the WOTUS Rule have been assigned to the Sixth Circuit Court of Appeals. In re: Clean Water Rule: Definition of

“Waters of the United States”, 80 Fed. Reg. 37,054, Published on June 29, 2015, J.P.M.L. MCP No. 135, Doc. #3. The Sixth Circuit has not yet made any decision as to its original jurisdiction to consider the petitions.

Law and Arguments

1. Jurisdiction

The CWA provides a bifurcated system for judicial review of regulations promulgated under that statute. 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).

Defendants assert that the WOTUS Rule is within the scope of the circuit court’s exclusive jurisdiction pursuant to § 1369(b)(1); plaintiffs maintain that it is not. Defendants cite, inter alia, National Cotton Council of America v. United States Environmental Protection Agency, 553 F.3d 927, 933 (6th Cir. 2009), where the circuit court found that it had original jurisdiction to review a CWA regulation governing permits under the National Pollutant Discharge Elimination System program. Plaintiffs cite Friends of the Everglades v. United States Environmental Protection Agency, 699 F.3d 1280, 1283 (11th Cir. 2012), where, after MDL consolidation, the Eleventh Circuit Court of Appeals held that a rule exempting water transfers from permit requirements was not properly reviewed by the circuit court. As discussed above,

petitions seeking review of the WOTUS Rule have been consolidated in the Sixth Circuit Court of Appeals, and that court will determine whether it has exclusive jurisdiction to review the WOTUS Rule.

2. Standard on Motion for Stay

There is no dispute that the court may, in its discretion, grant a stay when it serves the interest of judicial economy and efficiency. 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). A district court is not required to stay a case merely because a motion for MDL consolidation has been filed. Asmann v. Dairy Farmers of Am., Inc., No. 12-1060-KHV/DJW, 2012 WL 1136865, at *2 (D. Kan. Apr. 4, 2012). 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).

3. Potential Hardship and Inequity to Defendants

Defendants contend that, if a stay is not granted, they will experience extreme hardship because they will need to defend multiple cases in multiple district courts around the country. They further assert that, absent a stay, conflicting district court rulings might “undermin[e] the regulatory clarity and certainty that are at the heart of the [WOTUS] Rule” and result in a

disservice to the public. (Doc. #12-1, p. 8).

Plaintiffs assert that, since the matter involves review of an administrative record, there would not be duplicative discovery absent a stay. Plaintiffs argue that the only decisions likely to be made prior to the MDL decision are on the motions for preliminary injunction, and that the burden to the defendants of potentially conflicting decisions on those motions would be minimal. Plaintiffs characterize any harm to defendants as “self-inflicted,” in that it would result from the defendants’ “insistence on implementing the WOTUS Rule on August 28, 2015.” (Doc. #24, p. 12).

4. Potential Prejudice to Plaintiffs

The harm that plaintiffs assert is delay in consideration of their motion for a preliminary injunction until after the date on which the WOTUS Rule becomes effective. Plaintiffs contend that implementation of the WOTUS Rule will impose additional administrative burdens on the states, and will impact infrastructure projects and a multitude of industries (such as agricultural, mineral, and others). Plaintiffs contend that they are attempting to preserve the status quo during the process of judicial review of the WOTUS Rule. In plaintiffs’ view, defendants’ arguments about possible inconsistent outcomes is more relevant to the question of consolidation than to the question of whether a stay should be granted.

Defendants assert that if the MDL Panel consolidates the various district court cases, the consolidated district court and consolidated appellate reviews would continue as parallel proceedings. In defendants’ view, plaintiffs “will have ample opportunity to press their claims in a timely fashion.” (Doc. #12-1, p. 9). It is defendants’ position that the WOTUS Rule would not require that plaintiffs take any immediate action, and so its implementation would not result in

prejudice to plaintiffs.

5. Potential Savings of Judicial Resources

Defendants argue that overlapping claims in various district courts would waste judicial resources. They assert that a stay would avoid duplicative litigation and aid in orderly management of the various cases which challenge the WOTUS Rule. Defendants argue that avoiding duplicative litigation is especially important in this situation, where both district court and appellate court proceedings are pending, since appellate court decisions establish binding precedent. (Doc. #12-1, p. 6). Plaintiffs contend that consolidation and transfer are not warranted, and that defendants' arguments are premised on the MDL Panel ordering consolidation, and on the Sixth Circuit determining that it has exclusive jurisdiction. (Doc. #24, p. 14).

Discussion

If there is “‘even a fair possibility’ that the stay would work damage on another party,” the party seeking the stay must demonstrate “a clear case of hardship or inequity.” Gold v. Johns-Manville Sales Corp., 723 F.2d 1068, 1075-76 (3d Cir. 1983) (quoting Landis, 299 U.S. at 255).

The heart of the issue is whether plaintiffs should have an opportunity to establish their entitlement to a preliminary injunction prior to August 28, 2015. As one district court has stated, “When a party asks the Court to stay a motion for pendente lite relief, however, the potential that a stay may render the party seeking that relief incapable of obtaining relief tempers the Court’s discretion in issuing the stay in the first place.” Hertz Corp. v. The Gator Corp., 250 F. Supp. 2d 421, 425 (D.N.J. 2003).

In Rolo v. General Development Corp., 949 F.2d 695 (3d Cir. 1991), the court discussed circumstances where granting a stay may be tantamount to denying the motion for preliminary injunctive relief. In Rolo, the district court stayed the plaintiffs' motion for a preliminary injunction pending resolution of criminal cases and bankruptcy proceedings in which the plaintiffs were involved. The court of appeals reversed the stay as an abuse of discretion. The court reasoned that the stay was for an indeterminate time, since the bankruptcy proceedings were not scheduled for hearing and the criminal case would not begin for five months, and that plaintiffs had filed affidavits tending to show that irreparable injury would occur in the interim.

The Rolo court stated:

If a district court decides to stay proceedings for an indeterminate period and a party has competent and specific evidence tending to show that it will be unable to secure effective relief when the stay is terminated, the party in such jeopardy, in the absence of extraordinary circumstances, is entitled to have a motion for pendente lite relief considered on its merits.

Id. at 703-04. If a stay were granted in this matter, it would be tantamount to denying plaintiffs' motion for preliminary injunctive relief.

In this court's view, plaintiffs have shown a "fair possibility" that a stay would result in damage to them, and defendants have not demonstrated "a clear case of hardship or inequity" as is required under Landis. It appears that the motions for preliminary injunctive relief are very similar, and that defendants' responses to those motions are virtually identical from one district to another. In the event other district courts decide any pending motions for injunctive relief before plaintiffs' motion is considered in this district, the impact of those other decisions can be considered by this court in ruling on plaintiffs' motion.

Conclusion

For the reasons discussed above, defendants' motion for a stay, (Doc. #12), is **DENIED**.

Dated this 18th day of August, 2015.

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

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FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State of North Dakota, et al.,
Plaintiffs,

v.

United States Environmental
Protection Agency, et al.,
Defendants.

Case No. 3:15-cv-59

**ORDER DENYING MOTION TO
CONTINUE PRELIMINARY
INJUNCTION HEARING**

Defendants have moved to continue the preliminary injunction hearing set for August 21, 2015, at 1:30 pm.¹ The court is currently involved in a complex civil trial expected to last through August 28, 2015. The court has informed trial counsel that it has other matters to attend to on Friday and has carved out the afternoon to allow the parties in this case an opportunity to be heard on the preliminary injunction motion. Friday afternoon is the only time the court has available for a hearing in this case prior to August 28, 2015. If the parties stipulate to a stay, the court would be willing to reschedule the hearing for sometime in October. Without a stipulation, the hearing will take place as scheduled. Because the defendants' deadline to file a brief is August 25, 2015, the court will accept briefing after the hearing.

IT IS SO ORDERED.

Dated this 19th day of August, 2015.

/s/ Ralph R. Erickson
Ralph R. Erickson, Chief District Judge
United States District Court

¹ Doc. #57.