IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

AMERICAN FARM BUREAU FEDERATION, *et al*, Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al*, Defendants.	No. 3:15-cv-165

PLAINTIFFS' MOTION TO REOPEN

Pursuant to this Court's order of February 8, 2017 (Dkt. 54), Plaintiffs American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Leading Builders of America, Matagorda County Farm Bureau, National Alliance of Forest Owners, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, Public Lands Council, and Texas Farm Bureau respectfully move for an order reopening this case to permit the immediate filing of a motion for a preliminary injunction.

BACKGROUND

1. On June 29, 2015, the Environmental Protection Agency and Army Corps of Engineers (together, the Agencies) published a final administrative rule (the Rule) purporting to "clarify" the definition of "waters of the United States" within the meaning of the Clean Water Act (CWA)—that is, the scope of the Agencies' regulatory jurisdiction under the CWA. On July 2, 2015, plaintiffs filed a complaint for declaratory and injunctive relief in this Court, alleging that the Defendants' promulgation of the Rule violated the Administrative Procedure Act;

exceeded their authority under Article I, Section 8 of the Constitution; and offended the Due Process Clause of the Fifth Amendment. *See generally* Dkt. 1. Plaintiffs seek a declaration that the Rule is unlawful and an injunction against its implementation or application.

2. As it initially came to the Court, this case presented the threshold question of whether jurisdiction to hear this case fell to this Court or instead the courts of appeals. Section 509(b) of the CWA (33 U.S.C. § 1369(b)) establishes a special scheme of judicial review for certain agency decisions and rules promulgated under the CWA. In that section, Congress conferred original jurisdiction on the courts of appeals to review challenges to seven categories of final agency actions—including, the Agencies argued, the Rule at issue here. At the same time, the Administrative Procedure Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. Thus, when judicial review of a final agency action under the Clean Water Act is *not* available in the courts of appeals under Section 1369(b), the APA provides a cause of action in district court under 28 U.S.C. § 1331.

In light of the Agencies' assertion that review of the Rule belonged in the courts of appeals, various parties (including many of the plaintiffs in this case) filed protective petitions for review in under Section 1369(b). Those petitions initiated original actions in the courts of appeals that were entirely separate from the complaint in this case. More than 100 parties filed over 20 petitions across the country; all of the petitions were ultimately transferred to and consolidated by the Sixth Circuit.

3. Shortly after the petitions were consolidated, several petitioners moved for, and the Sixth Circuit granted, a nationwide stay of the Rule pending the court's consideration of the merits. *See In re EPA and Dept. of Defense Final Rule*, 803 F. 3d 804 (6th Cir. 2015). The court held, in particular, that "petitioners have demonstrated a substantial possibility of success on the

merits of their claims," describing the Rule as "facially suspect." *Id*. at 807. Acknowledging "the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general," the Court concluded that "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being." *Id*. at 808.

4. Firmly of the view that jurisdiction belongs in *this* Court, the National Association of Manufacturers—which did not join any of the petitions for review in the court of appeals—intervened in the petitions for review and moved to dismiss each for lack of jurisdiction.

While the jurisdictional issue was pending in the Sixth Circuit, the Agencies moved this Court for a stay of the proceedings to await the Sixth Circuit's decision. Dkt. 24. The Court heard argument on that motion on December 4, 2015 (Dkt. 29) but did not formally act on it.

The Sixth Circuit subsequently denied the motions to dismiss, holding in a splintered decision that jurisdiction belongs in the court of appeals, not the district courts. *See In re EPA and Dept. of Defense Final Rule*, 817 F.3d 261 (6th Cir. 2016).

After the Sixth Circuit issued its decision on jurisdiction, the National Association of Manufacturers filed a petition for a writ of certiorari in the U.S. Supreme Court. The Supreme Court granted the petition and, on January 22, 2018, issued a decision reversing the Sixth Circuit. The Supreme Court held, in short, that "[t]he WOTUS Rule falls outside the ambit of § 1369-(b)(1), and any challenges to the Rule therefore must be filed in federal district courts." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 2018 WL 491526, at *4 (U.S. Jan. 22, 2018) (Exhibit A).

We expect the Supreme Court to issue a certified judgment returning the petitions for review to the Sixth Circuit on or before February 23, 2018. Once the case is returned to the Sixth Circuit near the end of next month, we expect the Sixth Circuit immediately to dismiss the pending petitions for review, dissolving its nationwide stay of the Rule. Although the Agencies have proposed to add a later applicability date to the Rule (*see* 82 Fed. Reg. 55,542), it is unclear

when that rule will be finalized.

5. On February 8, 2017—after the Supreme Court granted certiorari but before it issued its decision reversing the Sixth Circuit—this Court entered an order administratively closing this case, inviting the parties to move to reopen the case under appropriate circumstances. Dkt. 54.

ARGUMENT

The Court should now enter an order reopening this litigation as expeditiously as possible. In its decision announced earlier this week, the Supreme Court confirmed that original jurisdiction to hear challenges to the Rule lies in the district courts and not the courts of appeals. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 2018 WL 491526, at *4 (U.S. Jan. 22, 2018). There is therefore no longer any doubt that this Court has jurisdiction to hear this lawsuit.

As noted, the Supreme Court will issue its certified judgment on or before February 23, 2018, returning the petitions for review to the Sixth Circuit. We expect that the Sixth Circuit to dismiss the petitions and lift the nationwide stay of the Rule. It is therefore essential that this Court have an opportunity to hear argument and rule upon a motion for a preliminary injunction before that time. Without a preliminary injunction in place by February 23, 2018, plaintiffs and their members are likely to suffer irreparable harm when the Sixth Circuit's stay is dissolved.

In saying this, we are mindful that the Court's February 8, 2017 order states that the parties may move to reopen the litigation "within thirty days after the Sixth Circuit terminates its abeyance or enters a further order on the matter." Dkt. 54, at 1. But, respectfully, there is no reason (practical or legal) to await a further order of the Sixth Circuit—and doing so would be highly prejudicial to plaintiffs.

The litigation pending in the Sixth Circuit is procedurally distinct and separate from this lawsuit. It originated when more than 100 petitioners (including some—but not all—of the plaintiffs here) filed petitions for review as original actions in the courts of appeals. Because the Sixth Circuit had asserted *original* jurisdiction over the petitions for review, no mandate will

issue to this or any other court, and no other process is necessary for this Court to proceed with this lawsuit. The Supreme Court having conclusively determined that jurisdiction belongs in this Court, the litigation should recommence immediately.[1]

Awaiting action by the Sixth Circuit would, moreover, unfairly prejudice plaintiffs. The next order likely to be entered by the Sixth Circuit is one that dismisses the petitions and dissolves the nationwide stay. The result, if a preliminary injunction is not entered by this Court in the interim, will be widespread and costly confusion about the state of the law. As the Sixth Circuit explained, "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being." 803 F.3d at 808. It is therefore essential that the Court reopen these proceedings in time for plaintiffs to move for and obtain a preliminary injunction before February 23, 2018.

CONCLUSION

The Court should reopen this case forthwith.

Dated: January 30, 2018

Respectfully Submitted,

/s/ Timothy S. Bishop

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[1] This is the approach taken by the Eleventh Circuit last week. A federal district court in Georgia initially dismissed a challenge to the Rule filed by eleven States, holding that original jurisdiction belonged in the courts of appeals. *See State v. McCarthy*, 2015 WL 5092568, at *1 (S.D. Ga. Aug. 27, 2015). The States appealed, but (like this Court) the Eleventh Circuit held the appeal in abeyance after the Supreme Court granted certiorari in *National Association of Manufacturers*. After the Supreme Court issued its decision this past Monday, the Eleventh Circuit immediately vacated the district court's order and remanded for further proceedings without awaiting the Supreme Court's certified judgment or any action by the Sixth Circuit. *See Georgia ex. rel. Carr v. Pruitt*, 2018 WL 523333, at *1 (11th Cir. Jan. 24, 2018). The Tenth Circuit did the same in *Chamber of Commerce v. EPA*, No. 16-5038.

CERTIFICATE OF CONFERENCE

In accordance with Local Rule 7.1.D and Court Procedure 6.C.2, counsel for plaintiffs certify that they conferred with counsel for the Agencies and counsel for intervenors. Counsel for the Agencies stated that the Agencies are not yet prepared to take a position on this motion. Counsel for the intervenors indicated that they consent to the motion "with the caveat that the imminent suspension of the Clean Water Rule may mean the litigation, or aspects of it, should not actively proceed."

/s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

I certify that on January 30, 2017, a copy of the foregoing document was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on all attorneys in this case.

/s/ *Michael B. Kimberly*