

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 23-5343

COMMONWEALTH OF KENTUCKY
Plaintiff-Appellant

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*
Defendants-Appellees

* * *

NO. 23-5345

KENTUCKY CHAMBER OF COMMERCE, *et al.*
Plaintiffs-Appellants

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*
Defendants-Appellees

**JOINT MOTION TO CONSOLIDATE
AND REVISE BRIEFING SCHEDULE**

Under Fed. R. App. P. 26(b) and 6 Cir. R. 26(a), the Commonwealth of Kentucky and Appellant Associations¹ (together, “Appellants”), as well as the

¹ Kentucky Chamber of Commerce, Chamber of Commerce of the United States of America, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce.

Federal Defendants-Appellees (“Appellees”), jointly move to consolidate case numbers 23-5343 and 23-5345 and to set a revised briefing schedule.

1. The underlying lawsuits challenge a federal rule revising the definition of a key phrase in the Clean Water Act—the “waters of the United States.” 88 Fed. Reg. 3004 (the “Initial Rule”). Kentucky and Appellant Associations filed separate suits earlier this year, which the district court consolidated. The district court denied Appellants’ motions for a preliminary injunction and dismissed both suits. Appellants appealed, after which they sought and received an injunction pending appeal from this Court. In granting the injunction, the Court noted the pendency of *Sackett v. EPA*, No. 21-454 (U.S.), which “will address the significant nexus test and therefore may have significant effects on the Final Rule.”

2. The Supreme Court decided *Sackett v. EPA* on May 25. 143 S. Ct. 1322 (2023). In light of *Sackett*, Appellees moved to hold these appeals in abeyance “pending publication of a new final rule regarding the definition of ‘waters of the United States’ in the Federal Register.” The Court granted abeyance. On August 29, EPA and the Army Corps issued the promised rule, which was published in the Federal Register on September 8. 88 Fed. Reg. 61964 (the “Revised Rule”).

3. The parties agree that the most efficient way to present the issues would be to consolidate the appeals, consistent with Federal Rule of Appellate Procedure 3(b)(2). The cases were consolidated in the district court and the appeals have so far proceeded in tandem in this Court as well.

4. The same day as the agencies issued the Revised Rule, the Court set a revised briefing schedule, which required Appellants to file their opening briefs by October 18, 2023.

5. Appellants then sought an unopposed extension of 30 days to file their opening briefs to “weigh how the Revised Rule affects the several legal questions in these appeals and their various interests, which include those of a sovereign state and its citizens, as well as those of the many and diverse members of Appellant Associations.”

6. This Court granted Appellants’ request and extended the deadline for opening briefs until November 17, 2023.

7. The parties now jointly request to revise the briefing schedule as follows:

- Appellants’ opening briefs shall be due December 18, 2023;
- Appellees’ brief shall be due February 16, 2024;
- Appellants’ reply briefs shall be due March 18, 2024.

8. If consolidated, the Commonwealth of Kentucky and Appellant Associations would file their own respective opening and reply briefs, in light of their differing governmental and private interests, subject to the requirements of Federal Rule of Appellate Procedure 32 and Sixth Circuit Rule 32. Appellees plan to file a single brief, but reserve the right to move for leave to file an overlength brief if necessary after seeing the opening briefs.

9. The parties respectfully request that the Court set the above revised briefing schedule for the following reasons:

10. To date, Appellants have used their additional time as they indicated they would: to evaluate the Revised Rule in light of *Sackett* and to determine what effect it has on these appeals, the underlying litigation more generally, and their varied interests.

11. All parties, including Appellees, have also used the time since the Revised Rule was issued to assess whether there is any way to resolve this appeal without proceeding with the litigation. Having engaged in discussions and determined that it is not possible to do so, the parties request a revised briefing schedule to provide both sides sufficient time to prepare and file their briefs in this case.

12. This request is not made for the purpose of delay.

For these reasons, the parties jointly request this Court consolidate the appeals and enter a revised briefing schedule as follows: Appellants' opening briefs shall be due December 18, 2023; Appellees' brief shall be due February 16, 2024; and Appellants' reply briefs shall be due March 18, 2024.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32(a), I certify that this motion complies with the type-volume limitation in Fed. R. App. P. 27(d)(2)(A) because it contains 722 words.

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 15-point Garamond font using Microsoft Word.

s/ Jenna M. Lorence

CERTIFICATE OF SERVICE

I certify that on October 26, 2023, the foregoing was electronically filed with the Court via the Court's appellate CM/ECF system, and a copy of the same was automatically served on all parties registered with the CM/ECF system on the same date.

s/ Jenna M. Lorence