

Nos. 23-5343

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY,
Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of Kentucky
No. 3:23-cv-7 (Hon. Gregory F. Van Tatenhove, U.S. District Judge)

DEFENDANTS-APPELLEES' STATUS REPORT

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Pursuant to this Court’s July 3, 2023, Order, Federal Appellees submit this status report. On January 18, 2023, the Environmental Protection Agency and Army Corps of Engineers (Agencies) published the Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004. The State of Kentucky and several trade associations (Plaintiffs) brought challenges to the Rule and moved to preliminarily enjoin the Rule. The district court denied Plaintiffs’ motions and dismissed Plaintiffs’ claims for lack of standing and ripeness. Plaintiffs appealed in both cases and moved for injunctions pending appeal. This Court granted Plaintiffs’ motions and enjoined the Rule’s enforcement in the state of Kentucky, and against all Plaintiffs and their members.

On May 25, 2023, the Supreme Court issued an opinion in *Sackett v. EPA*, 143 S. Ct. 1322, which addresses the standard for determining what constitutes “waters of the United States.” In June, the Agencies announced that they were developing a new rule to conform the definition of “waters of the United States” with *Sackett*, and that the Agencies intend to issue the rule on or before September 1, 2023. As a result, the Agencies moved this Court to hold the related appeals in abeyance pending publication of a new final rule regarding the definition of “waters of the United States” in the Federal Register, which this Court granted.

On August 29, 2023, the Agencies issued a final rule that amends the “Revised Definition of ‘Waters of the United States’” to conform with *Sackett*. U.S. EPA, *Amendments to the 2023 Rule*, <https://www.epa.gov/wotus/amendments-2023-rule>. The Agencies have submitted the new rule for publication in the Federal Register, but the rule has not yet been published. It is Federal Appellees’ view that the abeyance will end once the new rule is published in the Federal Register. The Agencies will notify the Court and the parties when the new rule is published, at which point the Court should issue a new briefing schedule.¹

¹ If the new rule has not been published in 60 days, pursuant to this Court’s July 3 Order, the Agencies will submit a status report by October 31, 2023, and every 60 days thereafter for the duration of the abeyance.

Respectfully submitted,

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