

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, <i>et</i>)	
<i>al.</i> ,)	
)	
Plaintiffs,)	
)	Civil No. 3:15-cv-00059-PDW-ARS
v.)	
)	
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
Defendant.)	

PLAINTIFF STATES’ STATUS REPORT

Plaintiff State of North Dakota, most of the other Plaintiff States¹, and Plaintiff-Intervenor, the Governor of the State of Iowa, Kimberly K. Reynolds (collectively, the “Plaintiff States”), respectfully submit this Status Report in response to this Court’s June 24, 2020 Order staying this action (ECF No. 325) and the Court’s January 18, 2023 Order requiring a status report by July 14, 2023 (ECF No. 360). For the reasons stated herein, Plaintiff States respectfully request that the Court continue the stay of this action.

¹Alaska, Arizona, Arkansas, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming. Arizona plans to withdraw from this litigation and takes no position on this status report.

Since the Plaintiff States' January 17, 2023 Status Report (ECF No. 359), there have been several material developments (as detailed below) in the status of the U.S. Environmental Protection Agency's and the U.S. Army Corps of Engineers' (collectively "Agencies") efforts to define "Waters of the United States" ("WOTUS") that may affect the disposition of this case with the potential to reinstate the 2015 WOTUS Rule at issue in this action, all of which justify the need for a continuation of the stay in this matter.

STATUS REPORT

1. On January 18, 2023, the Agencies finalized their proposed rule entitled "Revised Definition of 'Waters of the United States,'" 88 Fed. Reg. 3,004 (Jan. 18, 2023) (the "2023 WOTUS Rule"). The 2023 WOTUS Rule was challenged in multiple jurisdictions, resulting in a preliminary injunction being issued against the 2023 WOTUS Rule in the 27 plaintiff states in *West Virginia et al. v. EPA et al.*, Case No. 3:23-cv-32, ECF No. 131 (D. N.D. April 12, 2023)²; *State of Texas et al. v. EPA et al.*, Case No. 3:23-cv-00017, ECF No. 60 (S.D. Tex., March 19, 2023)³; *Commonwealth of Kentucky v. EPA et al.*, Case No. 3:23-cv-

² EPA appealed the preliminary injunction to the Eighth Circuit. *West Virginia et al. v. EPA et al.*, Case No. 23-2411 (8th Cir.).

³ EPA appealed the preliminary injunction to the Eighth Circuit. *State of Texas et al. v. EPA et al.*, Case No. 23-40306 (5th Cir.).

00007 (E.D. Ky.); *See also Commonwealth of Kentucky et al. v. EPA et al.*, Case No. 23-5343/5345, Doc. 24 (6th Cir., May 10, 2023).⁴

2. On May 25, 2023, the United States Supreme Court issued its decision in *Sackett et ux. v. EPA et al.*, providing clarity on the jurisdictional scope of WOTUS and holding that the Clean Water Act’s use of the term “navigable waters” in 33 U. S. C. §1362(7) refers only to geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes and to adjacent wetlands that are indistinguishable from those bodies of water due to a continuous surface connection.

3. In response to the *Sackett* decision, the Agencies requested a stay in the *West Virginia et al.* case on June 26, 2023 (Case No. 2:23-cv-32, ECF No. 143)⁵, the *State of Texas et al.* case on July 7, 2023 (Case No. 3:23-cv-00017, ECF No. 80)⁶, and the *Commonwealth of Kentucky et al.* case on June 30, 2023 (Case No. 23-5343/5345, Doc. No. 24). In the Agencies request for a stay, they announced that they will interpret the phrase WOTUS consistent with the Supreme Court’s decision in *Sackett* on a nationwide basis, and are developing a new rule to

⁴ In *Commonwealth of Kentucky et al.* the Sixth Circuit issued an injunction pending the completion of the appeal against the 2023 WOTUS Rule after the District Court denied a request for a preliminary injunction.

⁵ EPA also requested a stay in its appeal of the preliminary injunction in the Eighth Circuit on July 11, 2023. Case No. 23-2411, Doc No. 75.

⁶ EPA also requested a stay in its appeal of the preliminary injunction in the Fifth Circuit on July 11, 2023. Case No. 23-40306, Doc. No. 20.

amend the 2023 WOTUS Rule. *See e.g.* Case No. 2:23-cv-32, ECF No. 143 at ¶ 6. The Agencies intend to publish this proposed new rule amending the 2023 WOTUS Rule by September 1, 2023. *Id.* As of the filing of this Status Report, the Court has not ruled on the Agencies’ stay request in *West Virginia et al.*, but did grant the Agencies a stay of all briefing deadlines while the stay motion is pending. *Id.*, ECF No. 150 at 2. The Court granted the stay request in *State of Texas et al.* on July 10, 2023 (Case No. 3:23-cv-00017, ECF No. 81) and in *Commonwealth of Kentucky et al.* on July 3, 2023 (Case No. 23-5343/5345, Doc. No. 32).

4. The litigation in multiple forums (the “Related Litigation”) challenging the Agencies prior WOTUS rules entitled: “Definition of Waters of the United States—Recodification of Pre-Existing Rules,” 84 Fed. Reg. 56,626 (October 22, 2019) (“Recodification Rule”); “Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed. Reg. 22,250 (April 21, 2020) (“2020 WOTUS Rule”); and now the 2023 WOTUS Rule remain relevant to this action.

5. The Related Litigation seeks, in various forms, to either: (1) vacate the Recodification Rule, the 2020 WOTUS Rule, and the 2023 WOTUS Rule nationwide and reinstate the 2015 WOTUS Rule that is the subject of this action; or (2) enjoin all or part of the Recodification Rule or 2020 WOTUS Rule.

6. The following cases challenging the Recodification Rule or the 2020 WOTUS Rule remain in abeyance or were voluntarily remanded pending the outcome of ongoing challenges to the various WOTUS Rules or the Agencies' current rulemaking efforts on the 2023 WOTUS Rule: *California v. Wheeler*, 20-cv-03005 (N.D. Cal.); *Chesapeake Bay Found. v. Wheeler*, 1:20-cv-1063 consolidated with 1:20-cv-1064 (D. Md.); *Conservation Law Found. v. EPA*, 20-cv-010820 (D. Mass.); *Murray v. Wheeler*, 19-cv-1498 (N.D. N.Y.); *N.M. Cattle Growers' Assoc. v. EPA*, 19-cv-00988 (D. N.M.); *Or. Cattlemen's Assoc. v. EPA*, 19-cv-00564 (D. Or.); *S.C. Coastal Conservation League v. Wheeler*, 20-cv-01687 (D. S.C.); *Wash. Cattlemen's Assoc. v. EPA*, 19-cv-00569 (W.D. Wash.); *Navajo Nation v. Wheeler*, 2:20-cv-00602 (D. N.M.).

7. The following cases were dismissed by a stipulation of voluntary dismissal without prejudice since the last status report: *Puget Soundkeeper v. EPA*, 2:20-cv-950 (W.D. Wash.); *Navajo Nation v. Wheeler*, 2:20-cv-00602 (D. N.M.); *Pascua Yaqui Tribe v. EPA*, 4:20-cv-00266 (D. Ariz.).

8. The *Pascua Yaqui Tribe v. EPA*, 4:20-cv-00266 (D. Ariz.) case was dismissed without prejudice only as to the unresolved claims challenging the Recodification Rule.

9. As noted in the January 17, 2023 Status Report, the effect of the dismissal is that the pre-2015 WOTUS Rule regulations remain in effect in that

forum, and the plaintiffs may re-initiate an action challenging the amended 2023 WOTUS Rule (or any springing back WOTUS Rule) if desired.

10. It is both possible (and likely) that the Agencies proposed amendments to 2023 WOTUS Rule will be challenged in multiple forums and that the amended 2023 WOTUS Rule may be enjoined from taking effect, expanding the number of cases in the Related Litigation. Until the amendments to the 2023 WOTUS Rule go into effect and any challenges to the amendments to the 2023 WOTUS Rule have been resolved, there remains the possibility that the 2015 WOTUS Rule may spring back into effect. If this litigation over the 2015 WOTUS Rule springs back into effect, important questions will need to be answered as to the impact of the *Sackett* decision on the 2015 WOTUS Rule.

CONCLUSION

The *Sackett* decision, the Agencies planned amendments to the 2023 WOTUS Rule (planned to be noticed by September 1, 2023), and the potential impacts of an amended 2023 WOTUS Rule on the Related Litigation remains directly relevant to the disposition of this action. Until a final, non-enjoined WOTUS Rule is promulgated, consistent with the United States Supreme Court's direction in *Sackett*, there remains the possibility that the issues raised in this action challenging the 2015 WOTUS Rule, and the proper scope of the Agencies Clean Water Act jurisdiction, will again become relevant.

Therefore, Plaintiff States respectfully request that this Court continue to stay this case pending resolution of the Related Litigation, and any legal challenges to the forthcoming Agencies' amendments to the 2023 WOTUS Rule.

Dated: July 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July 2023, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF electronic filing system, which will send an electronic copy of this filing to all counsel of record.

s/ Paul M. Seby

Paul M. Seby