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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

OREGON CATTLEMEN'S
ASSOCIATION,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Defendants.

No. 3:19-cv-00564-AC

**JOINT PROPOSAL TO GOVERN
PROCEEDINGS/MOTION TO CONTINUE
STAY**

Pursuant to this Court’s January 24, 2023 Order (Dkt. No. 135), the Parties submit the following joint status report and proposal to continue the stay in this proceeding for another six months:

PROCEDURAL HISTORY

1. In this proceeding, Plaintiff is challenging two rules promulgated by the Agencies that define the phrase “waters of the United States” in Section 1362(7) of the Clean Water Act: “The Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed. Reg. 22,250 (Apr. 21, 2020) (“2020 Rule”), and “Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed. Reg. 37,054 (June 29, 2015) (“2015 Rule”).

2. On May 6, 2020, Columbia Riverkeeper was granted the right to intervene in this proceeding. Dkt. No. 93.

3. Also on May 6, 2020, the Court agreed to stay Plaintiff’s claims against the 2015 Rule until either after the Court resolved Plaintiff’s claims against the 2020 Rule on the merits “or until another federal court enters an order with the effect of reinstating the 2015 regulations in Oregon.” *Id.*

4. On June 8, 2020, Plaintiff filed a motion to preliminarily enjoin the portions of the 2020 Rule it is challenging as unlawful. Dkt. No. 97. After Plaintiff’s motion was fully briefed, the Court on August 6, 2020 held an oral hearing on the motion for preliminary injunction. Dkt. No. 108. The parties agree that at the hearing, the Court denied Plaintiff’s motion for preliminary injunction and dismissed without prejudice Plaintiff’s claims against the 2020 Rule for lack of standing. *Id.*; *see also* Dkt. No. 110 at pp. 30-31. Intervenor-Defendant maintains that all other claims were also dismissed without prejudice due to lack of standing. Plaintiff’s position is that the court only dismissed Plaintiff’s claims against the 2020 Rule. The Agencies agree that at a minimum, Plaintiff’s claims against the 2020 Rule were dismissed without prejudice.

5. On February 2, 2021, the Court held a telephonic status conference where, in light of the Agencies' intent to issue a new regulation regarding the definition of "waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. § 1362(7), the Court ordered the proceeding stayed. Dkt. No. 113. Since then, this proceeding has been in abeyance.

THE AGENCIES PROMULGATE THE 2023 RULE, WHICH HAS BEEN THE SUBJECT OF ADDITIONAL LITIGATION

6. On December 29 and December 28, 2022, respectively, the Administrator of EPA and the Assistant Secretary of the Army for Civil Works signed a final rule entitled "Revised Definition of 'Waters of the United States'" ("2023 Rule"). The rule revises the definition of "waters of the United States" under the Clean Water Act. On January 3, 2023, the Agencies filed a notice of final rule with the Court notifying the Court and the Parties that this rule has been signed. Dkt. No. 131.

7. On January 18, 2023, the 2023 Rule was published in the Federal Register. *See* 88 Fed. Reg. 3004 (Jan. 18, 2023).

8. The 2023 Rule has been challenged in three separate proceedings: (1) *Texas v. EPA*, 3:23-cv-00017 (S.D. Tex. Jan. 18, 2023) (consolidated with *Am. Farm Bureau Fed'n v. EPA*, No. 3:23-cv-00020 (S.D. Tex.)); (2) *West Virginia v. EPA*, No. 3:23-cv-0032 (D.N.D. Feb. 16, 2023); and (3) *Commonwealth of Kentucky v. EPA*, No. 3:23-cv-7 (E.D. Ky. Feb. 22, 2023) (consolidated with *Kentucky Chamber of Commerce v. EPA*, No. 3:23-cv-8 (E.D. Ky.)). In all three proceedings, the plaintiffs are seeking declaratory and injunctive relief against, and vacatur of, the 2023 Rule, and sought to preliminarily enjoin the 2023 Rule.

9. On March 19, 2023, the Southern District of Texas granted the State of Texas, five Texas state agencies, and the State of Idaho's motion to preliminarily enjoin the 2023 Rule (but denied the coalition of *Am. Farm Bureau Fed'n* plaintiffs' motion for preliminary

injunction). *See Order, Texas v. EPA*, 3:23-cv-00017 (S.D. Tex.) Dkt. No. 60 (March 19, 2023). The District of North Dakota also preliminarily enjoined the 2023 Rule within the 24 plaintiff states. *See Order, West Virginia v. EPA*, No. 3:23-cv-0032 (D.N.D.) Dkt. No. 131 (April 12, 2023). While the Eastern District of Kentucky denied the *Kentucky* plaintiffs’ motions for preliminary injunction and dismissed their claims for lack of standing, the Sixth Circuit enjoined the 2023 Rule pending the plaintiffs’ respective appeals of the district court’s order. *See Order, Kentucky v. EPA*, No. 23-5345 (6th Cir.) Dkt. No. 28 (May 10, 2023). In sum, the 2023 Rule is currently enjoined in 27 states, and as to the *Kentucky Chamber of Commerce* plaintiffs and their members.

10. The Agencies have since filed notices of appeals with respect to both the Southern District of Texas’s order and the District of North Dakota’s order to preliminarily enjoin the 2023 Rule. *See Texas v. EPA*, No. 23-40306 (5th Cir.); *West Virginia v. EPA*, No. 23-2411 (8th Cir.).

THE SUPREME COURT ISSUES AN OPINION IN *SACKETT v. EPA*

11. 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 are developing a new rule to amend the 2023 Rule consistent with the Supreme Court’s decision. U.S. EPA, *Amendments to the 2023 Rule*, <https://www.epa.gov/wotus/amendments-2023-rule>. The Agencies intend to issue a final rule by September 1, 2023. *Id.*

12. All current litigation with respect to the 2023 Rule has been stayed pending publication of the new rule that will amend the 2023 Rule. *See Order, Texas v. EPA*, No. 3:23-cv-17 (S.D. Tex.) Dkt. No. 81 (July 10, 2023); *Order, West Virginia v. EPA*, No. 3:23-cv-0032

(D.N.D.) Dkt. No. 151 (July 18, 2023); Order, *Kentucky v. EPA*, No. 23-5345 (6th Cir.) Dkt. No. 32 (July 3, 2023); Order, *Texas v. EPA*, No. 23-40306 (5th Cir.) Dkt. No. 29-2 (July 14, 2023); Order, *West Virginia v. EPA*, No. 23-2411 (8th Cir.) Dkt. No. 5296015 (July 17, 2023).

PROPOSAL TO CONTINUE STAY FOR SIX MONTHS

13. The pending publication of the Agencies’ rule (expected by September 1, 2023) and any further developments in the challenges to the 2023 Rule may impact how the Parties may want to proceed in this litigation. Therefore, the Parties agree that an additional six-month abeyance is warranted here. The Parties will submit a status report and proposal or proposals for further proceedings by no later than January 31, 2024. The Parties may move to lift the stay if subsequent developments lead to the reinstatement of the prior rule(s) defining “waters of the United States” under the Clean Water Act. And each party reserves its right to oppose such a motion.

Respectfully submitted this 28th day of July, 2023:

/s/ Hubert T. Lee
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[PROPOSED] ORDER

Based upon the foregoing, and good cause appearing, it is ORDERED that the above-captioned proceeding remain in abeyance. Each party may move to lift the stay if subsequent developments lead to the reinstatement of the prior rule(s) defining “waters of the United States” under the Clean Water Act. And each party reserves its right to oppose such a motion.

It is further ORDERED that the Parties will submit a status report and proposal or proposals for further proceedings by no later than January 31, 2024.

IT IS SO ORDERED.

Dated:

Hon. Jeffrey J. Armistead, Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that the foregoing filing was electronically filed with the Clerk of the Court on July 28, 2023, using the CM/ECF system, which will send notification of said filing to the attorneys of record.

/s/ Hubert T. Lee

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