

The Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Puget Soundkeeper Alliance and
Sierra Club,

Plaintiffs,

v.

Gina McCarthy, in her official capacity as
Administrator of the United States
Environmental Protection Agency, and Jo-
Ellen Darcy, in her official capacity as
Assistant Secretary of the Army for Civil
Works,

Defendants.

Case No. C15-1342JCC

DEFENDANTS' MOTION TO
STAY PROCEEDINGS

NOTE ON MOTION CALENDAR:
OCTOBER 23, 2015

Defendants Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency, and Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army for Civil Works (collectively, "Federal Agencies" or "Agencies") hereby move the Court to continue the stay of proceedings in this case pending a ruling from the United States Court of Appeals for the Sixth Circuit on the critical issue of whether exclusive jurisdiction to review the Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015), lies in the

1 courts of appeals under 33 U.S.C. § 1369(b)(1).¹ Plaintiffs in this action and numerous other
2 parties have filed petitions for review of the Clean Water Rule, which have been consolidated in
3 the Sixth Circuit pursuant to 28 U.S.C. § 2112(a)(3). If the Sixth Circuit has exclusive
4 jurisdiction over Plaintiffs’ challenge to the Clean Water Rule, then this Court lacks jurisdiction.
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6 To “facilitate the orderly resolution of any jurisdictional issues,” the Sixth Circuit issued
7 an order establishing a schedule under which the question of that court’s jurisdiction under 33
8 U.S.C. § 1369(b)(1) will be fully submitted and ripe for a ruling as of November 4, 2015 – just
9 three weeks from now. *In re Final Rule: Clean Water Rule: Definition of “Waters of the United*
10 *States,”* Sixth Circuit No. 15-3799 (lead case), Doc. No. 24-2 (Sept. 16, 2015). In the meantime,
11 the Sixth Circuit has granted a nationwide stay of the Clean Water Rule at least until it rules on
12 its jurisdiction. Given that the Sixth Circuit is poised to address whether the courts of appeals or
13 the district courts have jurisdiction over challenges to the Clean Water Rule, and that a
14 nationwide stay of the Rule is in place, this Court should stay all proceedings in this case
15 pending a decision by the Sixth Circuit on the jurisdictional question.
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18 Undersigned counsel has contacted Plaintiffs’ counsel regarding the relief sought in this
19 motion. Plaintiffs’ counsel is in trial and has not responded with Plaintiffs’ position as of the
20 time of this filing. In light of the recent ruling by the United States Judicial Panel on
21 Multidistrict Litigation on the United States’ motion to consolidate and transfer, which was the
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26 ¹ As discussed below, this case was stayed pending a decision from the United States Judicial Panel on
27 Multidistrict Litigation, and the Panel has now ruled.

1 basis for the prior stay in this case, the Agencies felt the need to file this motion promptly
2 nonetheless.

3 BACKGROUND

4 As explained in prior pleadings, the Clean Water Rule is a nationally-applicable
5 regulation defining the scope of “waters of the United States” subject to regulatory jurisdiction
6 under the Clean Water Act (“CWA” or the “Act”), 33 U.S.C. §§ 1251-1387. To date, nearly 90
7 parties have filed 16 petitions for review of the Clean Water Rule in the courts of appeals under
8 33 U.S.C. 1369(b)(1). On July 28, 2015, the United States Judicial Panel on Multidistrict
9 Litigation (“MDL Panel”) transferred all of the petitions for review to the Sixth Circuit pursuant
10 to the neutral circuit selection procedures under 28 U.S.C. § 2112(a)(3).² *In re Final Rule:*
11 *Clean Water Rule: Definition of “Waters of the United States,”* MCP No. 135 (J.P.M.L.), Doc. 3;
12 Sixth Circuit No. 15-3799 (lead case).

13 On September 9, 2015, 18 States filed two motions in the Sixth Circuit. First, the States
14 asked the Sixth Circuit to resolve whether it has jurisdiction under 33 U.S.C. § 1369(b)(1) by
15 moving to dismiss their own petitions. *See* Sixth Circuit No. 15-3799 (lead case), Doc. No. 23.
16 The Sixth Circuit shortly thereafter entered an order establishing a streamlined schedule for
17 briefing the jurisdictional issue that the States’ motion raises under which briefing will be fully
18 submitted by November 4, 2015. *See* Sixth Circuit No. 15-3799 (lead case), Doc. No. 26. In
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25 ² Plaintiffs in this district court case filed a petition for review of the Clean Water Rule in the Ninth
26 Circuit. *Puget Soundkeeper Alliance v. EPA*, No. 15-72227 (9th Cir.). The petition was transferred to the
27 Sixth Circuit under the MDL Panel’s July 28, 2015 order, and is now captioned as *Puget Soundkeeper
28 Alliance v. EPA*, No. 15-3839 (6th Cir.).

1 compliance with this order, by October 2, 2015, various parties filed a total of eight motions to
 2 dismiss asserting that the Sixth Circuit lacks jurisdiction over fifteen pending petitions for
 3 review. On October 23, 2015, the Agencies will file their response, explaining why they believe
 4 exclusive jurisdiction resides in the Sixth Circuit.
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6 In a second motion filed on September 9, the States moved for a nationwide stay of the
 7 Clean Water Rule pending judicial review. *See* Sixth Circuit No. 15-3799 (lead case), Doc. No.
 8 24, at 2. On October 9, 2015, after the issue was fully briefed, the Sixth Circuit stayed the Clean
 9 Water Rule pending further order of that court. *See* Sixth Circuit No. 15-3799 (lead case), Doc.
 10 No. 64.
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12 Meanwhile, more than 90 named plaintiffs—including almost all of the parties that filed
 13 petitions for review—have also filed 16 complaints in 12 district courts challenging the Clean
 14 Water Rule under the Administrative Procedure Act (“APA”), 5 U.S.C. § 702.³ On July 27,
 15 2015, the Federal Agencies moved the MDL Panel, under 28 U.S.C. § 1407, to consolidate all of
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18 ³ *See Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.), filed June 29, 2015; *North Dakota v. EPA*, No. 3:15-cv-
 19 59 (D.N.D.), filed June 29, 2015; *Ohio v. U.S. Army Corps of Eng’rs*, No. 2:15-cv-2467 (S.D. Ohio), filed
 20 June 29, 2015; *Georgia v. EPA*, No. 2:15-cv-79 (S.D. Ga.), filed June 30, 2015; *Murray Energy Corp. v.*
 21 *EPA*, No. 1:15-cv-110 (N.D. W. Va.), filed June 29, 2015 and dismissed on August 27, 2015; *Am. Farm*
 22 *Bureau Fed’n v. EPA*, No. 3:15-cv-165 (S.D. Tex), filed July 2, 2015; *Oklahoma v. EPA*, No. 4:15-cv-
 23 381 (N.D. Ok.), filed July 8, 2015; *Chamber of Commerce v. EPA*, No. 4:15-cv-386 (N.D. Ok.), filed July
 24 10, 2015; *Se. Legal Found. v. EPA*, No. 1:15-cv-2488 (N.D. Ga.), filed July 13, 2015, appeal pending;
 25 *Wash. Cattlemen’s Ass’n v. EPA*, No. 0:15-cv-3058 (D. Minn.), filed July 15, 2015; *NRDC v. EPA*, No.
 26 1:15-cv-01324 (D.D.C.), filed August 14, 2015; *Am. Exploration & Mining Ass’n v. EPA*, No. 1:15-cv-
 27 1323 (D.D.C.), filed August 14, 2015, and voluntarily dismissed on August 19, 2015; *Puget Soundkeeper*
 28 *Alliance v. EPA*, No. 2:15-cv-01342 (W.D. Wash.), filed August 20, 2015; *Waterkeeper Alliance v. EPA*,
 No. 3:15-cv-3927 (N.D. Cal.), filed August 27, 2015; *Ariz. Mining Ass’n v. EPA*, No. 2:15-cv-1752 (D.
 Ariz.), filed Sept. 1, 2015; *Association of Am. Railroads v. EPA*, 3:15-cv-266 (S.D. Tex.), filed Sept. 22,
 2015.

1 the district court actions in a single district court. The Agencies also moved for a stay of
 2 proceedings in the pending district court actions until the MDL Panel ruled on the Agencies' §
 3 1407 motion. On September 9, 2015, this Court entered a Minute Order granting the Agencies'
 4 motion to stay proceedings in this matter until November 15, 2015, pending a ruling from the
 5 MDL Panel. Case No. C15-1342-JCC, Dkt. No. 14. On October 13, 2015, the MDL Panel
 6 entered an order denying the Agencies' § 1407 motion. *In re: Clean Water Rule: Definition of*
 7 *"Waters of the United States,"* MDL No. 2663 (J.P.M.L.), Dkt. No. 163 (Attachment A).
 8 Accordingly, the stay granted by this Court has now expired.
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10 Although most of the district courts entered stays pending a ruling on the Agencies' §
 11 1407 consolidation motion, three district courts heard motions for a preliminary injunction of the
 12 Clean Water Rule while the consolidation motion was pending. Two denied relief, holding that
 13 the Sixth Circuit has exclusive jurisdiction under 33 U.S.C. § 1369(b)(1). *Georgia v. McCarthy*,
 14 No. 2:15-cv-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015) (appeal pending); *Murray Energy*
 15 *Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015). One found
 16 that it had jurisdiction and issued a preliminary injunction of the Rule effective in 13 states.
 17 *North Dakota v. EPA*, No. 3:15-cv-59 (D. N.D. Aug. 27 & Sept. 4, 2015). That preliminary
 18 injunction has now been supplemented by the Sixth Circuit's nationwide stay of the Clean Water
 19 Rule.
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ARGUMENT

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 24 This Court has "broad discretion to stay proceedings as an incident to its power to control
 25 its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Woodson v. Surgitek, Inc.*, 57 F.3d
 26 1406, 1417 (5th Cir. 1995). The Court may grant a stay where it would serve "economy of time
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1 and effort for itself, for counsel, and for litigants.” *Landis v. North Am. Co.*, 299 U.S. 248, 254
 2 (1936). As part of this broad discretion, a district court may stay a suit that is duplicative of
 3 another federal court suit. *See, e.g., Greco v. Nat'l Football League*, No. 3:13-CV-1005-M, 2015
 4 WL 4475663, at *15-16 (N.D. Tex. July 21, 2015) (staying district court proceedings pending
 5 review of related issues in appellate case); *Chruby v. Global Tel Link Corp.*, No. 1:14-CV-456
 6 GBL/TRJ, 2015 WL 4740633, at *2-3 (E.D. Va. Jan. 14, 2015) (same); *Meijer, Inc. v. Abbott*
 7 *Labs.*, No. C 07-5470 CW, 2009 WL 723882, at *2-5 (N.D. Cal. Mar. 18, 2009) (same);
 8 *Riverkeeper, Inc. v. EPA*, No. 06 CIV. 12987 PKC, 2007 WL 4208757, at *2 (S.D.N.Y. Nov. 26,
 9 2007) (staying district court proceedings pending court of appeal’s determination of its
 10 jurisdiction to review a CWA rule under 33 U.S.C. § 1369(b)(1)).
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 13 “[I]n determining whether a stay is proper, courts consider the interests of the parties and
 14 potential conservation of judicial resources.” *Greco*, 2015 WL 4475663, at *15 (citing *Landis*,
 15 99 U.S. at 254–55). Here, the Court should grant a stay pending a ruling from the Sixth Circuit
 16 on the question of that court’s jurisdiction to hear challenges to the Clean Water Rule because a
 17 stay: (1) would conserve the resources of the Court and the parties by allowing the Sixth Circuit
 18 to rule on a dispositive issue in this case; (2) would promote comity among the federal courts by
 19 avoiding inconsistent rulings on the identical issue; (3) would not harm Plaintiffs, who are
 20 parties to the Sixth Circuit proceedings; and (4) would avert the hardship faced by the Agencies
 21 and non-parties if proceedings in this Court were not stayed while the Sixth Circuit considers the
 22 dispositive issue of its exclusive jurisdiction to review the Clean Water Rule.
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25 First, a stay of proceedings would conserve resources by avoiding simultaneous litigation
 26 in this Court and in the Sixth Circuit Court of Appeals. A threshold issue in this case is whether
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1 jurisdiction to hear challenges to the Clean Water Rule lies in the court of appeals under 33
2 U.S.C. § 1369(b)(1), or in this Court under the APA (5 U.S.C. § 702) and the federal question
3 statute (28 U.S.C. § 1331). Plaintiffs here and many other parties have filed motions raising this
4 precise jurisdictional issue in the Sixth Circuit. To “facilitate the orderly resolution of any
5 jurisdictional issues,” the Sixth Circuit established a briefing schedule for motions raising the
6 question of jurisdiction under 33 U.S.C. § 1369(b)(1). Briefing will be complete on November
7 4, 2015. Because the Sixth Circuit is poised to address the threshold question of which court has
8 jurisdiction over the challenges to the Clean Water Rule, this Court should continue the stay of
9 proceedings until the Sixth Circuit rules on jurisdiction.
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12 The Sixth Circuit’s ruling under 33 U.S.C. § 1369(b)(1) will address a dispositive issue in
13 this case, *i.e.*, whether Plaintiffs’ complaint must be dismissed for lack of jurisdiction because
14 exclusive jurisdiction lies in the courts of appeals. Indeed, if this Court does not issue a stay of
15 proceedings, the Agencies would likely file a motion to dismiss, which would squarely present
16 the very same issue to both this Court and the Sixth Circuit. Other district courts have found in
17 granting the Agencies’ earlier motion to stay proceedings that it “would undoubtedly be a waste
18 of judicial resources for plaintiffs’ cases to proceed if it is ultimately determined that jurisdiction
19 is appropriate only in a federal circuit court of appeal.” No. 4:15-cv-00381-CVE-FHM, Dkt. No.
20 22 (N.D. Ok. July 31, 2015); *see also Ohio v. EPA*, No. 2:15-cv-2467, 2015 WL 5117699, at *3
21 (S.D. Ohio Sept. 1, 2015) (“[i]t would be a waste of judicial resources for this case to proceed
22 here if it is ultimately determined that it is the Sixth Circuit . . . that is the appropriate court to
23 consider plaintiffs’ claims”); *see also id.* (“[I]t would be inefficient for the parties to prepare, and
24 for this Court to review, potentially lengthy briefs and for this Court to rule on the underlying
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1 issues in this case, only to have to revisit the parties' arguments in light of the Sixth Circuit's
 2 ruling[.]") (citation omitted).

3 In cogent, well-reasoned decisions, two district courts have already ruled that challenges
 4 to the Clean Water Rule may only be heard in the courts of appeals, under 33 U.S.C. §
 5 1369(b)(1). *Georgia v. McCarthy*, No. 2:15-cv-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015)
 6 (appeal pending); *Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506 (N.D. W.
 7 Va. Aug. 26, 2015).⁴ If the Sixth Circuit finds, as these two district courts did, that exclusive
 8 jurisdiction lies in the courts of appeals, then this Court does not have such jurisdiction and this
 9 case must be dismissed. A stay of proceedings would avoid the wasteful expenditure of the
 10 Court's and the parties' resources that would occur if both this Court and the Sixth Circuit were
 11 to simultaneously consider the very same jurisdictional question. *See Catskill Mountains*
 12 *Chapter of Trout Unlimited, Inc. v. EPA*, 630 F. Supp. 2d 295, 305-306 (S.D.N.Y. 2009)
 13 (granting stay pending a decision on the merits by the Eleventh Circuit in consolidated petitions
 14 for review of the same agency rulemaking because doing so would "minimize the amount of
 15 time and resources [the parties would] spend on duplicative litigation").

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 19 Second, the potential for inconsistent decisions is a compelling reason to continue the
 20 stay, given that Plaintiffs and others have filed numerous challenges to the Clean Water Rule in
 21 both the courts of appeals and the district courts. *See Catskill Mountains Chapter of Trout*
 22 *Unlimited*, 630 F. Supp. 2d at 306 (recognizing the importance of avoiding inconsistent
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 26 ⁴ The Agencies disagree with the *North Dakota* court's decision that jurisdiction to review the Clean
 27 Water Rule is proper in district court. *See North Dakota v. EPA*, No. 3:15-cv-59 (D. N.D. Aug. 27 &
 28 Sept. 4, 2015).

1 judgments where a court of appeals was already considering consolidated petitions for review of
 2 the same agency rule at issue in the district court action). Congress has provided for the
 3 automatic consolidation of multiple petitions for review of the same agency action in a single
 4 circuit, *see* 28 U.S.C. § 2112(a), and that process has occurred here. As the court designated to
 5 hear all of the petitions for review, the Sixth Circuit’s decision on whether it has jurisdiction
 6 under 33 U.S.C. § 1369(b)(1) will have a direct bearing on the question of district court
 7 jurisdiction. *See Riverkeeper, Inc. v. EPA*, No. 06 CIV. 12987 PKC, 2007 WL 4208757, at *2
 8 (S.D.N.Y. Nov. 26, 2007) (“there is much to be gained from knowing whether the Fifth Circuit
 9 considers itself to have exclusive jurisdiction over a review of the final agency action. If this
 10 Court were to charge ahead . . . to final judgment and it were later determined that this Court
 11 lacked jurisdiction, it may have served to delay a final adjudication in the proper court and would
 12 have wasted resources of the parties and the Court.”).⁵

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⁵ The Sixth Circuit previously addressed § 1369(b)(1) in *National Cotton Council of America v. EPA*, and held that jurisdiction to review a nationwide CWA regulation that relates to permitting procedures was proper in the Sixth Circuit, “at a minimum, [under] § 1369(b)(1)(F).” 553 F.3d 927, 933 (6th Cir. 2009). *National Cotton Council* is instructive to the circumstances here. In *National Cotton Council*, environmental and industry petitioners had filed petitions for reviews of a CWA regulation in eleven circuit courts of appeals, and the Sixth Circuit was randomly selected by order of the MDL Panel as the circuit for consolidation. *Id.* at 932. A subset of the environmental petitioners had also filed a complaint in the Northern District of California to preserve review in the event that the Sixth Circuit concluded that it did not have jurisdiction. *Id.* The Northern District of California District Court granted EPA’s request for a stay until the Sixth Circuit resolved the jurisdictional question of whether the circuit court had exclusive jurisdiction over the challenges to the regulation at issue there. *See Baykeeper, v. EPA*, 3:07-cv-725-SI (N.D. Cal.), Dkt. No. 9. The Sixth Circuit subsequently resolved the jurisdictional question, holding that original jurisdiction was in the court of appeals. The district court case was then dismissed. *Id.*, Dkt. Nos. 21, 22.

1 Third, Plaintiffs are not harmed by a stay. The Agencies seek only a temporary stay of
2 proceedings in this Court until the Sixth Circuit decides whether it has jurisdiction under 33
3 U.S.C. § 1369(b)(1). Briefing on the jurisdictional question will be completed by November 4,
4 2015. Therefore, a stay of proceedings until the Sixth Circuit rules on such motions is of limited
5 duration, and is not “immoderate.” *Landis*, 299 U.S. at 256.

7 Finally, a stay pending a ruling from the Sixth Circuit on jurisdiction will avert the
8 hardship to the Agencies of having to litigate simultaneously in this Court and the Sixth Circuit.
9 *See Catskill Mountains Chapter of Trout Unlimited*, 630 F. Supp. 2d at 306 (concluding that a
10 stay of district court proceedings where a court of appeals was already considering consolidated
11 petitions for review of the same agency rule “serve[d] not only the interest of the courts, but also
12 the interests of the Parties, the nonparties, and the public in an orderly and efficient use of
13 judicial resources”) (internal quotation and citation omitted); *Riverkeeper*, 2007 WL 4208757, at
14 *2 (noting that a stay while a court of appeal considers the issue of its exclusive jurisdiction over
15 review of the final agency action may avoid wasted party resources).

18 Similarly, other parties to the Sixth Circuit action who are not parties here could also be
19 prejudiced if these district court proceedings are not stayed. Nearly 90 parties have filed
20 petitions for review. In addition, numerous other parties have intervened in the consolidated
21 Sixth Circuit cases, including seven states and the District of Columbia that have intervened in
22 support of the Agencies. These parties have the opportunity to file briefs in the Sixth Circuit,
23 more fully informing that court as to the impact of any decision regarding the Clean Water Rule.
24 Thus, a failure to stay these district court proceedings pending a decision from the Sixth Circuit
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1 on the issue of its exclusive jurisdiction has the potential not only to prejudice the Agencies but
2 to “work damage to someone else.” *Landis*, 299 U.S. at 255.

3
4 **CONCLUSION**

5 For the foregoing reasons, the Agencies respectfully request that this Court exercise its
6 inherent authority to temporarily stay all proceedings in this action pending a decision by the
7 Sixth Circuit on whether it has exclusive jurisdiction under 33 U.S.C. § 1369(b)(1) to hear all
8 challenges to the Clean Water Rule.

9 Dated: October 15, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2015, I electronically filed the foregoing Defendants' Motion To Stay Proceedings with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

s/ Amy J. Dona
United States Department of Justice
Environmental Defense Section