

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

FEDERAL DEFENDANTS'
UNOPPOSED MOTION TO STAY
PROCEEDINGS

NOTE ON MOTION CALENDAR:
SEPTEMBER 8, 2015

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 Defendants"), hereby move for a
stay of all proceedings in this case until November 15, 2015, pending a ruling from the Judicial
Panel on Multidistrict Litigation on Federal Defendants' motion under 28 U.S.C. § 1407 to

1 transfer and consolidate.¹ Counsel for the Federal Defendants has conferred with counsel for
 2 Plaintiffs, who do not oppose the relief requested.

3 INTRODUCTION

4 Plaintiffs in this action challenge a final rule, known as the “Clean Water Rule” and
 5 published at 80 Fed. Reg. 37,054 (June 29, 2015). The Clean Water Rule is a nationally-
 6 applicable rulemaking defining the scope of “waters of the United States” subject to regulatory
 7 jurisdiction under the Clean Water Act (“CWA” or the “Act”), 33 U.S.C. §§ 1251-1387. The
 8 Rule is intended to provide clarity and certainty to the regulated community about what waters
 9 are within federal CWA jurisdiction and what waters are outside of CWA jurisdiction. To date,
 10 more than 80 named plaintiffs have challenged the Clean Water Rule through fourteen
 11 complaints in twelve district courts across the country.

12 On July 27, 2015, Federal Defendants filed a motion under 28 U.S.C. § 1407, asking the
 13 United States Judicial Panel on Multidistrict Litigation (“MDL Panel”) to consolidate the district
 14 court cases seeking judicial review of the Clean Water Rule. *In re Clean Water Rule: Definition*
 15 *of “Waters of the United States,”* MDL No. 2663 (J.P.M.L.), Dkt. No. 1. A hearing on the
 16 motion is scheduled for October 1, 2015, and Federal Defendants anticipate an order to follow
 17 soon after.

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 19 ¹ On September 8, 2015, Federal Defendants provided notice to the Court, pursuant to Local Civil Rules W.D.
 20 Wash, LCR 3(g), of the pendency of the following twelve actions in other federal district courts and consolidated
 21 Sixth Circuit Court of Appeals proceeding that relate to this case: *Texas v. EPA*, No. 3:15-cv-162 (S. D. Tex.), filed
 22 June 29, 2015; *North Dakota v. EPA*, No. 3:15-cv-59 (D. N.D.), filed June 29, 2015; *Ohio v. United States Army*
 23 *Corps of Eng’rs*, No. 2:15-cv-2467 (S. D. Oh.), filed June 29, 2015; *Georgia v. EPA*, No. 2:15-cv-79 (S.D. Ga.),
 24 filed June 30, 2015, and Amended Complaint filed on July 20, 2015; *American Farm Bureau Fed’n v. EPA*, No.
 25 3:15-cv-165 (S. D. Tex), filed July 2, 2015; *Oklahoma v. EPA*, No. 4:15-cv-381 (N.D. Ok.), filed July 8, 2015;
 26 *Chamber of Commerce v. EPA*, No. 4:15-cv-386 (N.D. Ok.), filed July 10, 2015; *Se. Legal Found. v. EPA*, No. 1:15-
 27 cv-2488 (N.D. Ga.), filed July 13, 2015; *Washington Cattlemen’s Ass’n v. EPA*, No. 0:15-cv-3058 (D. Minn.), filed
 28 July 15, 2015; *NRDC v. EPA*, No. 1:15-cv-01324 (D.D.C.), filed Aug. 14, 2015; *Waterkeeper Alliance, Inc. v. EPA*,
 No. 3:15-cv-3927 (N.D. Cal.), filed Aug. 27, 2015; *Arizona Mining Assoc. v. EPA*, No. 2:15-cv-01752-BSB (D.
 Ariz.), filed Sept. 2, 2015; and *Murray Energy Corp. v. EPA*, Case No. 15-3887 (6th Cir.). Dkt. No. 12. A related
 case in the Northern District of West Virginia has been dismissed without prejudice for lack of subject matter
 jurisdiction. *Murray Energy Corp. v. EPA*, No. 1:15CV110, 2015 WL 5062506 (N.D.W. Va. Aug. 26, 2015).

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1 Section 1407 exists to promote the just and efficient conduct of cases filed in multiple
2 district courts with common issues of law and fact; and courts frequently grant a stay of
3 proceedings while such a motion is pending, recognizing that a stay conserves the courts' and the
4 parties' resources, avoids unnecessary duplication and inconsistent pretrial rulings, and promotes
5 orderly and efficient proceedings. Given the numerous actions already pending in multiple
6 district courts raising substantially similar challenges to the Clean Water Rule—with potentially
7 more to come—a stay pending a ruling on the Federal Defendants' motion under 28 U.S.C. §
8 1407 serves all of these purposes.

9 In addition, to date multiple parties, including plaintiffs in this action, filed petitions for
10 review of the Clean Water Rule in eight circuit courts of appeals, pursuant to CWA section
11 509(b)(1), 33 U.S.C. § 1369(b)(1).² Another statute, 28 U.S.C. § 2112(a), provides a neutral,
12 orderly, and swift mechanism for consolidating multiple petitions for review of the same agency
13 action in a single court of appeals. Pursuant to section 2112(a), on July 28, 2015, the MDL Panel
14 consolidated all petitions for review in the Sixth Circuit. *In re Final Rule: Clean Water Rule:
15 Definition of "Waters of the United States,"* MCP No. 135 (J.P.M.L.), Dkt. No. 3.

16 **PROCEDURAL BACKGROUND**

17 Plaintiffs filed the complaint in this action on August 27, 2015. Dkt. No. 1. As noted,
18 this action is only one among numerous cases filed by multiple parties across the country raising
19 substantially similar claims regarding the Clean Water Rule. All of the cases challenging the
20 Clean Water Rule, including this one, are at the early stages of proceedings. Federal
21 Defendants' motion to stay proceedings has been granted in eight of the pending actions thus far.

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26 ² Section 509(b)(1) of the CWA provides for exclusive judicial review in the courts of appeals for certain
enumerated actions of the EPA Administrator. 33 U.S.C. § 1369(b)(1).

ARGUMENT

This court has “broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997). As part of this broad discretion, a district court may stay or dismiss a suit that is duplicative of another federal court suit. *See Co. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (“As between federal district courts . . . though no precise rule has evolved, the general principle is to avoid duplicative litigation.”). A stay is appropriate here because the claims in this case overlap with claims asserted in multiple challenges to the Clean Water Rule filed in district courts (and circuit courts) across the country. Indeed, courts “frequently grant stays in cases when an MDL decision is pending.” *See, e.g., Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997) (“Under these circumstances, i.e. pending a decision by the MDL Panel whether to add a case, stays are frequently granted to avoid duplicative efforts and preserve valuable judicial resources”); 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3866.1 (3d ed. 2010).

In determining whether a stay pending a motion to transfer and for consolidation under 28 U.S.C. § 1407 is proper, courts have considered three factors: (1) the judicial resources that would be saved by avoiding duplicative litigation if the cases are in fact consolidated; (2) hardship and inequity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party. *Esquivel v. BP Co. N. Am., Inc.*, Civ. A. Nos. B-10-227, B-10-236, B-10-237, 2010 WL 4255911, at *3 (S.D. Tex. Oct. 14, 2010) (internal citations omitted); *La. Stadium & Exposition Dist. v. Fin. Guar. Ins. Co.*, Civ. A. No. 09-CV-235, 2009 WL 926982, at *1 (E.D. La. Apr. 2, 2009). When exercising its discretion, the Court is “guided by the policies of justice and efficiency.” *Boudreaux v. Metro. Life Ins. Co.*, Civ. A. No. 95-cv-138, 1995 WL 83788, at *1 (E.D. La. Feb. 24, 1995). Granting a stay of proceedings in this case pending a ruling from the MDL Panel on consolidation of the multiple district court challenges to the Clean Water Rule will conserve judicial and governmental resources, avoid the possibility of

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(202) 514-0223

1 inconsistent rulings, and provide for orderly and efficient management of complex litigation
2 concerning a nationally-applicable rule under the federal Clean Water Act.

3 **I. A STAY OF PROCEEDINGS PENDING RESOLUTION OF FEDERAL**
4 **DEFENDANTS' MOTION TO THE MDL PANEL WILL CONSERVE**
5 **JUDICIAL RESOURCES.**

6 Plaintiffs in this case are among many states, private parties and associations, and non-
7 governmental organizations that have filed substantially-related cases challenges to the Clean
8 Water Rule. The cases arise from the same agency rulemaking, involve the same administrative
9 record for judicial review, and raise related or overlapping claims under the Administrative
10 Procedure Act, and the Clean Water Act. Because numerous suits challenging the very same
11 rule and raising overlapping claims have been filed in multiple district courts, it would be
12 duplicative and wasteful for each of these cases to proceed separately. Moreover, the possibility
13 of multiple courts rendering decisions on similar challenges to a single nationwide rule raises the
14 likelihood of inconsistent results, leading to confusion and legal uncertainty. Accordingly,
15 Federal Defendants have requested that the MDL Panel transfer and consolidate all proceedings
16 in a single district court. Staying the present case until the MDL Panel rules on Federal
17 Defendants' motion to transfer and consolidate will avoid duplicative litigation, conserve the
18 courts' (and the parties') resources, and aid in the orderly management of these cases.

19 **II. A STAY OF PROCEEDINGS IS NECESSARY TO AVOID THE EXTREME**
20 **PREJUDICE TO FEDERAL DEFENDANTS OF LITIGATING DUPLICATIVE**
21 **CHALLENGES TO THE SAME RULE IN MULTIPLE DISTRICT COURTS.**

22 In the absence of a stay, Federal Defendants will be harmed by the need to engage in
23 duplicative and wasteful proceedings in multiple district courts across the country. Such
24 wasteful effort would divert resources not only of attorneys, but of agency staff required to
25 support the litigation. *See Aikins v. Microsoft Corp.*, No. 00-cv-242, 2000 WL 310391, at *1
26 (E.D. La. Mar. 24, 2000) (granting stay pending MDL Panel decision because movant "would
27 suffer a considerable hardship and inequity if forced to simultaneously litigate multiple suits in
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1 multiple courts,” while “Plaintiffs have failed to show any significant prejudice” beyond slight
2 delay).

3 Moreover, the possibility of conflicting rulings from different district courts is an
4 outcome that section 1407 is designed to prevent. *See Scott v. Bayer Corp.*, No. 03-cv-2888,
5 2004 WL 63978, at *1 (E.D. La. Jan. 12, 2004) (“Deference to the MDL court for resolution of
6 these matters provides the opportunity for the uniformity, consistency, and predictability in
7 litigation that underlies the multidistrict litigation system.”). The Clean Water Rule is a
8 nationally-applicable rulemaking defining the scope of waters of the United States subject to
9 CWA jurisdiction. It is intended to provide clarity and certainty to the regulated community
10 about what waters are within federal CWA jurisdiction and what waters are not regulated under
11 the CWA. The potential for inconsistent rulings that would arise from related and overlapping
12 challenges to the Rule proceeding simultaneously in multiple courts in different districts risks
13 undermining the regulatory clarity and certainty that are at the heart of the Rule. A stay of this
14 and other district court challenges to the Clean Water Rule will effectuate the purposes of section
15 1407.

16 **III. THE REQUESTED STAY IS NOT PREJUDICIAL TO PLAINTIFFS.**

17 Plaintiffs in this action do not oppose a stay and therefore an order granting the stay
18 would not be prejudicial. Moreover, the stay requested in this motion is bounded by reasonable
19 limits on duration and purpose and therefore is not “immoderate.” *See Landis v. North American*
20 *Co.*, 299 U.S. 248, 256 (1936). Federal Defendants request a temporary stay pending a ruling
21 from the MDL Panel on the United States motion to transfer and consolidate all district court
22 proceedings. A hearing on that motion is scheduled for October 1, 2015, and Federal Defendants
23 anticipate that the Panel will act swiftly to decide the motion.

24 **CONCLUSION**

25 For the foregoing reasons, Federal Defendants respectfully request that this Court
26 exercise its inherent authority to temporarily stay all proceedings in this action until November
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1 15, 2015, pending the MDL Panel’s ruling on Federal Defendants’ motion under 28 U.S.C. §
2 1407 to transfer and consolidate the district court challenges to the Clean Water Rule in a single
3 district court, or in the eventuality. A proposed order is attached to this motion.

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5 Dated: September 8, 2015

Respectfully submitted,

6
7 JOHN C. CRUDEN
8 Assistant Attorney General
9 Environment and Natural Resources Division

10 *s/ Amy J. Dona*
11 MARTHA C. MANN
12 DANIEL R. DERTKE
13 AMY J. DONA
14 ANDREW J. DOYLE
15 JESSICA O’DONNELL
16 United States Department of Justice
17 Environmental Defense Section
18 P.O. Box 7611
19 Washington, DC 20044
20 T: (202) 514-0223 (Dona)
21 martha.mann@usdoj.gov
22 daniel.dertke@usdoj.gov
23 amy.dona@usdoj.gov
24 andrew.doyle@usdoj.gov
25 jessica.o’donnell@usdoj.gov

26
27 *Counsel for Federal Defendants*

28 U.S. DEPT. OF JUSTICE
ENV. DEFENSE SECTION
P.O. Box 7611
WASHINGTON, D.C. 20044
(202) 514-0223

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2015, I electronically filed the foregoing Federal 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