UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; and Greater Atlanta Homebuilders Association, Inc., Plaintiffs, v. United States Environmental Protection Agency, et al., Defendants.	)	Civil Action No. 1:15-cv-2488-TCB

PLAINTIFFS' STATUS REPORT AND MOTION FOR CONTINUED STAY OF PROCEEDINGS

The Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; and Greater Atlanta Homebuilders Association, Inc. ("Plaintiffs") provide this Status Report and Motion for Continued Stay of Proceedings. In a 1-1-1 split decision inviting *en banc* review, the Sixth Circuit panel found it has jurisdiction over this litigation. Because that decision is not binding on this Court and has a reasonable likelihood of reversal *en banc*, it does not resolve the question of this Court's jurisdiction. The issue remains pending before the Eleventh Circuit, where the court has suggested a need for further briefing. Judicial economy favors

retaining the stay of these proceedings while the Sixth and Eleventh Circuits resolve the jurisdictional question with finality.

I. Procedural History

This litigation challenges EPA's rule amending the definition of "waters of the United States" in the Clean Water Act ("CWA"). *See* "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,053-37,127 (Jun. 29, 2015) ("WOTUS Rule"). EPA did not follow the required procedures in promulgating the WOTUS Rule and the WOTUS Rule conflicts with the CWA and applicable judicial precedent. Because the CWA is unclear whether Plaintiffs' challenge belongs in a circuit court of appeals or in a district court, Plaintiffs filed suits in both this Court and the United States Court of Appeals for the Eleventh Circuit. Other litigants followed the same strategy, and to date, have filed at least sixteen district court and fifteen circuit court lawsuits across the country.

Under 28 U.S.C. § 2112(a)(3), the circuit court cases were all transferred to the United States Court of Appeals for the Sixth Circuit. To resolve the threshold jurisdictional question, the Sixth Circuit motions panel requested briefing on the court's jurisdiction. *See* Case No. 15-3885, Doc. 22-2. Meanwhile, the Sixth Circuit issued a stay of the WOTUS Rule pending resolution of the jurisdictional

issue, finding the "petitioners have demonstrated a substantial possibility of success on the merits of their claims." *See* Case No. 15-3751, Doc. 49-2, p. 4.

Unlike in the circuit court cases, no comparable provision exists for consolidating the district court lawsuits. Defendants attempted to use the ill-fitting multidistrict litigation process to accomplish that task, and Plaintiffs acquiesced to a stay of this litigation for Defendants to complete that effort. Not all plaintiffs in the other actions consented. Eleven states in the Southern District of Georgia (*State of Georgia, et al.*, CV 215-79), thirteen states in the District of North Dakota (*States of North Dakota, et al.*, No. 3:15-cv-59), and Murray Energy in the Northern District of West Virginia (1:15CV110) all fought entry of a stay and filed motions for a preliminary injunction prohibiting implementation of the WOTUS Rule pending completion of the legal challenges. Following hearings on the preliminary injunction motions that hardly touched upon jurisdiction and instead centered around the courts' skepticism over the WOTUS Rule's legality, the Southern District of Georgia and the Northern District of West Virginia judges issued orders finding they lacked jurisdiction over their cases. The District of North Dakota judge found the court has jurisdiction and granted the motion for preliminary injunction, finding the "States are likely to succeed on their claim because (1) it appears likely that the EPA has violated its Congressional grant of

authority in its promulgation of the Rule at issue, and (2) it appears likely the EPA failed to comply with APA requirements when promulgating the Rule." *N. Dakota v. EPA*, No. 3:15-CV-59, 2015 WL 5060744, at *1 (D.N.D. Aug. 27, 2015).

The state plaintiffs in *State of Georgia, et al.* appealed the court's determination it lacked jurisdiction. The Eleventh Circuit granted the states' request for expedited briefing on the issue, and the final briefs were submitted on October 2nd. Plaintiffs submitted a brief to the Eleventh Circuit as *amici curiae*, in support of the states' position that the district courts have jurisdiction over this litigation. *See* Case No. 15-14035 (11th Cir. Sept. 22, 2015). The Eleventh Circuit initially scheduled oral argument for February 23rd, but cancelled the argument to allow the Sixth Circuit to consider the issue first. *See id.*, Feb. 18, 2016, Order. The Eleventh Circuit advised that after the Sixth Circuit published its decision, the Eleventh Circuit would solicit supplemental briefing from the parties. *See id.*

On February 22nd, the Sixth Circuit motions panel issued a fractured 1-1-1 decision reflecting profound disagreement on the jurisdictional issue. Although the panel retained the case, it all but invited reversal by the *en banc* court. Not only is this decision not binding on this Court, but the decision does not even resolve the issue within the Sixth Circuit.

Because the Eleventh Circuit has not ruled and the Sixth Circuit panel's ruling is tenuous, the appropriate action is to continue the stay of these proceedings pending a determination on jurisdiction from either the Eleventh Circuit or the Sixth Circuit *en banc*.

II. Background on CWA Jurisdiction

A brief background of the CWA judicial review section illustrates why jurisdiction over this matter is so unsettled and why the Eleventh Circuit may disagree with the Sixth Circuit panel's conclusion. Section 509(b) of the CWA sets forth the agency actions subject to challenge only in circuit court. *See* 33 U.S.C. § 1369(b)(1). All parties to the WOTUS Rule litigation agree § 509(b)(1) does not govern all possible CWA challenges, but only those pertaining to the following agency actions:

> (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title…

33 U.S.C. § 1369(b).

The jurisdictional dispute is whether the WOTUS Rule falls under either subsection (E) or (F). Courts across the country have applied these subsections to a wide range of agency actions and reached a variety of conclusions. These decisions are largely reconcilable by looking beyond the surficial rhetoric and analyzing each agency action independently. That analysis reveals this litigation belongs in district court. But a fundamental preliminary question for each court is whether the jurisdictional provision should be interpreted textually or based on policy concerns (which themselves are numerous and point both ways).

The Eleventh Circuit recently employed a textualist approach in interpreting this provision. *See Friends of the Everglades v. EPA*, 699 F.3d 1280, 1286 (11th Cir. 2012) ("It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."). EPA argued for a functional approach, but the court declined. *See id.* at 1288 ("The Administrator argues that we should read section 1369(b)(1)(F) to apply to any 'regulations relating to permitting itself,' but this interpretation is contrary to the statutory text."). In doing so, the court expressly rejected a recent decision from the Sixth Circuit adopting EPA's policy-based approach, *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009). *See id*.

Because of the fundamental differences in statutory interpretation between the Eleventh and Sixth Circuits, the Sixth Circuit panel decision in the WOTUS Rule litigation is of limited value in this circuit. The Eleventh Circuit's textual approach to the jurisdiction question set forth in *Friends of the Everglades* is the binding authority for this Court. This Court should not take any action based on an out-of-circuit decision, particularly one from a circuit with a starkly different view of the law. The stay should remain in place until the Eleventh Circuit decides the issue according to its own precedent or the Sixth Circuit re-evaluates *en banc*.

III. The fractured Sixth Circuit decision invites reversal.

Although the Sixth Circuit motions panel retained jurisdiction over the WOTUS Rule challenges, two of the three judges actually concluded jurisdiction should be in district court. Because of that odd result, it is reasonably likely the Sixth Circuit *en banc* court will overturn the panel decision and/or that the Eleventh Circuit will decline to follow its result. In either case, this matter would be properly before this Court. The stay should remain in place while the Eleventh and Sixth Circuits complete their review.

Judge McKeague, the author of the majority opinion of the three-judge Sixth Circuit motions panel, was the only judge who concluded this litigation belongs in circuit court. He followed the policy-based approach articulated in *National*

Cotton. Both the concurrence and the dissent sharply disagreed. Judge Griffin, the author of the concurrence, concluded, "the question is whether Congress in fact created jurisdiction in the courts of appeals for this case. I conclude that it did not." *In re Clean Water Rule*, No. 15- 3839, 2016 WL 723241, at *12 (6th Cir. Feb. 22, 2016). Nevertheless, he explained circuit precedent obligated him to keep the case, reasoning, "In my view, it is illogical and unreasonable to read the text of either [§ 509(b)] subsection (E) or (F) as creating jurisdiction in the courts of appeals for these issues. Nonetheless, because *National Cotton* held otherwise with respect to subsection (F), I concur in the judgment, only." *Id.* Further, "[w]ere it not for *National Cotton*, I would grant the motions to dismiss." *Id.* Because Sixth Circuit rules preclude a motions panel from overturning the court's precedent, Judge Griffin considered himself powerless to decide otherwise. *See id.* ("It is a well-established rule in this Circuit that a panel of this court may not overrule a prior published opinion of our court absent *en banc* review…"). This reference to the *en banc* process invites further review of this decision by the full Sixth Circuit court, and certain Petitioners have already requested *en banc* review of the jurisdictional decision. *See* Case No. 15-3751, Doc. 73 (6th Cir.). Judge Griffin's concurrence suggests the Sixth Circuit is likely to grant the *en banc* request or at least consider the issue again as part of an evaluation of the merits of the case.

Judge Keith, the author of the dissent, "agree[d] with Judge Griffin's reasoning and conclusion that, under the plain meaning of the statute, neither subsection (E) nor subsection (F) of 33 U.S.C § 1369(b)(1) confers original jurisdiction on the appellate courts." *Id.* at *20. However, unlike Judge Griffin, Judge Keith did not find *National Cotton* compelled the court to keep the case.

Therefore, two judges of the three-judge Sixth Circuit motions panel concluded this litigation is properly before this Court. Because two of the three panel judges actually disagreed with the majority opinion, the decision should not be deemed the Sixth Circuit's final resolution. Both *en banc* review and reversal are reasonably likely. Dismissing this action based on a tenuous intermediate panel decision before the Sixth Circuit court has completed its full review of the jurisdictional issues would be highly premature.

IV. A decision from the Sixth Circuit is not binding on this Court.

The Sixth Circuit panel's decision is not only tenuous but non-binding on this Court. It should have no effect on this litigation. Plaintiffs' petition for review in the Sixth Circuit is an entirely distinct legal action brought under separate legal authority and entirely independent of Plaintiff's district court case. The Sixth Circuit panel's jurisdictional decision does not affect the litigation in this Court under law of the case, collateral estoppel, or any other theory. This Court is only

bound by decisions issued by the Eleventh Circuit and the Supreme Court, not an outside circuit with its own unique and contradictory precedent.

The Eleventh Circuit will soon entertain the jurisdictional question as part of the *State of Georgia*, *et al.*'s appeal from the Southern District of Georgia. In that appeal, the Eleventh Circuit must independently assess the question and not simply defer to the Sixth Circuit's decision. *See In re Korean Air Lines Disaster of Sept. 1*, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987), aff'd sub nom. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989):

> The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit.

See also Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993) (internal citations omitted):

> [U]ntil the Supreme Court speaks, the federal circuit courts are under duties to arrive at their own determinations of the merits of federal questions presented to them; if a federal court simply accepts the interpretation of another circuit without independently addressing the merits, it is not doing its job.

The Sixth Circuit litigation is an entirely separate action, brought under the judicial review provision of the CWA, 33 U.S.C. § 1369. The lawsuit before this Court was a separately filed action under the Administrative Procedure Act. Under

no theory is the Sixth Circuit panel's intermediate decision binding on this Court. "Issue preclusion" does not occur until a lawsuit concludes with a final decision on the merits. *See In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990) ("A court's order or judgment can never have any preclusive effect on future litigation unless that order or judgment constitutes a final decision on the merits."). Because the Sixth Circuit litigation remains ongoing, that court has not issued a final decision on the merits. The panel's jurisdictional decision has no preclusive effect.

"Law of the case differs from issue preclusion in that the former applies only to proceedings within the same case, while the latter applies to proceedings in different cases." *Id*. "Law of the case" applies during subsequent stages of the same litigation prior to issuance of a final judgment, but it does not operate between entirely different suits. *See Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1288 (11th Cir. 2000) (*emphasis added)* ("Under the law of the case doctrine, both the district court and the appellate court are generally bound by a prior appellate decision *of the same case*."); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478, at 637–39 (2d ed. 2002) (cited favorably in *Stoufflet v. United States*, 757 F.3d 1236, 1240 (11th Cir. 2014)) ("Law-of-the-case rules have developed to maintain consistency and

avoid reconsideration of matters once decided during the course of a single continuing lawsuit. They do not apply between separate actions.").

For example, in *Beyers v. Dep't of State*, 505 F. App'x 951 (Fed. Cir. 2013), the court had bifurcated the litigation into two parts, each with a separate docket number. Although the two cases involved the same parties, the court found law of the case inapplicable. *See* 505 F. App'x at 953 ("Any decision in the suitability appeal could not be law of the case with respect to the VEOA appeal, as those cases are separate appeals…"). The doctrine also would not apply between separate lawsuits filed in state and federal court. *See Interstate Realty & Inv. Co. of Louisiana v. Bibb County, Ga.*, 293 F. 721, 722 (5th Cir. 1923) (internal quotations omitted):

> In Georgia, a decision of the Supreme Court on appeal would be the law of the case thereafter in the state court. It would not be the law of a different case, in a different forum, between the same parties or their privies. The doctrine of the law of the case in its customary sense does not run from state to federal jurisdiction or conversely.

See similarly Farina v. Nokia Inc., 625 F.3d 97, 117 (3d Cir. 2010); *Harbor Ins. Co. v. Essman*, 918 F.2d 734, 738 (8th Cir. 1990) (both finding law of the case inapplicable to separate lawsuits).

This Court is bound only by the precedent of the Eleventh Circuit. And, indeed, because the Eleventh Circuit's only applicable precedent is the textualist

Friends of the Everglades decision, that would be the controlling law in this Court, not a tenuous split decision in an outside circuit decided according to an entirely different interpretive approach. "It is well-established in this Circuit that a district court is bound by a prior decision of a panel in our Circuit. This prior-panel precedent rule requires the Court to follow a decision of the Eleventh Circuit unless and until it is overruled by the Eleventh Circuit *en banc* or by the Supreme Court." *Inniss v. Aderhold*, 80 F. Supp. 3d 1335, 1347 (N.D. Ga. 2015) (internal quotations omitted).

Dismissing this action based on a questionable Sixth Circuit panel decision would disrespect the basic rules of *stare decisis* that bind this Court solely to the jurisprudence of the Eleventh Circuit. This Court should wait for the Eleventh Circuit to rule or for the Sixth Circuit to complete its analysis *en banc*.

V. A stay pending resolution of jurisdictional issues would be appropriate.

As invited by the Sixth Circuit panel, certain Petitioners have already requested *en banc* review of the jurisdictional decision. *See* Case No. 15-3751, Doc. 73 (Sixth Cir.). Because two out of the three Sixth Circuit panel members believe jurisdiction belongs in district court but one felt bound by the wrongly-decided *National Cotton* precedent, *en banc* consideration would appear likely. Similarly, the Eleventh Circuit recently suggested it would solicit additional

briefing on the jurisdictional issue. *See* Case No. 15-14035, Feb. 18, 2016, Order. A stay while these courts continue their efforts would be appropriate.

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936).

Any decision by the Eleventh or Sixth Circuits that this matter belongs in district court would mean the case was properly before this Court all along and Defendants' actions contesting jurisdiction only served to delay Plaintiffs' day in court. And importantly, if the Sixth Circuit finds it lacks jurisdiction, its nationwide stay of the WOTUS Rule will dissolve, and Plaintiffs' will be harmed by Defendants' unlawful rule. Staying this case while the appellate jurisdictional review process resolves is the most efficient method of handling the continued jurisdictional uncertainty. In the reasonably likely event the circuit courts find jurisdiction over this matter is in district court, this litigation could promptly resume. That efficiency is of utmost importance here, where an immediate motion for preliminary injunction must follow any dismissal by the Sixth Circuit.

VI. Conclusion

WHEREFORE, Plaintiffs respectfully ask this Court to continue the stay of these proceedings pending a decision on jurisdiction from either the Eleventh Circuit or the Sixth Circuit *en banc*.

This 1st day of March, 2016.

/s/ Jennifer A. Simon

Richard A. Horder
Georgia Bar No. 366750
Jennifer A. Simon
Georgia Bar No. 636946
Kazmarek Mowrey Cloud Laseter LLP
1230 Peachtree Street, NE, Suite 3600
Atlanta, GA 30309
Tel.: (404) 812-0126
Fax: (404) 812-0845
jsimon@kmcllaw.com

Kimberly S. Hermann
Georgia Bar No. 646473
Southeastern Legal Foundation, Inc.
2255 Sewell Mill Road, Suite 320
Marietta, GA 30062
Tel.: (770) 977-2131
Fax: (770) 977-2134
khermann@southeasternlegal.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March, 2016, electronically filed the foregoing PLAINTIFFS' STATUS REPORT AND MOTION FOR CONTINUED STAY OF PROCEEDINGS with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all registered CM/ECF users.

/s/ Jennifer A. Simon
Jennifer A. Simon
Georgia Bar No. 636946
Kazmarek Mowrey Cloud Laseter LLP
1230 Peachtree Street, NE, Suite 3600
Atlanta, GA 30309
Tel.: (404) 812-0126
Fax: (404) 812-0845
jsimon@kmcllaw.com

Attorney for Plaintiffs