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' MOTION FOR RECONSIDERATION AND RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO CONTINUE STAY OF PROCEEDINGS

The Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; and Greater Atlanta Homebuilders Association, Inc. ("Plaintiffs") respectfully move this Court to reconsider its Order Granting Federal Defendants' Motion to Continue Stay of Proceedings (Doc. 8). Plaintiffs object to the scope of Defendants' requested stay and did not consent to Defendants' motion. *See* Oct. 13, 2015, E-mail from J. Simon to M. Mann, attached as Exhibit A ("Plaintiffs would oppose a continuation of the stay pending only the 6th Circuit decision.").[1]

[1] Contrast with Defendants' representation in their Proposed Order (Doc. 7-2), which Plaintiffs were not provided prior to its filing, referencing "Defendants' unopposed motion."

Because jurisdictional questions are now pending before the United States Courts of Appeals for both the 6th and 11th Circuits, but only the 11th Circuit decision would be binding on this Court (and may occur first), the 11th Circuit ruling may prove to be the more relevant benchmark. Plaintiffs request this Court limit the scope of the stay until the first-issued decision from either the 6th or 11th Circuits on the currently pending jurisdictional briefs.

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 11th 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 6th Circuit. To resolve the threshold

jurisdictional question, the 6th Circuit requested briefing on the court's jurisdiction from all petitioners by October 2, 2015. *See* Case No. 15-3885, Doc. 22-2. Respondents will have an opportunity to respond by October 23rd, and petitioners can submit any reply briefs by November 4th. *Id.* Oral argument is scheduled for December 8th. *See* Case No. 15-3751, Doc. 53. Meanwhile, the 6th 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 had 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." No. 3:15-cv-59, Doc. 70, p. 2.

The state plaintiffs in *State of Georgia, et al.* appealed the court's determination it lacked jurisdiction. The United States Court of Appeals for the 11th 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 11th 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 Judicial Panel on Multidistrict Litigation heard Defendants' motion to transfer and consolidate the district court WOTUS challenges on October 1st and was highly critical of Defendants' strategy of using the 28 U.S.C. § 1407

multidistrict litigation consolidation procedures for the WOTUS litigation. The Panel harshly challenged Defendants' counsel during oral argument and ultimately found "centralization under § 1407 is inappropriate." *See* Case MDL No. 2663, Doc. 163.

With the Panel's decision not to consolidate the district court cases, this matter is back before this Court. Defendants now file another motion for stay, attempting to further delay consideration of the merits of the WOTUS Rule challenges. Plaintiffs did not and do not consent to that stay, because the scope is too broad. As Plaintiffs told counsel for Defendants via e-mail, "Plaintiffs would oppose a continuation of the stay pending only the 6th Circuit decision." *See* Exhibit A. If the 11th Circuit decides this Court has jurisdiction before the 6th Circuit rules on the issue, Plaintiffs should be entitled to proceed with their case. Therefore, a more appropriate metric for terminating the stay would be the first-issued decision from the 11th or 6th Circuits on the currently pending jurisdictional issues.

II. A decision from the 6th Circuit is not binding on this Court.

This Court should more finely tailor Defendants' request for a stay, because any decision from the 6th Circuit would not bind this Court and may have no effect on this litigation. Should the 11th Circuit decide the jurisdictional issue first and

find this matter is properly before this Court, Defendants would have no reasonable basis for awaiting the 6th Circuit's ruling. If this Court is inclined to grant a stay, Plaintiffs would be amenable to a stay pending either a decision from the 11th or 6th Circuits, whichever occurs first.

Defendants highlight several cases in support of their motion to stay, but none of them stand for the proposition that a decision from an appellate court in a different circuit could bind the district court. A closer read of *Riverkeeper, Inc. v. EPA*, No. 06 CIV. 12987, 2007 WL 4208757 (S.D.N.Y. Nov. 26, 2007) reveals the court's preference was actually to hear from the 2nd Circuit on jurisdiction rather than the 5th. The district court had determined it had jurisdiction to hear the CWA challenge, but certified the question for interlocutory review in circuit court. To the court's frustration, EPA never sought review of the court's decision in the 2nd Circuit, and so the 2nd Circuit would not have an opportunity to rule. Contrary to Defendants' insinuation, the court did not conclude the 5th Circuit's ruling would be binding on it but determined instead only that there was "much to be gained" from the 5th Circuit's opinion. *See* 2007 WL 4208757, at *2 ("Putting aside whether this Court would be bound by a ruling of the Fifth Circuit, there is much to be gained from knowing whether the Fifth Circuit considers itself to have exclusive jurisdiction over a review of the final agency action.").

Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 630 F. Supp. 2d 295 (S.D.N.Y. 2009) involved litigation over the CWA's Water Transfer Rule. The district court concluded "the Eleventh Circuit's handling of the Consolidated Petitions will be given serious consideration by the Second Circuit," but not that the outside circuit's decision would be binding. 630 F. Supp. 2d at 307.

In *Chruby v. Global Tel Link Corp.*, No. 1:14-CV-456, 2015 WL 4740633 (E.D. Va. Jan. 14, 2015), the related circuit court case had been pending for over a year and was already into the merits by the time the district court stayed the litigation, giving the parties more hope for a speedy resolution than in this WOTUS litigation. Nevertheless, on a motion for reconsideration the court then overturned its decision to stay the proceedings, because the litigation stalled in the circuit court and relief would not be expeditious after all. *See Chruby v. Global Tel Link Corp.*, No. 1:14-CV-456, 2015 WL 4740790 (E.D. Va. Mar. 10, 2015).

The plaintiffs, not the defendants, sought the stay in *Greco v. Nat'l Football League*, No. 3:13-CV-1005-M, 2015 WL 4475663 (N.D. Tex. July 21, 2015). And the related appellate proceeding was in the 5th Circuit (and would therefore be binding on the Northern District of Texas court). In *Meijer, Inc. v. Abbott Labs.*, No. C 07-5470 CW, 2009 WL 723882 (N.D. Cal. Mar. 18, 2009), the related

appeal was in the 9th Circuit (and would therefore be binding on the Northern District of California court).

Defendants' citation to the *National Cotton Council of America v. EPA* litigation is also not useful to this Court's decision, at least not in the way Defendants' hope. In that case, because the plaintiffs consented to EPA's request for a stay pending the 6th Circuit's decision as to jurisdiction, the court never considered the merits of EPA's request for a stay and simply granted the unopposed motion. *See Baykeeper v. EPA*, 3:07-cv-725-SI (N.D. Cal.), Dkt. No. 9. However, the case is informative with regard to timing. The parties filed their motions on jurisdiction in the 6th Circuit on May 1, 2007. Because the 6th Circuit then deferred its decision on jurisdiction until its consideration of the merits of the case, the court did not hear oral argument until April 29, 2008, and did not enter a decision until January 7, 2009. *See id.*, Doc. Nos. 13 and 15. By consent, the parties continued the stay of the district court proceedings pending possible review by the Supreme Court, and the plaintiffs did not finally dismiss the case until January 2010. *See id.*, Doc Nos. 17, 21. From April 2007 until January 2010, the district court proceedings were stayed, and only in January 2009 did the plaintiffs obtain relief from the 6th Circuit.

Plaintiffs here do not consent to a nearly two-year delay of their day in court. The WOTUS Rule impacts their current and future business plans, and while justice delayed may save on court costs, it does not advance the goal of holding our government accountable to the law. Further delay will deprive Plaintiffs of the opportunity to challenge Defendants' unlawful actions and will open the door to the rule taking effect if the 6th Circuit finds it lacks jurisdiction. At a minimum, Defendants' requested stay will create a delay until 2016, because oral argument is not scheduled in the 6th Circuit until December 8, 2015.

"The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). Defendants have not met that burden here. Because a 6th Circuit decision would not bind this Court and may be entirely irrelevant, Defendants' request for a stay is overly broad and should be limited to account for a possible earlier decision from the 11th Circuit.

III. The balance of harms supports a more limited stay.

Plaintiffs recognize the inefficiency of litigating a case in a court without jurisdiction and therefore do not contest Defendants' request for a stay in its entirety. Instead, Plaintiffs request the stay be limited to account for a possible earlier decision from the 11th Circuit confirming this Court's jurisdiction. A more limited stay would serve Defendants' interests in obtaining an appellate ruling

while allowing Plaintiffs to proceed with the merits of their case at the earliest possible opportunity.

"[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). "However, this power must not be exercised lightly. The interests of all the parties and the interests of the court in an orderly disposition of its caseload must be considered." *Home Ins. Co. v. Coastal Lumber Co.*, 575 F. Supp. 1081, 1083 (N.D. Ga. 1983). "[I]t is inappropriate to stay a matter where the stay will serve simply to delay proceedings." *Ecolab, Inc. v. FMC Corp.*, No. 05-CV-831, 2007 WL 1582677, at *1 (D. Minn. May 30, 2007).

Defendants' request for a stay pending a 6th Circuit decision will merely serve to delay proceedings if the 11th Circuit issues its decision first. An earlier decision from the 11th Circuit would bind this Court irrespective of how the 6th Circuit ultimately rules. If the 11th Circuit decides this Court has jurisdiction, Plaintiffs should be entitled to proceed with the merits of their case. Similarly, Defendants would benefit from an earlier 11th Circuit decision finding this Court

lacks jurisdiction. Therefore, Defendants have no compelling reason for requesting such a broad stay when a more limited stay would serve their purposes equally well.

In contrast, Plaintiffs would be harmed by Defendants' broad stay request because of the potential for the WOTUS Rule taking effect immediately upon the 6th Circuit's decision. The 6th Circuit's current stay of the WOTUS Rule would be automatically lifted if the 6th Circuit determines it lacks jurisdiction. Any subsequent motion to this Court for preliminary injunction would require time for briefing, argument and decision. Meanwhile, Plaintiffs would suffer harm from Defendants' implementation of an unlawful rule. Only if Defendants agree now to a continued stay of the WOTUS Rule following the 6th Circuit's decision would Plaintiffs suffer no harm from Defendants' litigation stay request.

Because Plaintiffs would be harmed by the potential expansiveness of Defendants' stay request and because Defendants would not be harmed (and could even benefit) from a more limited stay, the balance of harms favors a stay pending the first-issued decision from either the 11th or the 6th Circuit.

IV. Conclusion

Because Plaintiffs never consented to the scope of Defendants' stay, Plaintiffs respectfully ask this Court to reconsider its Order granting the stay.

Waiting on the 6th Circuit, when the 11th Circuit could decide the jurisdictional issue first, would unnecessarily delay these proceedings and serve no legal purpose. The needless delay would deprive Plaintiffs of their lawful right to litigate their claims before this Court and could subject Plaintiffs to the enforcement of the unlawful WOTUS Rule if the 6th Circuit decides it lacks jurisdiction. Because the balance of harms and the law both support a more circumscribed stay, Plaintiffs request this Court limit Defendants' stay to the first decision from either the 6th or the 11th Circuits on jurisdiction.

This 23rd day of October, 2015.

/s/ Jennifer A. Simon

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CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of October, 2015, electronically filed the foregoing PLAINTIFFS' MOTION FOR RECONSIDERATION AND RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO CONTINUE 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.

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