

**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

JOINT STATUS REPORT AND MOTION TO STAY PROCEEDINGS

The Plaintiffs (Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; and Greater Atlanta Homebuilders Association, Inc.) and the Defendants (United States Environmental Protection Agency, Department of the Army, and United States Army Corps of Engineers) provide this status report and jointly move for a continued stay of these proceedings.

STATUS REPORT AND RELEVANT CASE HISTORY

1. This litigation challenges EPA’s 2015 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) (“2015 WOTUS Rule”).

2. Because of ambiguity in the jurisdictional provision of the CWA, Plaintiffs filed suits in both this Court and the United States Court of Appeals for the Eleventh Circuit. Plaintiffs' Eleventh Circuit action and other similar circuit court actions across the country were consolidated in the United States Court of Appeals for the Sixth Circuit by the Judicial Panel on Multi-District Litigation.

3. On October 9, 2016, the Sixth Circuit granted a nationwide stay of the 2015 WOTUS Rule pending its determination of jurisdiction over the controversy. *See In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015).

4. On February 22, 2016, the Sixth Circuit held it had exclusive jurisdiction pursuant to CWA Section 509(b)(1), 33 U.S.C. § 1369(b)(1), to hear all petitions for review of the 2015 WOTUS Rule. On April 21, 2016, the Sixth Circuit denied panel and en banc rehearing.

5. The Supreme Court granted certiorari and on January 22, 2018, determined these challenges to the 2015 WOTUS Rule were properly brought in district court. Therefore, it reversed and remanded the matter to the Sixth Circuit with instructions to dismiss for lack of jurisdiction. *See Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617 (2018).

6. On February 28, 2018, the Sixth Circuit vacated its stay of the rule and dismissed all challenges before it for lack of jurisdiction. *See In re: U.S.*

Department of Defense and U.S. EPA Final Rule: Clean Water Rule: Definition of “Waters of the United States,” No. 15-3751, 2018 WL 1108702 (6th Cir. Feb. 28, 2018).

7. On June 8, 2018, the U.S. District Court for the Southern District of Georgia granted the motion for preliminary injunction filed by the States of Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, and the Commonwealth of Kentucky, and preliminarily enjoined the 2015 Rule in those states. *See Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018). Motions for summary judgment in that case have been briefed and argued and are currently awaiting a decision.

8. Meanwhile, the Defendant Agencies have been engaged in rulemaking in response to the President of the United States’ February 28, 2017, Executive Order directing the Agencies to reconsider the 2015 WOTUS Rule. *See* Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

9. The Agencies announced a two-step process for the rulemaking. For step one, the Agencies issued a notice of proposed rulemaking entitled “Definition of ‘Waters of the United States’—Recodification of Pre-Existing Rules,” 82 Fed. Reg. 34,899 (July 27, 2017) and supplemented at 83 Fed. Reg. 32,227 (“proposed Recodification Rule”). That notice proposed to rescind the 2015 WOTUS Rule

and to recodify the 1986 regulatory definition of “waters of the United States.”

The comment period on the supplemental notice of the proposed Recodification Rule ended August 13, 2018.

10. For step two, the Agencies proposed a revised definition of “waters of the United States” under the Clean Water Act. The proposed rule was published in the Federal Register on February 14, 2019. *See* 84 Fed. Reg. 4154 (Feb. 14, 2019). The public comment period for the proposed rule closed on April 15, 2019.

11. In addition, in November 2017, the Agencies published and solicited public comment on a proposal to establish an applicability date for the 2015 WOTUS Rule. *See* 82 Fed. Reg. 55,542 (Nov. 22, 2017). On February 6, 2018, the Agencies published the final rule, which added an applicability date of February 6, 2020, to the 2015 WOTUS Rule. *See* 83 Fed. Reg. 5200 (“Applicability Rule”). As the Agencies explained in finalizing the Applicability Rule, the addition of the 2020 applicability date was intended “to provide clarity and certainty about the definition of ‘waters of the United States’ for an interim period while they continue to work on the two-step rulemaking process.” *Id.*

12. Recognizing that the 2015 WOTUS Rule was currently enjoined in this State and the Defendants did not intend for the 2015 WOTUS Rule to take effect before February 6, 2020, on August 1, 2018, this Court granted the Parties’

joint motion to continue the stay in this case for one year to serve the related principles of avoiding unnecessary litigation and of conserving judicial and party resources.

13. Since that time, two courts have vacated the Applicability Rule nationwide. *See S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018); *Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 WL 6169196 (W.D. Wash. Nov. 26, 2018).

14. As a result, the 2015 WOTUS Rule is now in enjoined in more than half the states, and in effect in the remaining states, the District of Columbia, and the U.S. territories.

JOINT MOTION TO CONTINUE STAY

15. Although the Agencies' intent was that the 2015 WOTUS Rule would not become applicable at least until February 6, 2020, and are in the midst of a rulemaking process that could operate to rescind and replace the 2015 WOTUS Rule before that time, the injunctions of the Applicability Rule have resulted in the 2015 WOTUS Rule taking effect in any state where it is not temporarily or permanently enjoined.

16. Therefore, while the 2015 WOTUS Rule is currently enjoined in this State, events beyond the control of the Parties could cause the 2015 WOTUS Rule

to take effect in the near term, including but not limited to the outcome of the summary judgment motions currently before the U.S. District Court for the Southern District of Georgia.

17. To serve the related principles of avoiding unnecessary litigation and of conserving judicial and party resources, the Parties request a continued stay of this litigation, but that again the stay be limited to one year and be automatically lifted if the 2015 WOTUS Rule becomes effective and applicable in this State or is ordered or scheduled to become so within a three-month time horizon.

18. 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); *Rogers v. City of Atlanta*, 214 F. Supp. 3d 1314, 1319 (N.D. Ga. 2016). The Court may grant a stay where it would serve “economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

CONCLUSION

For the reasons stated above, the Parties request a one-year continued stay of this action, to be automatically lifted if the 2015 WOTUS Rule becomes effective and applicable in this State or is ordered or scheduled to become so within a three-month time horizon.

Dated: August 2, 2019

Respectfully submitted,

/s/ Martha C. Mann

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CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of August, 2019, electronically filed the foregoing JOINT STATUS REPORT AND MOTION TO STAY 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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