

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

STATE OF TEXAS, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	No. 3:23-cv-17 (consolidated
	§	with No. 3:23-cv-20)
	§	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	§	
	§	
Defendants,	§	
	§	
BAYOU CITY WATERKEEPER,	§	
	§	
Intervenor-Defendant.	§	

**FEDERAL DEFENDANTS' MOTION TO STAY CASE OR EXTEND TIME TO
RESPOND TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

Federal Defendants (“the Agencies”) respectfully request that this Court stay the case pending publication of the Agencies’ forthcoming rule in the Federal Register, after which time the Parties would file proposal(s) to govern further proceedings in this case in light of the new rule. Alternatively, the Agencies request that the Court extend the time to respond to Plaintiffs’ motions for summary judgment until 21 days after publication of the Agencies’ forthcoming final rule in the Federal Register. As described below, the Agencies have good cause for this request.

BACKGROUND

I. The 2023 Rule, this case, and related litigation.

On January 18, 2023, the Agencies published the *Revised Definition of “Waters of the United States,”* 88 Fed. Reg. 3004 (“2023 Rule” or “Rule”). Plaintiffs, the State of Texas, five Texas state agencies, and the State of Idaho (“States”), and eighteen trade associations (“Associations”) moved to preliminarily enjoin the Rule. On March 19, this Court granted the States’ motion and denied the Associations’ motion. Dkt. No. 60 at 2. The Agencies noticed their appeal of the Court’s grant of the States’ preliminary injunction motion on May 17, 2023. Dkt. No. 73. The Associations did not appeal the Court’s denial of their preliminary injunction motion.

The Associations are also intervenors in a challenge to the 2023 Rule brought by the State of West Virginia and 23 other states in the District of North Dakota. *See West Virginia v. EPA*, No. 3:23-cv-0032 (D.N.D.). The Associations moved for a preliminary injunction seeking nationwide relief there as well but withdrew their motion after the court granted the plaintiff states’ motion. *Id.*, Dkt. No. 114 at 20 (Associations’ motion

requesting that the Rule be preliminarily enjoined nationwide); *id.*, Dkt. No. 131 at 43-45 (order granting plaintiff states’ motion and preliminarily enjoining the Rule within the 24 states’ borders); *id.*, Dkt. No. 134 (Associations’ notice withdrawing their preliminary injunction motion).

The Commonwealth of Kentucky and a different coalition of business groups filed suit in the Eastern District of Kentucky and moved to preliminarily enjoin the Rule. *See Kentucky v. EPA*, No. 3:23-cv-7 (E.D. Ky.). That court found that the plaintiffs failed to demonstrate standing and ripeness and dismissed the complaints. *Id.*, Dkt. No. 51 at 1, 21-22. The plaintiffs appealed, and the Sixth Circuit issued an injunction of the Rule pending appeal as to Kentucky and the business coalition plaintiffs. *Kentucky v. EPA*, No. 23-5345, Dkt. No. 28 at 7 (6th Cir.). In sum, the 2023 Rule is currently enjoined in 27 states, including Texas and Idaho.

II. Recent developments.

After the Court’s March 19 Order on the motions for preliminary injunction, on April 5, 2023, the Parties appeared before Magistrate Judge Edison for a status conference. The Court then scheduled a status conference for July 14, 2023, and ordered the Parties to file a joint letter regarding scheduling on July 12, 2023. Dkt. No. 69; Minute Entry (Apr. 5, 2023). On May 25, the Supreme Court issued its ruling in *Sackett v. EPA*, 143 S. Ct. 1322 (2023), which addresses the standard for determining what constitutes “waters of the United States.” Shortly thereafter, the Agencies publicly stated that they are interpreting the phrase “waters of the United States” consistent with *Sackett*.

See Ex. 1, Declaration of Radhika Fox ¶¶ 7-8 (“Fox Decl.”); Ex. 2, Declaration of Michael L. Connor ¶¶ 6-7 (“Connor Decl.”).

In June, the Agencies announced that they are developing a new rule to amend the 2023 Rule consistent with *Sackett*, and that the Agencies intend to issue a final rule on or before September 1, 2023. Fox Decl. ¶¶ 9-10; Connor Decl. ¶¶ 8-9; *see also* EPA, *Amendments to the 2023 Rule*, <https://www.epa.gov/wotus/amendments-2023-rule> (last visited July 7, 2023); Corps, *UPDATE Supreme Court Ruling in Sackett v. Environmental Protection Agency*, <https://www.usace.army.mil/Media/Announcements/Article/3440421/27-june-2023-update-supreme-court-ruling-in-sackett-v-environmental-protection/> (June 27, 2023).

On June 27—before Plaintiffs filed their motions for summary judgment—counsel for the Agencies informed Plaintiffs’ counsel that the Agencies are developing a new rule to conform the definition of “waters of the United States” with *Sackett* and that the Agencies intend to issue a final rule by September 1. Ex. 3, Declaration of Sonya Shea ¶ 6 (“Shea Decl.”).

The Agencies also moved for a stay of the case in the North Dakota District Court in light of their forthcoming rule. *West Virginia v. EPA*, No. 3:23-cv-32, Dkt. No. 143 (D.N.D. June 26, 2023). That motion is currently pending. The Associations, as intervenors in that case, were the only party to oppose—the 24 plaintiff states did not oppose. The Associations later filed a motion for summary judgment in that case. *Id.*, Dkt. No. 144 (June 30, 2023).

And on July 3, the Sixth Circuit granted the Agencies' unopposed request for an abeyance of the appeals from the Eastern District of Kentucky's order denying preliminary injunction motions and dismissing the complaints, with the Agencies' status reports due every 60 days starting September 1. *Kentucky v. EPA*, No. 23-5345, Dkt. No. 32 (6th Cir.).

CERTIFICATE OF CONFERENCE

The Agencies conferred with the Parties on the relief requested in this motion. The States oppose abeyance and stated that they "are not inclined to oppose a reasonable extension to manage your workload impacts"; Associations oppose this motion; and Intervenor does not oppose a stay and joins in this motion's alternative request for an extension. Counsel cannot agree about the disposition of this motion. Shea Decl.

¶¶ 10-11.

SUMMARY OF THE ARGUMENT

The Court should grant this motion and stay the case until after a new final rule is published in the Federal Register. First, a stay will best conserve the Parties' and the Court's resources because it may result in avoiding unnecessary litigation and/or narrowing the issues. Second, a stay will be appropriately limited in duration because the Agencies intend to issue the new rule by September 1, and promptly submit it for publication in the Federal Register. Third, no Party will be prejudiced by the stay. Nor has any Party shown that they are harmed by the 2023 Rule or that harm would be likely as a result of the stay. Finally, continuing with litigation now instead of waiting a few months would be unnecessary, burdensome, inefficient, and wasteful. As an alternative to

staying the case, the Court could grant an extension of time to respond to the Plaintiffs' summary judgment motions until after publication of the new rule in the Federal Register.

ARGUMENT

Courts have “broad discretion to stay proceedings.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997). This authority is “incidental to the power inherent in every court to control” its docket. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). This case should be stayed.

Before Plaintiffs filed their motions, the Agencies were in the process of developing a new rule to amend the 2023 Rule consistent with *Sackett*. Fox Decl. ¶ 9; Connor Decl. ¶ 8. The Agencies intend to issue a final rule on or before September 1, 2023. Fox Decl. ¶ 10; Connor Decl. ¶ 9; *see also* EPA, *Amendments to the 2023 Rule*, <https://www.epa.gov/wotus/amendments-2023-rule>; Corps, *UPDATE Supreme Court Ruling in Sackett v. Environmental Protection Agency*, <https://www.usace.army.mil/Media/Announcements/Article/3440421/27-june-2023-update-supreme-court-ruling-in-sackett-v-environmental-protection>. Because the new rule will amend the 2023 Rule—the rule challenged in this case—the new rule will indisputably have a direct impact on this case. A stay of this case allowing time for the Parties to examine that impact will best preserve the Parties' resources and conserve judicial economy.

The Agencies' new rule may resolve, or at least narrow, the issues in this case. A stay will allow the Parties time to assess the new rule and determine whether to continue to litigate. A stay will also serve the interest of judicial economy because it may result in avoiding unnecessary litigation and/or narrowing the issues. *See, e.g., Franciscan All.*,

Inc. v. Price, No. 7:16-cv-00108, 2017 WL 3616652, at *5 (N.D. Tex. July 10, 2017) (finding that staying the case until after an agency completes its review of a challenged rule “makes efficient use of both the Court’s and the parties’ resources” and “will promote judicial efficiency”).

The stay would be appropriately limited in duration and would not unduly delay any further proceedings in this case. The Agencies intend to issue a new rule by September 1. The Agencies will then promptly submit the rule for publication in the Federal Register. Fox Decl. ¶ 10; Connor Decl. ¶ 9. Once published, the Parties would examine that official version of the new rule in assessing whether and how this litigation might continue. This process would conserve the Court’s and the Parties’ resources, allowing the Parties and the Court to focus only on any disputed issues that might remain.

No Party would be prejudiced by the stay, and a stay best serves the public interest. Plaintiffs have not shown, nor do their summary judgment motions show, that the 2023 Rule is causing them any harm that compels a decision on the Rule before the Agencies’ new final rule is published in the Federal Register. The 2023 Rule is stayed as to the States, and in 25 other states. The Agencies “are interpreting the phrase ‘waters of the United States’ consistent with the Supreme Court’s decision in *Sackett*.” EPA, *Amendments to the 2023 Rule*, <https://www.epa.gov/wotus/amendments-2023-rule>; Corps, *UPDATE Supreme Court Ruling in Sackett v. Environmental Protection Agency*, <https://www.usace.army.mil/Media/Announcements/Article/3440421/27-june-2023-update-supreme-court-ruling-in-sackett-v-environmental-protection>. This interpretation extends nationwide, including areas where the Rule is not subject to an injunction. *See*

Franciscan All., 2017 WL 3616652, at *5 (finding that staying the case until after an agency completes its review of a challenged rule imposed no undue prejudice on plaintiffs).

Alternatively, pressing forward with litigation now would be burdensome and would waste resources by requiring the Parties and the Court to engage on issues that may be entirely avoided or more efficiently resolved in just a matter of months. Even if briefing were to proceed now and assuming no Party receives an extension, because the Agencies would cross-move, briefing could not be completed until August 16—about two weeks before the latest date by which the Agencies intend to issue the new final rule. *See* Gal. Div. R. Prac. 5.g; S.D. Tex. Local Rule 7. And if, after reviewing the new rule, the Parties proceed with summary judgment briefing, the Parties would undoubtedly seek to supplement their filings to account for the new rule. Waiting a few months to allow for consideration of the new rule before proceeding with litigation makes good sense.

A stay of this case would allow time for the Parties to determine whether the new rule resolves Plaintiffs' concerns. It could eliminate the need for further briefing on complicated issues that could be avoided entirely or at least narrow the issues that may require resolution by the Court. Accordingly, a stay (or an extension of the deadline to respond to the summary judgment motions) pending publication of the new rule in the Federal Register is warranted.¹

¹ The Agencies intend to seek a similar stay or extension in the Fifth Circuit of their appeal of the Court's preliminary injunction Order. The Agencies reserve the right to seek an extension of the stay (or additional extensions) as appropriate.

The Agencies will promptly notify the Court and the Parties when the new rule is published in the Federal Register. The Agencies propose that the Court order the Parties to submit a proposal or proposals for further proceedings within 21 days after the new rule's publication. The Agencies agree to provide periodic status reports every 45 days during the duration of the stay. Each Party reserves the right to move this Court to lift or extend the stay prior to the end of the duration of the stay if circumstances warrant.

CONCLUSION

The Court should grant this motion and stay the case until publication of the Agencies' final rule in the Federal Register. Alternatively, the Court could extend the deadline to respond to Plaintiffs' summary judgment motions until 21 days after publication of the Agencies' final rule in the Federal Register.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2023, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Sonya J. Shea