

No. 23-2411

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

STATE OF WEST VIRGINIA, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Defendants-Appellants.

On Appeal from the U.S. District Court for the District of North Dakota
No. 3:23-cv-32 (Hon. Daniel L. Hovland, U.S. District Judge)

DEFENDANTS-APPELLANTS' UNOPPOSED MOTION FOR ABEYANCE

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Defendants-Appellants request that this appeal be held in abeyance until the Environmental Protection Agency and Army Corps of Engineers (Agencies) publish a new final rule amending the regulations defining “waters of the United States” under the Clean Water Act. No party opposes this motion.

BACKGROUND

On January 18, 2023, the Agencies published the Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004. Plaintiffs, the State of West Virginia and 23 others, moved to preliminarily enjoin the Rule. Eighteen trade groups intervened as plaintiffs and four tribes intervened as defendants. On April 12, 2023, the district court granted the States’ preliminary injunction motion. The Agencies noticed their appeal of the Court’s grant of the States’ preliminary injunction motion on June 12, 2023.

On May 25, 2023, the Supreme Court issued an opinion in *Sackett v. EPA*, 143 S. Ct. 1322, which addresses the standard for determining what constitutes “waters of the United States.” In June, the Agencies announced that they are developing a new rule to amend the 2023 Rule consistent with the Supreme Court’s decision. U.S. EPA, *Amendments to the 2023 Rule*, <https://www.epa.gov/wotus/amendments-2023-rule>. The Agencies intend to issue a final rule by September 1, 2023. *Id.* Given the forthcoming rulemaking, the Agencies seek to hold this appeal in abeyance pending publication of the

final rule in the Federal Register. 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. *Kentucky v. EPA*, Nos. 23-5345, Dkt. No. 32 (6th Cir.).

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). A Court may hold its own proceedings in abeyance when it would serve “economy of time and effort for itself, for counsel, and for litigants.” *Id.*

An abeyance here would conserve the Parties' resources and would promote judicial economy. The Agencies' forthcoming final rule is likely to affect the ultimate resolution of this appeal in that it may narrow the issues that the Court chooses to resolve. An abeyance would allow the Parties time to assess the new rule and determine how to best proceed with the case. Allowing the Parties time to react to the new rule would avoid unnecessary litigation in the interim, conserving the resources of both the Parties and the Court.

The requested abeyance would be appropriately limited in duration so that it would not unduly delay any further proceedings in this appeal. The Agencies'

opening brief is currently due by July 24, 2023. The Agencies intend to issue a new final rule by September 1, 2023, little more than a month later. No Party would be prejudiced by the abeyance. When the new rule is issued, the Agencies will promptly submit the rule for publication in the Federal Register. Once published, the Parties would examine that official version of the new rule in assessing whether and how this litigation should continue. In the meantime, the 2023 Rule is stayed as to the States, and 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, *UPDATED 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. The Agencies have also conferred with the parties, and no party opposes this motion.

CONCLUSION

For the foregoing reasons, the Court should grant this motion and hold this appeal in abeyance pending publication of a new final rule regarding the definition of “waters of the United States” in the Federal Register.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts of the document exempted by Rule 32(f), this document contains 638 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Calisto MT font.

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