

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
EASTERN DIVISION**

STATE OF WEST VIRGINIA, <i>et al.</i> ,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	
AMERICAN FARM BUREAU	)	
FEDERATION, <i>et al.</i> ,	)	
	)	
<i>Plaintiff-Intervenors</i>	)	No. 3:23-cv-32-DLH-ARS
	)	
v.	)	Hon. Daniel L. Hovland
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, <i>et al.</i> ,	)	
	)	
<i>Defendants,</i>	)	
	)	
CHICKALOON VILLAGE	)	
TRADITIONAL COUNCIL, <i>et al.</i> ,	)	
	)	
<i>Defendant-Intervenors.</i>	)	

**FEDERAL DEFENDANTS’ MOTION FOR A STAY**

Federal Defendants respectfully request that the Court stay the case. In support of this motion, Federal Defendants state as follows:

1. On January 18, 2023, Defendants Environmental Protection Agency and Army Corps of Engineers (“Federal Defendants”) published the *Revised Definition of “Waters of the United States,”* 88 Fed. Reg. 3004 (“2023 Rule” or “Rule”).
2. Plaintiffs, the State of West Virginia and 23 others (“Plaintiff States”), moved to preliminarily enjoin the Rule, which this Court granted. ECF No. 131.
3. Eighteen trade associations (“Business Plaintiffs”) moved to intervene, which the Court granted, ECF No. 110. Business Plaintiffs filed their Complaint on March 23, 2023, ECF No. 111, and served it on March 29, 2023.

4. 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.”

5. Federal Defendants moved for an extension of time to respond to Business Intervenors’ Complaint, which the Court granted. ECF Nos. 138 & 139.

6. Federal Defendants respectfully request that the Court stay this case. Good cause exists for this request. Federal Defendants are developing a new rule to amend the 2023 Rule consistent with *Sackett*. Ex. 1, Declaration of Radhika Fox (“Fox Decl.”) ¶ 9; Ex. 2, Declaration of Michael Connor (“Connor Decl.”) ¶ 8. Federal Defendants intend to issue a final rule on or before September 1, 2023. Fox Decl. ¶ 10; Connor Decl. ¶ 9. In light of Federal Defendants’ forthcoming rule, a stay of this case will best preserve the Parties’ resources and conserve judicial economy. Federal Defendants’ 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 this case. A stay will also serve the interest of judicial economy because it may result in avoiding unnecessary litigation and/or narrowing the issues. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

7. No Party would be prejudiced by the stay, and a stay best serves the public interest. The 2023 Rule is stayed as to Plaintiff States. Federal Defendants “are interpreting the phrase ‘waters of the United States’ consistent with the Supreme Court’s decision in *Sackett*.” Fox Decl. ¶ 8; Connor Decl. ¶ 7. This interpretation extends nationwide, including areas where the Rule is not subject to an injunction.

8. A stay would not unduly delay any further proceedings in this case. Federal Defendants’ response to Business Intervenors’ complaint is currently the only deadline. And

with the exception of Federal Defendants' appeal of the order granting Business Intervenors' intervention motion, ECF No. 129, no pending matters are before the Court.

9. The stay would be appropriately limited in duration. Federal Defendants intend to issue a new rule by September 1, 2023. Fox Decl. ¶ 10; Connor Decl. ¶ 9. Federal Defendants 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 in this case. 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. Accordingly, a stay pending publication of the new rule in the Federal Register is warranted.<sup>1</sup>

10. Federal Defendants will promptly notify the Court and the Parties when the new rule is published in the Federal Register. Federal Defendants 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. Federal Defendants 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.

11. Federal Defendants have conferred with the Parties on this motion. Plaintiff States and Tribal Intervenors do not oppose the relief requested. Business Intervenors oppose.

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<sup>1</sup> If the Court grants the stay, Federal Defendants intend to seek a similar stay or extension in the Eighth Circuit of their appeal of the Court's preliminary injunction order, ECF No. 141.

For the foregoing reasons, Federal Defendants respectfully request that the Court grant this motion and (a) stay this case pending publication of a final rule regarding the definition of “waters of the United States” in the Federal Register; (b) direct the Parties to submit a proposal or proposals for further proceedings within 21 days after publication of the final rule; and (c) direct Federal Defendants to file status reports every 45 days during the duration of the stay.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 26, 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