

**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.¹

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.

¹ 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,

TODD KIM
Assistant Attorney General
ENVIRONMENT AND NATURAL
RESOURCES DIVISION

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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

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
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<i>Defendant-Intervenors.</i>)	
)	

DECLARATION OF RADHIKA FOX

I, Radhika Fox, declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge, information contained in the records of the United States Environmental Protection Agency (“EPA” or “the Agency”), and information supplied to me by current EPA employees.

1. I am the Assistant Administrator for the Office of Water in EPA. I have served in this position since June 2021. I was the Principal Deputy Assistant Administrator for the Office of Water in EPA between January 2021 and June 2021.

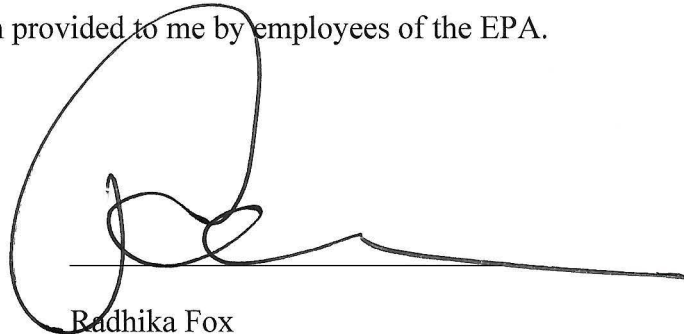
2. As Assistant Administrator, I am responsible for, and provide counsel to, the Administrator on policy, planning, program development and implementation, management, and control of the technical and administrative aspects of the Office of Water. I manage the Agency's programs under the Clean Water Act ("CWA"), Safe Drinking Water Act, and the Marine Protection, Research, and Sanctuaries Act.
3. Within EPA, the Office of Water has primary responsibility for the rulemaking process related to the CWA.
4. Within the Department of the Army ("Army"), the Office of the Assistant Secretary of the United States Army for Civil Works has primary responsibility for the rulemaking process related to the CWA.
5. These two offices have the responsibility of implementing the definition of "waters of the United States" regarding their respective CWA regulatory actions and programmatic activities. The definition of "waters of the United States" is a key term used to identify the jurisdictional scope of the CWA.
6. On January 18, 2023, EPA and the Army (collectively "the agencies") published in the *Federal Register* a final rule revising the definition of "waters of the United States." ("Revised Definition of 'Waters of the United States'").
7. On May 25, 2023, the U.S. Supreme Court issued a decision in the case of *Sackett v. Environmental Protection Agency*, 143 S. Ct. 1322 (2023) ("*Sackett*"), addressing the phrase "waters of the United States."
8. Shortly thereafter, the agencies stated publicly that the agencies were in receipt of the U.S. Supreme Court's May 25, 2023 decision in the case of *Sackett v.*

Environmental Protection Agency and that in light of this decision, the agencies are interpreting the phrase “waters of the United States” consistent with the Supreme Court’s decision in *Sackett*. <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

9. The agencies are developing a rule to amend the final “Revised Definition of ‘Waters of the United States’” rule, published in the *Federal Register* on January 18, 2023, consistent with the U.S. Supreme Court’s decision in *Sackett*.
10. The agencies intend to issue a final rule on or before September 1, 2023. The agencies will promptly submit the final rule to the *Federal Register* for publication.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of the EPA.

Dated: June 26, 2023

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

Radhika Fox
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency

EXHIBIT 2

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)	
<i>Defendant-Intervenors.</i>)	

DECLARATION OF MICHAEL L. CONNOR

I, Michael L. Connor, declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge, information contained in the records of the Office of the Assistant Secretary of the Army for Civil Works (“OASACW”), and information supplied to me by current OASACW employees.

1. I am the Assistant Secretary of the Army for Civil Works. I have served in this position since November 2021. As the Assistant Secretary of the Army for Civil Works, I serve as the principal advisor to the Secretary of the Army on all matters related to the Army’s Civil Works Program. In this role, I establish policy

direction and provide supervision of Department of the Army functions relating to all aspects of the U. S. Army Corps of Engineers' Civil Works program.

2. Within the United States Environmental Protection Agency (“EPA”), the Office of Water has primary responsibility for the rulemaking process related to the Clean Water Act (“CWA”).
3. Within the Department of the Army (“Army”), the Office of the Assistant Secretary of the United States Army for Civil Works has primary responsibility for the rulemaking process related to the CWA.
4. These two offices have the responsibility of implementing the definition of “waters of the United States” regarding their respective CWA regulatory actions and programmatic activities. The definition of “waters of the United States” is a key term used to identify the jurisdictional scope of the CWA.
5. On January 18, 2023, EPA and the Army (collectively “the agencies”) published in the *Federal Register* a final rule revising the definition of “waters of the United States.” (“Revised Definition of ‘Waters of the United States’”).
6. On May 25, 2023, the U.S. Supreme Court issued a decision in the case of *Sackett v. Environmental Protection Agency*, 143 S. Ct. 1322 (2023) (“*Sackett*”), addressing the phrase “waters of the United States.”
7. Shortly thereafter, the agencies stated publicly that the agencies were in receipt of the U.S. Supreme Court’s May 25, 2023 decision in the case of *Sackett v. Environmental Protection Agency* and that in light of this decision, the agencies are interpreting the phrase “waters of the United States” consistent with the Supreme Court’s decision in *Sackett*.

<https://www.usace.army.mil/Media/Announcements/Article/3409141/26-may-2023-supreme-court-ruling-in-sackett-v-environmental-protection-agency/>

8. The agencies are developing a rule to amend the final “Revised Definition of ‘Waters of the United States’” rule, published in the *Federal Register* on January 18, 2023, consistent with the U.S. Supreme Court’s *Sackett* decision.
9. The agencies intend to issue a final rule on or before September 1, 2023. The agencies will promptly submit the final rule to the *Federal Register* for publication.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of the OASACW.

Dated: June 26, 2023



Michael L. Connor
Assistant Secretary of the Army
Civil Works