

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

STATE OF NORTH DAKOTA, <i>et al.</i> ,)	
Plaintiffs,)	
v.)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <i>et al.</i> ,)	Case No. 3:15-cv-00059-RRE-ARS
Defendants.)	

**DEFENDANTS’ RENEWED MOTION TO STAY PROCEEDINGS PENDING A
RULING FROM THE JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION
UNDER 28 U.S.C. § 1407 TO TRANSFER AND CONSOLIDATE**

Defendants the United States Environmental Protection Agency and the United States Army hereby renew their request to stay proceedings pending a decision by the Judicial Panel for Multidistrict Litigation (“MDL Panel”) on Defendants’ motion under 28 U.S.C. § 1407 for transfer and consolidation of all district court challenges to the Clean Water Rule in a single district court. In support of this motion, Defendants state the following:

1. On July 27, 2015, Defendants filed a motion with the MDL Panel to consolidate all district court actions in a single district court pursuant to 28 U.S.C. § 1407. *In re Clean Water Rule: Definition of “Waters of the United States,”* MDL No. 2663 (J.P.M.L.), Dkt. No. 1.
2. A hearing on Defendants’ motion to consolidate is scheduled for October 1, 2015, and Defendants anticipate an order to follow soon after. According to the former Chair of the MDL Panel, the Panel “prepares extensively for oral argument and usually reaches a decision on each case during its conference immediately afterwards.” John G. Heyburn II, “A View from the Panel: Part of the Solution,” 82 Tul. L. Rev. 2225, 2242 (2008).

3. Defendants previously moved this Court for a stay pending a decision by the MDL Panel. Dkt. No. 12 (filed July 21, 2015). Magistrate Judge Senechal denied Defendants' motion on August 18, 2015, finding that "a stay would result in damage to [Plaintiffs]" in light of their then-pending motion for a preliminary injunction. Dkt. No. 55 at 9.

4. This rationale for the denial of Defendants' motion for stay no longer has force. Plaintiffs have now been heard on their motion for preliminary relief, and have in fact obtained such relief from the Court. Dkt. No. 70 (Order of August 27, 2015). Thus, Plaintiffs can no longer claim that a short stay of the litigation would harm them.

5. The requested stay would be of short duration because Defendants' motion to consolidate will be heard by the MDL Panel in barely more than three weeks' time, on October 1.

6. "As a general rule, 'courts frequently grant stays pending a decision by the MDL panel regarding whether to transfer a case.' " *Lundy v. C.B. Fleet Co., Inc.*, No. 09-cv-00802-WYD-KLM, 2009 WL 1965521, at *1 (D. Colo. July 6, 2009) (citing *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 809 (N.D. Cal. 1998)). In the Clean Water Rule litigation, this is the only district court to deny Defendants' motion for a stay. To date, requests for a stay have been granted in nine actions challenging the Rule. *Ohio v. EPA*, No. 2:15-cv-2467 (S.D. Ohio), Dkt. No. 27; *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.) Dkt. No. 15; *Am. Farm Bureau v. EPA*, No. 3:15-cv-165 (S.D. Tex.), Dkt. No. 22; *Okla. v. EPA*, No. 4:15-cv-381 (N.D. Okla.) Dkt. No. 22; *Chamber of Commerce v. EPA*, No. 4:15-cv-386 (N.D. Okla.), Dkt. No. 32; *Se. Legal Found., Inc. v. EPA*, 1:15-cv-2488 (N.D. Ga.), Dkt. No. 5; *Wash. Cattlemen's Ass'n v. EPA*, No. 1:15-cv-3058 (D. Minn.), Dkt. No. 14 *Waterkeeper Alliance, Inc. v. EPA*, No. 3:15-cv-3927 (N.D. Cal.), Dkt. No. 9; *Puget Soundkeeper v. McCarthy*, No. 2:15-cv-1342 (W.D. Wash.), Dkt.

No. 14. An unopposed motion for stay is pending in *NRDC v. EPA*, No. 1:15-cv-1324 (D.D.C.), Dkt. No. 6. Defendants' motions to stay in *Murray Energy Corp. v. EPA*, No. 1:15-cv-110 (N. D. W. Va.), and *Georgia v. McCarthy*, No. 2:15-cv-0079 (S.D. Ga.), were rendered moot in light of those courts' holdings that they lack jurisdiction to hear a challenge to the Clean Water Rule. And Defendants will soon be filing unopposed motions for stay in recently-filed actions in *Az. Mining Ass'n v. EPA*, No. 2:15-cv-1752 (D. Az.).

7. As set forth in Defendants' briefing in support of its previous motion to stay (Dkt. Nos. 12-1 and 34), a stay of proceedings in this case pending a ruling from the MDL Panel on consolidation of the multiple district court challenges to the Clean Water Rule will conserve judicial and governmental resources and provide for orderly and efficient management of the complex litigation concerning the Clean Water Rule.¹

For these reasons, Defendants respectfully request that this Court stay all further proceedings pending action by the MDL Panel under 28 U.S.C. § 1407.

Dated: September 9, 2015

Respectfully submitted,

JOHN C. CRUDEN
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Environment and Natural Resources Division

¹ On September 1, the District Court for the Southern District of Ohio granted Defendants' motion for stay of the proceedings in *Ohio v. EPA*, pending a decision by the MDL Panel. No. 2:15-cv-2467, 2015 WL 5117699 (S.D. Ohio Sept. 1, 2015). In its order, the court observed that "[i]t would be a waste of judicial resources for this case to proceed here if it is ultimately determined that it is the Sixth Circuit . . . that is the appropriate court to consider plaintiffs' claims." *Id.* at *3; *see also id.* ("[I]t would be inefficient for the parties to prepare, and for this Court to review, potentially lengthy briefs and for this Court to rule on the underlying issues in this case, only to have to revisit the parties' arguments in light of the Sixth Circuit's ruling[.]") (citation omitted). Counsel for Defendants was advised that a group of states (not including Plaintiffs here) will today be filing in the Sixth Circuit a motion to stay the Clean Water Rule and a motion to dismiss the petitions for lack of subject-matter jurisdiction.

/s/ Martha C. Mann
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing to be electronically filed on September 9, 2015. All registered counsel are to receive notice of the filing via the Court's electronic case filing system.

/s/ Martha C. Mann