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

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

FEDERAL DEFENDANTS' RESPONSE TO THE COURT'S AUGUST 28, 2015 ORDER SETTING BRIEFING SCHEDULE

In this action, twelve States[1] plus the New Mexico Environment Department and State Engineer (collectively "Plaintiffs" or "Plaintiff States") challenge a final rule entitled the "Clean Water Rule: Definition of 'Waters of the United States,'" published at 80 Fed. Reg. 37,054 (June 29, 2015) (the "Clean Water Rule"). On August 27, 2015, the Court issued an order granting Plaintiffs' "motion for a preliminary injunction enjoining Fed. Reg. 37,054-127." Dkt. No. 70. On August 28, 2015, the Court invited the parties to submit briefs "addressing the issue of whether the injunction applies nationally or in a limited geographic area." Dkt. No. 74. The United States respectfully submits this response to the Court's order.

The United States Environmental Protection Agency, its Administrator, the United States Army Corps of Engineers, and Assistant Secretary for the Army Jo-Ellen Darcy (the "Federal Defendants") are fully complying with the Court's August 27, 2015 order. Upon receipt of the Court's order, Federal Defendants announced that the Clean Water Rule will not be applied in

[1] North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming.

the States that are parties to this litigation (including New Mexico). Consistent with Supreme Court precedent, as described below, Federal Defendants interpret the Court's August 27 order to apply only to these States as parties before the Court and to remedy the specific irreparable harms to these States that the Court identified. See Dkt. No. 70, at 15-18. Without conceding that any irreparable harm exists, Federal Defendants interpret the Court's order as limited to the jurisdiction of Plaintiff States because relief beyond those States is unnecessary to address the harm found by the Court. This interpretation is especially appropriate given that (1) many States are not challenging the Clean Water Rule at all, and some seek to support it in the Sixth Circuit Court of Appeals; and (2) challenges by other parties, including other States, are pending in other courts, two of which have held, contrary to this Court, that jurisdiction to review challenges to the Clean Water Rule lies exclusively in the Sixth Circuit and therefore denied motions for preliminary injunctions. *See* Dkt. No. 69 (Federal Defendants' notice of supplemental authority, *Murray Energy Corp. v. EPA*, 1:15-cv-0110, Dkt. No. 32 (N.D. W. Va. Aug. 26, 2015)); Dkt. No. 71 (Federal Defendants' notice of supplemental authority, *Georgia v. EPA*, 2:15-cv-0079, Dkt. No. 77 (S.D. Ga. Aug. 27, 2015)). [2]

I. The Preliminary Relief Should Be Limited to the Specific Irreparable Harm Plaintiffs Allege and Upon Which the Court's August 27 Order Relied.

In entering the preliminary injunction, the Court found irreparable harm in two respects: (1) "the Rule will irreparably diminish the States' power over their waters," and (2) "[t]he States assert numerous losses that would be attributable to the Rule," which "are unrecoverable economic losses." Dkt. No. 70, at 16-17. "The States" were defined by the Court to mean the

[2] Additionally, currently pending before the Panel on Multidistrict Litigation is the United States' motion under 28 U.S.C. § 1407 to consolidate the multiple district court challenges to the Clean Water Rule in a single district court for pre-trial proceedings, which the Plaintiff States have opposed.

"twelve States and the New Mexico Environment Department and the New Mexico State Engineer that filed a complaint" in this case. Dkt. No. 70, at 2. Thus, the Court's preliminary injunction is based on and addresses harms alleged to affect only the Plaintiff States.

Confining the scope of the Court's order to the specific harms of the Plaintiff States aligns with principles of injunctive relief. An injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011) (nationwide injunction was "too broad" where injunction preventing agency from enforcing regulation against plaintiffs was sufficient to afford relief to plaintiffs); *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001) (nationwide injunction was an abuse of discretion where it was broader than necessary to afford relief to the plaintiff); *Meinhold v. United States Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (vacating Armed-Forces-wide injunction except as to individual plaintiff). Plaintiffs here asserted, and this Court found, that a preliminary injunction was warranted to prevent the Plaintiff States' alleged loss of sovereignty over intrastate waters and their alleged monetary losses associated with implementation of and compliance with the Clean Water Rule. Dkt. No. 70 at 15-17. These alleged harms are specific to the individual Plaintiff States and thus an award of preliminary injunctive relief that sweeps in parties not before this Court is neither necessary nor appropriate. *See Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1136 (11th Cir. 1984) (injunctive relief not benefitting the plaintiff is "unnecessary to the 'just disposition of the action'") (citations omitted).

In contrast, giving nationwide effect to the preliminary injunction would go beyond addressing the specific irreparable harms alleged by the Plaintiffs and therefore is not a proper

interpretation of the Court's order. An injunction of nationwide scope is particularly unwarranted because the Court has determined only that the Plaintiffs here are entitled to preliminary relief to preserve the status quo pending this litigation; the Court made no findings and reached no conclusions regarding any other party. Even with respect to the Plaintiff States, the Court acknowledged that it did not have the full record before it. Dkt. No. 70, at 8, 9, 15. Because the preliminary injunction is intended to preserve the status quo as to these Plaintiffs, it should not apply nationwide, encompassing waters in States that either have not challenged the Clean Water Rule or that have unsuccessfully sought to preliminarily enjoin it in separate judicial proceedings.

Indeed, the Plaintiff States' assertion that the press statement attached to their August 28, 2015 notice to the Court is "contrary to, and in defiance of" the Court's order, Dkt. No. 73, lacks any explanation as to how the Plaintiff States are not protected from the harms they asserted in their motion for preliminary injunction. The Plaintiff States cannot contend that if any district court in any proceeding where the Clean Water Rule is challenged finds that the criteria for preliminary injunctive relief have been satisfied, that court's order is binding in all the other proceedings and throughout the nation. That logic would lead to the absurd situation where if a single regulated entity is able to persuade a single district court that *it* will potentially incur an irreparable harm, then the Clean Water Rule may be enjoined across the nation with respect to every single regulated and regulating entity, including those who benefit from and support the Rule, and even in the jurisdiction of district courts that have previously denied similar injunctive relief.

Interpreting this Court's preliminary injunction to have nationwide effect would be in direct conflict with the decisions reached by other district courts considering challenges to the

Clean Water Rule brought by other plaintiffs, including other States. Of the five preliminary injunction motions filed in these matters, two were denied based upon lack of subject-matter jurisdiction, *Murray Energy Corp. v. EPA*, 1:15-cv-0110, Dkt. No. 32 (N.D. W. Va. Aug. 26, 2015), and *Georgia v. EPA*, 2:15-cv-0079, Dkt. No. 77 (S.D. Ga. Aug. 27, 2015); and two were deferred until the Judicial Panel for Multidistrict Litigation issues a decision on the United States' pending motion for transfer and consolidation of the district court matters, *Oklahoma ex rel. Pruitt v. EPA*, Nos. 15-cv-0381, 15-cv-0386, 2015 WL 4607903, at *4 (N.D. Okla. July 31, 2015). Other challenges to the Clean Water Rule have been stayed in the district courts for the Southern District of Ohio, the Southern District of Texas, the Northern District of Georgia, and the District of Minnesota, and a motion for stay is awaiting decision in the district court for the District of Columbia.[3] It would be contrary to the principles of sound judicial administration and comity among federal courts of equal rank for this Court to conclude that its order should be given effect in the States that have unsuccessfully sought to or otherwise have been unable to enjoin the Clean Water Rule.

It would also be inappropriate to conclude, in the name of protecting state sovereignty, that this Court's order to enjoin the Clean Water Rule applies in the nineteen States that have not challenged the Rule, seven of which have moved to intervene in the Sixth Circuit proceedings to, in fact, support it. *See In re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States*, Case No. 15-3751

[3] On September 1, 2015, the United States District Court for the Southern District of Ohio issued an opinion and order granting Federal Defendants' motion to stay proceedings pending a ruling by the Judicial Panel on Multidistrict Litigation on consolidation. *Ohio v. EPA*, No. 2:15-cv-02467, Dkt. No. 27. The United States is preparing motions to stay in the recently-filed matters in the district courts for the Western District of Washington and the Northern District of California. *Puget Soundkeeper Alliance v. McCarthy*, No. 2:15-cv-1342 (W.D. Wash); *Waterkeeper Alliance, Inc. v. EPA*, No. 3:15-cv-3927 (N.D. Cal.).

(6th Cir.), Motion by States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, and Washington, and the District of Columbia, to Intervene in Support of Respondents in Docket No. 15-3751 and In Each of the Related Cases, Aug. 28, 2015 (attached hereto as Attachment 1). Thus, given the different postures in which different States and other parties find themselves with respect to the Clean Water Rule, injunctive relief here is properly confined to the Plaintiff States. To conclude otherwise would only serve to encourage parties to pursue piecemeal litigation and multiple challenges to administrative rules, secure in the knowledge that only one party would need to prevail in one lawsuit in order to obtain injunctive relief for all, even those who do not seek it.

II. Giving Nationwide Effect to the Court's Order Would Be Contrary to the Court's Conclusion that Clean Water Act Section 509(b)(1) Does Not Apply.

As the Court is aware, it is the United States' position that section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1), provides a mechanism for a broad nationwide resolution of regulatory challenges that affect a large number of entities. The Judicial Panel on Multidistrict Litigation has already consolidated 14 petitions for review in the Sixth Circuit. Accordingly, as noted above, four district courts have denied motions for preliminary injunction and several other district courts have stayed proceedings. Were a stay of the Clean Water Rule to be sought in the consolidated Sixth Circuit proceedings, and were the Sixth Circuit to agree that it has jurisdiction, that court would have all interested parties before it and could consider the appropriateness of nationwide relief, if it found such a stay motion had merit.

The situation here, however, is far different because this Court has determined that Congress's specialized mechanism for consolidating review of EPA rules under the Clean Water Act, section 509(b)(1), does not apply. The logical consequence of this Court's conclusion is that any injunctive relief should extend only to the harms alleged by the Plaintiffs in this action.

A preliminary injunction limited to the Plaintiff States adequately preserves the status quo for these Plaintiffs pending judicial review. A nationwide injunction, in contrast, would effectively resolve the issue for all courts with pending challenges to the Clean Water Rule, most of which have yet to decide the threshold jurisdictional question or are, in the interest of judicial economy, deferring any ruling until the Judicial Panel on Multidistrict Litigation considers consolidation. In light of the pendency of numerous other challenges to the Clean Water Rule, a nationwide injunction would be an unnecessarily blunt tool to address the specific irreparable harms alleged by Plaintiffs here that form the basis of the Court's August 27 order.

Dated: September 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby state and certify that on September 1, 2015, I have filed the foregoing document using the ECF system, and that such document will be served electronically on all parties of record.

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