UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

WASHINGTON CATTLEMEN'S ASSOCIATION; CALIFORNIA CATTLEMEN'S ASSOCIATION; OREGON CATTLEMEN'S ASSOCIATION; NEW MEXICO CATTLE GROWERS ASSOCIATION; NEW MEXICO WOOL GROWERS, INC.; NEW MEXICO FEDERAL LANDS COUNCIL; COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH; DUARTE NURSERY, INC.; PIERCE INVESTMENT COMPANY; LPF PROPERTIES, LLC.; and HAWKES COMPANY, INC., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; GINA McCARTHY, in her official capacity as Administrator of the ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES ARMY CORPS OF ENGINEERS; and JO ELLEN DARCY, in her official Capacity as Assistant Secretary of the Army, Civil Works, Defendants.	No. 015-cv-03058 **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS**

INTRODUCTION

On May 18, 2016, Federal Defendants filed a motion to dismiss this case in light of the Sixth Circuit decision that the courts of appeals, rather than the district courts, have original jurisdiction under § 1369(b)(1) of the Clean Water Act to consider a challenge to the final rule redefining "waters of the United States." 80 Fed. Reg. 37054 (June 29, 2015) (Clean Water Rule). However, the motion is misplaced; the Sixth Circuit decision is not binding on this Court and the jurisdictional issue is far from settled. In fact, two of the three judges who participated in the Sixth Circuit decision read the Clean Water Act as vesting jurisdiction over the Clean Water Rule challenges in the district courts, not the courts of appeals. Therefore, the motion to dismiss should be denied and briefing in the case should proceed. Alternatively, given the posture of this case, this Court should continue the stay (as was done in the District of North Dakota) until the U.S. Supreme Court rules on the jurisdictional question or the merits of the challenge.

ARGUMENT

I

THE SIXTH CIRCUIT JURISDICTIONAL DETERMINATION IS NOT BINDING ON THIS COURT THEREFORE THE MOTION TO DISMISS SHOULD BE DENIED

It is hornbook law that a district court is not bound by the decision of a court of appeals outside the district court's own circuit. *See Moore's Federal Practice* ¶ 0.402 (2d ed. rev. 1996) ("[T]he district courts . . . owe no obedience to the decisions of their counterparts in other districts, nor to the decisions of the courts of appeals in other

circuits."). Therefore, this Court (which lies in the Eighth Circuit) owes no deference to the Sixth Circuit decision on jurisdiction. *See In Re Department of Defense, U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Water of U.S.*, 817 F.3d 261 (6th Cir. 2016). Nor does the Sixth Circuit decision provide any meaningful persuasive authority for exclusive jurisdiction in the courts of appeals. That decision was anything but clear or consistent, since two of the three judges on the panel actually read the Clean Water Act as not vesting exclusive jurisdiction in the courts of appeals

Under § 1369(b)(1) of the Clean Water Act, certain actions of the EPA Administrator are subject to exclusive review in the courts of appeals. Relevant here are subsections (E) and (F) that state:

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) in issuing or denying any permit under section 1342 of this title.

The action at issue here is EPA's adoption of the Clean Water Rule, cited above, which purports to do nothing more or less than define "waters of the United States" subject to the Act. In the lead opinion, Judge McKeague held the Clean Water Rule fell under § 1369(b)(1)(E) and (F) of the Act, giving exclusive jurisdiction to the courts of appeals. *In Re Department of Defense*, 817 F.3d 263-264. But that was not based on a literal reading of the statutory language, but on what the judge called a "practical, functional" reading of the Act. *Id*. at 273. Contrary to Judge McKeague, Judge Griffin eschewed a "functional" reading of the Act preferring a more "textualist" approach.

According to Judge Griffin, "it is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals for these issues. Nevertheless, because [*National Cotton Council of America v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009)] held otherwise with respect to subsection (F), I concur in the judgment only." *Id*. at 275. In other words, Judge Griffin would have ruled against circuit court jurisdiction, but considered himself bound by Sixth Circuit precedent to rule for it. Finally, Judge Keith concluded that "under a plain meaning of the statute, neither subsection (E) nor subsection (F) of 33 U.S.C. § 1369(b)(1) confers original jurisdiction on the appellate courts" and that *National Cotton* was inapposite. *Id*. at 283. Therefore, Judge Keith would have found jurisdiction in the district courts. This fractured ruling suggests the issue of jurisdiction is uncertain even in the Sixth Circuit. And, outside the Sixth Circuit, without the applicability of *National Cotton*, courts should read the two opinions of Judges Griffin and Keith against circuit court jurisdiction as the more persuasive aspect of *In re Department of Defense*.

In the face of such uncertainty this Court has the right and responsibility to make its own decision as to the meaning of § 1369(b)(1)(E) and (F). The meaning is clear. The Clean Water Rule is strictly definitional and does not approve or promulgate any effluent or other limitation. Nor does the rule issue or deny any permit. Therefore, this provision of the Act does not apply. This Court should deny the motion to dismiss, assume jurisdiction, and hear the case on the merits.

II

ALTERNATIVELY, THIS COURT SHOULD STAY THE CASE PENDING RESOLUTION IN THE U.S. SUPREME COURT

Procedurally and substantively, this case is virtually identical to the case pending in this Court's sister court in North Dakota which has been stayed pending further action. *States of North Dakota, et al. v. U.S. Environmental Protection Agency*, United States District Court for the District of North Dakota, 3:15-cv-59.

Plaintiffs filed a complaint in this Court on July 15, 2015. This was one of many cases, like the North Dakota case, that were brought in district courts throughout the country challenging the Clean Water Rule. On August 5, 2015, Plaintiffs filed an amended complaint. On October 13, 2015, the United States Judicial Panel on Multidistrict Litigation denied Federal Defendants' motion to consolidate the various pending cases at the district level. As a protective measure, on October 26, 2015, Plaintiffs filed a petition for review in the Eight Circuit Court of Appeals, as did the State of North Dakota, et al. And like that case, Plaintiffs' petition for review in the Eighth Circuit was transferred to the Sixth Circuit for consolidation. As discussed above, in a widely split decision that court subsequently ruled the courts of appeals have exclusive jurisdiction to hear challenges to the Clean Water Rule pursuant to 33 U.S.C. § 1369(b)(1).

Accordingly, several petitioners, including the Plaintiffs in this case, moved for a hearing en banc which was denied. However, Plaintiffs and other parties have the option of petitioning the jurisdictional decision to the Supreme Court. The timeframe for doing

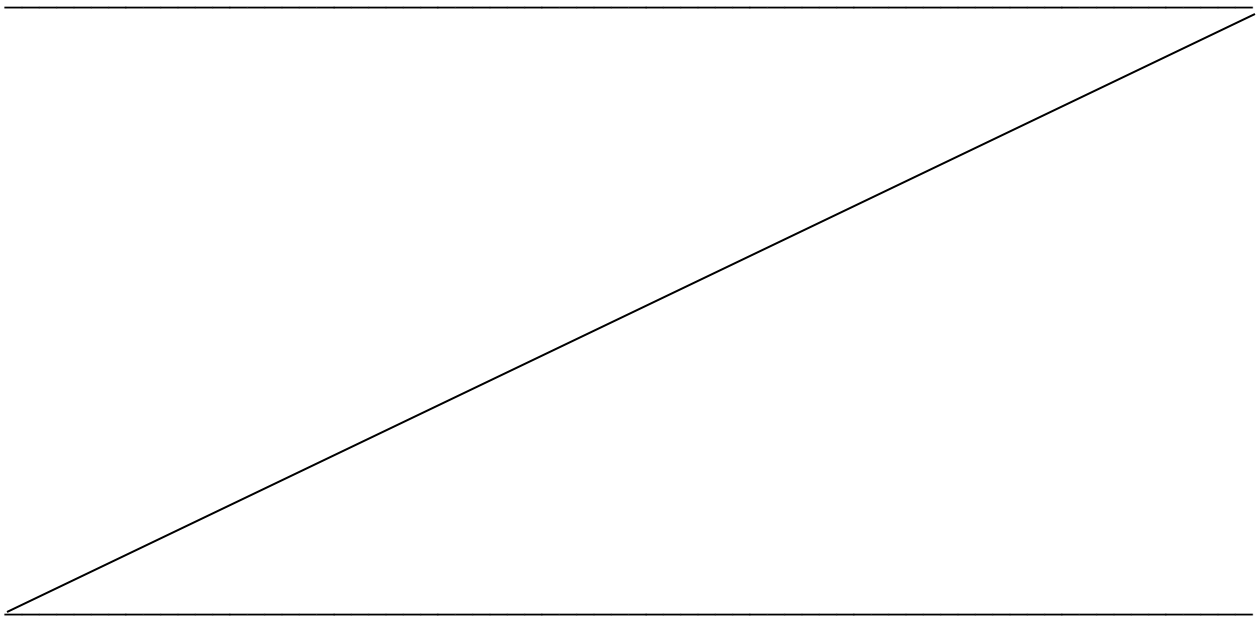
so extends to the end of July, and could readily be extended to the end of August, 2016. To complicate matters, both the Tenth (15-9552) and Eleventh (15-14035) Circuits are still considering the jurisdictional question and could rule contrary to the Sixth Circuit creating a conflict warranting Supreme Court review. *See Moore's Federal Practice* ¶ 0.402 (2d ed. rev. 1996)) ("[T]he court of appeals in one circuit owes no obedience to decisions of a court of appeals in another circuit, though of course it may find the reasons given for such a decision persuasive . . . ."). It is also likely that if and when the Sixth Circuit rules on the merits of the case, that ruling will be appealed, by one side or the other, to the Supreme Court which may address the jurisdictional question, the merits of the case, or both. If the High Court overturns the Sixth Circuit on the jurisdictional question, Plaintiffs could find themselves back in the district court.

In the meantime, Federal Defendants moved for dismissal in the District of North Dakota relying on the Sixth Circuit jurisdictional decision. That court recently held "it is unclear whether this court continues to retain jurisdiction over the claims" raised in the amended complaint. Attachment A: *States of North Dakota, et al. v. U.S. Environmental Protection Agency*, United States District Court for the District of North Dakota, 3:15-cv-59, Order Denying Defendants' Motion to Dismiss Amended Complaint and Dissolve Preliminary Injunction; And Staying Case, at 3. "In such circumstances," the court continued, it "may stay proceedings pending the outcome of the other court." *Id*. (Citing *Ritchie Capital Management, L.L.C. v. Jeffries*, 653 F.3d 755, 763 n.3 (8th Cir. 2011) (stating that the district court may decide to dismiss or stay an action to avoid duplicative litigation)). Therefore, the court denied the Federal Defendants' motion to dismiss and

ordered all proceedings in the case stayed "pending any further decisions by the Courts of Appeals or the United States Supreme Court." Order at 3. If this Court does not assume jurisdiction, it should do likewise and stay the proceedings pending further action by the High Court.

CONCLUSION

The Clean Water Rule defines the scope of the Clean Water Act. It does not address any sort of effluent limitations or permit processing. Therefore, under 33 U.S.C. § 1369(b)(1), jurisdiction lies with the district courts, not the appellate courts. This Court should deny the motion to dismiss and hear the case. Alternatively, it would be prudent for this Court to deny the motion to dismiss and stay the case pending resolution in the U.S. Supreme Court. This approach would harm no one but would allow the case to continue if the case is remanded for further action.



DATED: June 8, 2016

Respectfully submitted,

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