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

States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming; New Mexico Environment Department; and New Mexico State Engineer, Plaintiffs, and Terry E. Branstad, Governor of the State of Iowa, Plaintiff-Intervenor, vs. U.S. Environmental Protection Agency; Scott Pruit, in his official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. Army Corps of Engineers; and R.D. James, in his official capacity as Assistant Secretary of the Army (Civil Works), Defendants.	Case No. 3:15-cv-59 **ORDER**

Plaintiffs—twelve states and two agencies of a thirteenth state—seek judicial review of a final regulation promulgated under the Clean Water Act (CWA). A May 24, 2016 order stayed the case pending a circuit court's decision on whether jurisdiction to review the regulation was proper in the district courts or in the circuit courts. (Doc. #156). On January 22, 2018, a unanimous Supreme Court held that district courts have jurisdiction to review the regulation. Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S.Ct. 617 (2018).

Subsequent to the Supreme Court's decision, seven of the thirteen plaintiff states (hereinafter movants) filed a motion to lift the stay.[1] (Doc. #165). Defendants—the United States Environmental Protection Agency (EPA), the United States Army Corps of Engineers (ACOE), and the chief administrators of those two agencies—oppose the motion to lift the stay and move to continue the stay for at least one year. (Doc. #175). This order addresses both the motion to lift the stay and the motion to continue the stay.

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[1] The movants include North Dakota, Alaska, Arizona, Colorado, Idaho, Montana, and South Dakota.

The other six plaintiff states (hereinafter non-movants), though continuing to support invalidation of the WOTUS Rule, take the position that lifting the stay at this time would be premature because of pending administrative proceedings. The non-movants acknowledge that their position would change if the status of an August 2015 preliminary injunction changed. (Doc. #178). The non-movants' response was also based on the Sixth Circuit having not yet issued a mandate, but review of the Sixth Circuit's dockets shows that it has now vacated a stay and dismissed the cases for lack of jurisdiction. Murray Energy Corp. v. EPA, No. 15-3751, Doc. #184 (6th Cir. Feb. 28, 2018); Ohio v. U.S. Army Corp. of Eng'rs, No. 15-3799, Doc. #191 (6th Cir. Feb 28, 2018); Nat'l Wildlife Fed'n v. EPA, No. 15-3817, Doc. #150 (6th Cir. Feb 28, 2018); Nat. Res. Def. Council, Inc. v. EPA, No. 15-3820, Doc. #148 (6th Cir. Feb 28, 2018); Oklahoma v. EPA, No. 15-3822, Doc. #180 (6th Cir. Feb 28, 2018); Chamber of Commerce of the USA v. EPA, No. 15-3823, Doc. #165 (6th Cir. Feb 28, 2018); North Dakota v. EPA, No. 15-3831, Doc. #200 (6th Cir. Feb 28, 2018); Waterkeeper All. v. EPA, No. 15-3837, Doc. #153 (6th Cir. Feb 28, 2018); Puget SoundKeeper v. EPA, No. 15-3839, Doc. #151 (6th Cir. Feb 28, 2018); Am. Farm Bureau Fed'n v. EPA, No. 15-3850, Doc. #161 (6th Cir. Feb 28, 2018); Texas v. EPA, No. 15-3853, Doc. #185 (6th Cir. Feb 28, 2018); Util. Water Act Grp. v. EPA, 15-3858, Doc. #144 (6th Cir. Feb 28, 2018); Se. Legal Found. v. EPA, No. 15-3885, Doc. #165 (6th Cir. Feb 28, 2018); Georgia v. EPA, No. 15-3887, Doc. #186 (6th Cir. Feb 28, 2018); One Hundred Miles v. EPA, No. 15-3948, Doc. #125 (6th Cir. Feb 28, 2018); Se. Stormwater Ass'n, Inc. v. EPA, No. 15-4159, Doc. #116 (6th Cir. Feb 28, 2018); Mich. Farm Bureau v. USACE, No. 15-4162, Doc. #115 (6th Cir. Feb 28, 2018); Wash. Cattlemen's Ass'n v. EPA, No. 15-4188, Doc. #113 (6th Cir. Feb 28, 2018); Ass'n of Am. R.R.s v. EPA, No. 15-4211, Doc. #115 (6th Cir. Feb 28, 2018); Tex. All. for Responsible Growth, Env't & Transp. v. EPA, No. 15-4234, Doc. #115 (6th Cir. Feb 28, 2018); Am. Expl. & Mining Ass'n v. EPA, No. 15-4305, Doc. #110 (6th Cir. Feb 28, 2018); Ariz. Mining Ass'n v. EPA, No. 15-4404, Doc. #106 (6th Cir. Feb 28, 2018).

Summary

The basis for the May 2016 stay—the undecided jurisdictional question—has now been resolved. Defendants request a stay to allow them to conduct additional rulemaking proceedings that might result in this case becoming moot at some point in the future. But, at this time, defendants have not clearly shown that they would suffer hardship or inequity if the stay were not continued. There is at least a fair possibility that movants would be harmed by continuing the stay. Therefore, the stay will be lifted, subject to reconsideration upon significant developments in related administrative proceedings or in related litigation.

Background

1. Procedural History of the Litigation

The regulation at issue is the Clean Water Rule: Definition of Waters of the United States, 80 Fed. Reg. 37,054 (June 29, 2015) (WOTUS Rule). The WOTUS Rule, promulgated jointly by the EPA and the ACOE, defines the scope of "waters of the United States" that are subject to federal regulatory jurisdiction under the CWA, 33 U.S.C. §§ 1251-1388. Defendants describe the rule as "intended to provide clarity and certainty to the regulated community about what waters are within federal CWA jurisdiction and what waters are outside of CWA jurisdiction." (Doc. #12-1, p. 1). Plaintiffs describe the rule as making "sweeping changes for the determination of [CWA] jurisdiction, drastically altering the administration of water quality programs implemented by [plaintiffs], EPA, and the ACOE." (Doc. #24, p. 2).

Plaintiffs challenge the WOTUS Rule on grounds that it exceeds the statutory authority of the federal agencies under the Commerce Clause, that the EPA and the

ACOE did not comply with the Administrative Procedures Act in promulgating the regulation, and that the regulation infringes on the rights of the plaintiff states in violation of the Tenth Amendment and principles of federalism. Plaintiffs seek declaratory and injunctive relief.

The WOTUS Rule was initially scheduled to take effect on August 28, 2015. But, on August 27, 2015, the district judge issued an order preliminarily enjoining enforcement of the Rule. (Doc. #70). A later order clarified that the preliminary injunction applies only in the thirteen states that are plaintiffs in this case. (Doc. #79). As discussed below, through administrative action, the WOTUS Rule's effective date was recently extended to February 6, 2020.

This case was one of many filed in federal district courts throughout the county.[2] In addition to the various district court cases, a number of plaintiffs initiated litigation in the circuit courts under a statute—33 U.S.C. § 1369(b)(1)—providing for direct and

[2] Apart from cases filed in the Southern District of Texas, the Southern District of Georgia, and the Northern District of Oklahoma, which are further discussed below, cases were filed in the Southern District of Ohio, the Northern District of West Virginia, the Northern District of Geogia, and the District of Minnesota. After the district court in the Southern District of Ohio granted defendants' motion to dismiss for lack of jurisdiction, the plaintiffs appealed. Ohio v. U.S. EPA, No. 2:15-cv-2467, Doc. #56 (S.D. Ohio April 25, 2016). That appeal is currently pending before the Sixth Circuit, and plaintiffs have filed a motion to remand in light of the Supreme Court's decision in National Association of Manufacturers. See Ohio v. U.S. EPA, No. 16-3564, Doc. #26 (6th Cir. Mar. 7, 2018). The district court in the Northern District of Georgia stayed its case pending a decision on subject matter jurisdiction from either the Sixth Circuit or the Eleventh Circuit, and the case remains stayed despite resolution of the jurisdictional issue. See Se. Legal Found. v. U.S. EPA, No. 1:15-cv-2488, Doc. #17 (N.D. Ga. Mar. 28, 2016). The district courts in the Northern District of West Virginia and the District of Minnesota dismissed their cases for lack of jurisdiction, and plaintiffs in those cases did not appeal those decisions. See Murray Energy Corp. v. U.S. EPA, No. 1:15-cv-110, Doc. #32 (W.D. Va. Aug. 26, 2015); Wash. Cattlemen's Ass'n v. U.S. EPA, No. 0:15-cv-3058, Doc. #50 (D. Minn. Nov. 8, 2016).

exclusive review of certain EPA regulations by the federal courts of appeals. Circuit cases challenging the WOTUS Rule were consolidated in the Sixth Circuit Court of Appeals, which found the WOTUS Rule within the ambit of direct and exclusive review in the courts of appeals. In re Dep't of Def. & EPA Final Rule, 817 F.3d 261, 263-64 (6th Cir. 2016). The Sixth Circuit issued a nationwide stay of the WOTUS Rule. In re EPA & Dep't of Def. Final Rule, 803 F.3d 804 (6th Cir. 2015). After the Sixth Circuit's decision, the district judge—finding that this case might duplicate proceedings in the Sixth Circuit—stayed this case pending further decision by the Courts of Appeals or the United States Supreme Court. (Doc. #156). The Supreme Court recently concluded that the WOTUS Rule is outside the scope of 33 U.S.C. § 1369(b)(1) and that the Court of Appeals did not have jurisdiction to consider the petitions on direct review.

Subsequent to the Supreme Court's reversal of the Sixth Circuit decision, movants filed a request to lift the stay in this case, and defendants moved to continue the stay. Additionally, plaintiffs in WOTUS Rule challenges in the Southern District of Texas moved for a nationwide preliminary injunction. Texas v. EPA, Case No. 3:15-cv-162, Doc. #79 (S.D. Tex. Feb. 6, 2018); Am. Farm Bureau Fed'n v. EPA, Case No. 3:15-cv-165, Doc. #61 (S.D. Tex Feb. 7, 2018). Those motions remain pending.

In two Northern District of Oklahoma cases challenging the WOTUS Rule, subsequent to the National Association of Manufacturers decision, the court ordered that the cases "should be administratively closed while the EPA completes its rulemaking process concerning the definition of 'Waters of the United States.'"[3] In the

[3] Oklahoma v. U.S. EPA, No. 4:15-cv-381, Doc. #56 (N.D. Ok. Mar. 9, 2018); Chamber of Commerce of the U.S.A. v. U.S. EPA, No. 4:15-cv-386, Doc. #64 (N.D. Ok.

Southern District of Georgia, the court denied the defendants' motion for a one-year stay but continued a stay for thirty days.[4]

2. Procedural History of Administrative Actions

In addition to the litigation described above, certain administrative actions may ultimately result in revision of the WOTUS Rule. A February 28, 2017 Executive Order directed the EPA and the ACOE to reconsider the 2015 WOTUS Rule.[5] (Doc. #179-1, pp. 5-6; Doc. #180-1, pp. 5-6). On July 27, 2017, defendants issued a notice of proposed rulemaking, which proposed to rescind the 2015 WOTUS Rule and recodify a prior regulatory definition of "waters of the United States" before beginning a new rulemaking process concerning that term (hereinafter Recodification Rule).[6] (Doc. #175-2, p. 3). Defendants advise that the comment period on the proposed Recodification Rule ended in September 2017 and that they are in the process of reviewing the over 685,000 public comments that they received. Id. at 4. Defendants state that they are working "as expeditiously as possible to complete the reconsideration rulemaking process" and that they expect completion of the necessary tasks to require "no more than two years." Id. at 5.

Defendants also describe steps they have taken to "initiate[] administrative proceedings to replace the 2015 WOTUS Rule with a new rule defining the scope of 'waters of the United States'" (hereinafter Replacement Rule). (Doc. #175-1, p. 5). They

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Mar. 9, 2018).

[4] Georgia v. McCarthey, No. 2:15-cv-79, Doc. #144 (S.D. Ga. Mar. 9, 2018).

[5] Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

[6] 82 Fed. Reg. 34,899.

describe having completed "multiple stakeholder meetings," with the next steps in the administrative process to include "publication of a proposed rule, a period of public comment, and interagency coordination to address public comments and to publish a final rule." Id.

Additionally, in November 2017, defendants published a notice soliciting public comment on a proposal to add an applicability date to the 2015 WOTUS Rule. On February 6, 2018, defendants published a final rule that added a February 6, 2020 applicability date to the WOTUS Rule (hereinafter Delay Rule). (Doc. #175-2, p. 4).

The Delay Rule itself is under challenge in several cases filed the day it became final. See New York v. Pruitt, Case No. 1:18-cv-1030 (S.D.N.Y. Feb. 6, 2018); Nat. Res. Def. Council v. EPA, Case No. 1:18-cv-1048 (S.D.N.Y. Feb. 6, 2018); S.C. Coastal Conservation League v. Pruitt, Case No. 2:18-cv-330 (D.S.C. Feb. 6, 2018). Defendants have filed motions to transfer each of those cases to the Southern District of Texas, where motions for a nationwide preliminary injunction are pending. The motions to transfer also remain pending.

In affidavits supporting their position on the current motions, defendants state that they have no plans to implement the 2015 WOTUS Rule pending completion of their ongoing reconsideration process and that "until February 6, 2020, the [EPA and ACOE] will maintain the *status quo* and administer the regulations in place prior to the 2015 Rule, and will continue to interpret the statutory term 'waters of the United States' to mean the waters covered by those regulations, as they are currently being implemented, consistent with Supreme Court decisions and practice, and as informed by applicable agency guidance documents." (Doc. #175-2, p. 4).

Discussion

Movants first argue that the only reason for the May 2016 stay—the question of application of 33 U.S.C. § 1369(b)(1)—has now been resolved and that, since the reason for imposition of the stay no longer exists, it must be lifted. Though acknowledging that ongoing administrative proceedings might result in this litigation becoming moot in the future, movants assert that the possibility of later mootness is insufficient reason for continuing the stay. They point to the Supreme Court's opinion summarizing defendants' recent administrative actions and to the Court's discussion of the relationship between those administrative actions and litigation over the WOTUS Rule:

> There have been a number of developments since the Court granted review in this case. In February 2017, the President issued an Executive Order directing the agencies to propose a rule rescinding or revising the WOTUS Rule. On July 27, 2017, the agencies responded to that directive by issuing a proposed rule. That proposed rule, once implemented, would rescind the WOTUS Rule and recodify the pre-2015 regulatory definition of "waters of the United States." Then, in November 2017, following oral argument in this case, the agencies issued a second proposed rule establishing a new effective date for the WOTUS Rule. That November 2017 proposed rule sets a new effective date of "two years from the date of final action on [the agencies'] proposal," to "ensure that there is sufficient time for the regulatory process for reconsidering the definition of 'waters of the United States' to be fully completed."
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> The parties have not suggested that any of these subsequent developments render this case moot. That is for good reason. Because the WOTUS Rule remains on the books for now, the parties retain "'a concrete interest'" in the outcome of this litigation, and it is not "'impossible for a court to grant any effectual relief . . . to the prevailing party.'" That remains true even if the agencies finalize and implement the November 2017 proposed rule's new effective date. That proposed rule does not purport to rescind the WOTUS Rule; it simply delays the WOTUS Rule's effective date.

Nat'l Ass'n of Mfrs., 138 S.Ct. at 627 n.5 (internal citations omitted). As movants note, the Supreme Court denied defendants' motion to stay National Association of

Manufacturers, and defendants had based that motion on pendency of the various administrative proceedings described above. See Supreme Court Order List April 3, 2017, Case No. 16-299 (2017).

Movants assert that, though they strongly support administrative efforts to repeal or rescind the WOTUS Rule, defendants' administrative actions to date are subject to other legal challenges, making defendants' arguments for potential mootness speculative. From the perspective of movants, "whether, and if so, when and how the WOTUS Rule may ultimately be changed is undeniably uncertain and will probably not be resolved for years." (Doc. #180, p. 3). Though recognizing defendants's right to reconsider the rule, movants contend that accepting that as reason to continue the stay could result in indefinite evasion of judicial review. Id. at 4. They contend that defendants' use of "three step" administrative proceedings will prolong the rulemaking process because the three-step process is complex, lengthy, and "fraught with uncertainty" as to timing, content, and outcome. They point to two of the three steps—recodification and replacement—currently being only in the proposal stages.

Additionally, movants assert that litigation is likely at each of the three steps. In fact, litigation concerning the Delay Rule has begun. According to movants, the pending litigation raises "non-trivial" questions about validity of the Delay Rule, which could result in reinstatement of the 2015 effective date. Movants argue that "[i]t is virtually assured" that the planned Recodification Rule and the planned Replacement Rule will be challenged immediately upon finalization. Id. at 8. From movants' perspective, the challenges to the Delay Rule, the pending motion for a nationwide preliminary injunction, and the likely challenges to the planned Recodification Rule and

Replacement Rule make a timely decision on the merits of this case even more important.

Having initiated this litigation almost three years ago, movants argue that further delay is not warranted. They contend that if this case remains stayed, a decision on the merits is likely to be delayed for much longer than the one year defendants request for a stay. Movants contend that this case has progressed further than cases challenging the WOTUS Rule in other districts and that to continue the stay would "effectively [ignore] the Supreme Court's decision that WOTUS Rule challenges be decided at the district court level and percolate up through the appellate courts." Id. at 3. They argue this court has a "virtually unflagging" obligation to exercise its jurisdiction. Id. at 10. Asserting that WOTUS Rule supporters might seek to dissolve the preliminary injunction in this case, movants contend that they "have the right to invoke this Court's jurisdiction now to proceed affirmatively with their challenge to the WOTUS Rule, rather than being required to wait and be put on the defensive if, and when, this Court's preliminary injunction is threatened with dissolution." Id. at 4. They also point to the potential for conflicting decisions regarding validity of the Delay Rule and of the WOTUS Rule. Movants fear that, if a nationwide injunction is granted in the Southern District of Texas, defendants will then ask for a stay in that district. And, if a nationwide injunction is denied, movants fear that defendants would then press for a decision on the merits in the Southern District of Texas.

Defendants argue that they have inherent authority to revise regulations as permitted by law, with a reasoned explanation. They contend that if the ongoing administrative proceedings result in replacement of the 2015 WOTUS Rule or in

recodification of the prior definition, this case would become moot. Defendants assert that a continued stay would "promote the important interest of open-minded administrative decision-making" by allowing their reconsideration process to "proceed unhindered without diverting limited [EPA and ACOE] resources for litigation." (Doc. #175-1, p. 7). They argue a continued stay would protect against judicial interference in ongoing agency decision-making and avoid piecemeal review of agency decisions. Further, defendants argue that continuing the stay would be consistent with fundamental principles of ripeness.

From defendants' perspective, a continued stay would not result in harm to movants because the preliminary injunction remains in place. Defendants contend that continuing the stay would avoid unnecessary litigation, conserve judicial resources, and conserve the parties' resources. They point to two motions filed before the current stay was ordered—a contested motion concerning completion of the administrative record and a motion to intervene—as likely to consume considerable judicial resources. And, of course, determining the merits of the case will require significant judicial resources.

Defendants also point to the fact that each of the plaintiff states involved in this case has submitted comments supporting recodification of the regulations that preceded the 2015 WOTUS Rule. (See Doc. #175-6). Defendants state that—at this time—they cannot predict the time they may need to consider comments to the proposed recodification rule and that their request for a one-year stay, with a possible extension "if the circumstances so warrant, is well-tailored to the circumstances here." (Doc. #175-1, p. 11). Defendants project that a two-year timeline would accommodate either recodification or replacement of the WOTUS Rule and dispute that their three-step

process is either unduly complex or lengthy. From defendants' perspective, the possibility of judicial challenges after completion of the administrative process is not relevant to the question of continuation of the stay.

In response to movants' assertion that the Supreme Court's denial of a stay also supports denial of a stay of this case, defendants argue that the jurisdictional issue which the Supreme Court decided could have arisen regardless of the outcome of the administrative proceedings and regardless of the WOTUS definition ultimately adopted. They argue that the Supreme Court's reference to the litigants' continuing "concrete interest" cannot be equated to potential harm to movants.

There is no dispute that a court, in its discretion, has the inherent power to stay proceedings to control its docket, to conserve judicial resources, and to ensure that each matter is handled "with economy of time and effort for itself, for counsel, and for litigants." Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). The decision to stay proceedings involves an "exercise of judgment, which must weigh competing interests and maintain an even balance." Id. at 254-55. Factors to be balanced in the exercise of the court's discretion include: (1) potential prejudice to the non-moving party, (2) hardship and inequity to the moving party if the action is not stayed, and (3) the judicial resources that would be saved by granting a stay. Buie v. Blue Cross & Blue Shield of Kan. City, Inc., No. 05-0534-CV-W-FJG, 2005 WL 2218461, at *1 (W.D. Mo. Sept. 13, 2005) (citing Rivers v. Walt Disney Co., 980 F. Supp. 1358, 1360 (C.D. Cal.1997)).

A party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay . . . will

work damage to someone else.'' United States v. Minnkota Power Co-op, Inc., 831 F. Supp. 2d 1109, 1118 (D.N.D. 2011) (quoting Landis, 299 U.S. at 255).

There is no dispute that the reason the case was stayed in May 2016 no longer exists. But for the pending administrative proceedings, there is no question the motion to lift the stay would be granted. The court therefore considers defendants to have the burden to clearly establish that they would suffer hardship or inequity if the litigation proceeds at this time.

The court considers the Supreme Court's denial of a stay—and its discussion of the impact of the administrative proceedings on the litigation—to be relevant but not determinative. Here, the request for a stay involves the merits of the litigation, and it affects the parties' resources and judicial resources differently than did the jurisdictional question that the Supreme Court addressed. But assertions of potential later mootness did not persuade the Supreme Court to stay National Association of Manufacturers.

Defendants argue that they should be given time—at least one year but perhaps two years—to reexamine the WOTUS Rule. Though they cite a number of cases addressing a stay to allow administrative action to proceed, few of those cases deal with review of agency rulemaking. Most of the cases which defendants cite deal with agency decisions on contested matters such as permit or license applications.

Movants argue that to stay litigation because of pending administrative proceedings could effectively result in evasion of judicial review. In deciding to hold a case in abeyance pending rulemaking proceedings, the Court of Appeals for the District of Columbia considered possible evasion of judicial review versus allowing further agency deliberation. Am. Petroleum Inst. v. EPA, 683 F.3d 382 (D.C. Cir. 2012)

(hereafter API). API involved a challenge to an EPA rule changing the classification of certain "hazardous secondary materials," which resulted in deregulation of various materials under the Resource Conservation and Recovery Act, 42 U.S.C. § 69-1-6992k. In seeking judicial review, API contended that the EPA erred by not changing the classification of "spent refinery catalysts." A proposed rule would have excluded spent refinery catalysts from regulation if they were sent to a third party for reclamation. But, in the final rule, the EPA omitted that exclusion and explained that it would address spent refinery catalysts in a separate rulemaking procedure. Id. at 385-86. Both API—a refinery industry group whose members generated spent refinery catalysts—and the Sierra Club challenged the final rule. The EPA and the Sierra Club entered into a settlement under which the EPA agreed to propose a new rule addressing certain issues that the Sierra Club had raised. Under the settlement agreement, the EPA agreed to propose a new rule by June 30, 2011, and to take final action on that rule by December 31, 2012.

After briefing of API's challenge closed, the EPA published a new notice of proposed rulemaking pursuant to its settlement agreement with the Sierra Club. In light of the proposed new rule, the court directed the parties to address the question of justiciability and ultimately concluded the case should be held in abeyance under the doctrine of prudential ripeness.

In applying the doctrine of prudential ripeness, the court focused on "the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." Id. at 387. The court described the proposed new rule as a

"complete reversal of course on EPA's part" that, if adopted, "would necessitate substantively different legal analysis and would likely moot the analysis we could undertake if deciding the case now." Id. at 388-89.

The rulemaking process for the proposed new rule involved in API had progressed much further than the Recodification and Replacement Rules involved in this case. And, unlike this case, EPA's settlement agreement with the Sierra Club established a definite date by which the rulemaking process would be finalized. As the court noted:

> All of this is not to say an agency can stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review.
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> That risk of agency abuse is not present here. . . . [T]he happening or timing of the future event we are awaiting to ripen (or solve) this dispute—final action on the 2011 proposed rule—is not within the discretion of or controlled by the agency as would usually be the case. . . . That settlement [with the Sierra Club] requires EPA to take final action concerning the proposed rulemaking by December 31, 2012. This definite end date to the delay we would effectively impose by deeming this case unripe further alleviates any concern that EPA is using a new rulemaking to elude review.

Id.

This case may in fact become moot at some point in the future, but whether that will occur, and when that might occur, cannot be known. Recodification or replacement of the WOTUS Rule cannot be considered a foregone conclusion. Though defendants have inherent authority to reconsider past decisions, their capacity to do so is constrained by the Administrative Procedure Act. See Noll and Grab, Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks, 38 Energy L.J. 269, 273-84 (2017).

The hardship which defendants assert is expenditure of resources, which may later prove to have been unnecessary. Whether in litigation or in the administrative process, there is no question defendants will be expending significant resources in addressing the WOTUS Rule over a potentially lengthy time period.

But movants may indeed be prejudiced by delaying the litigation. Although the WOTUS Rule's effective date has now been extended, that extension itself is being challenged. Movants describe the current challenges as raising "non-trivial" questions of the validity of the Delay Rule's extension. As the Supreme Court stated, delaying the WOTUS Rule's effective date has not made it "impossible for a court to grant any effectual relief . . . to the prevailing party." Nat'l Ass'n of Mfrs., 138 S.Ct. at 627 n.5.

There is no question that a stay would, at least in the short term, conserve judicial resources. And there is no question that judicial resources are currently at a premium in this district.[7] But the Supreme Court has directed that litigation proceed in the district courts.

Conclusion

Balancing all factors that the parties have raised, the court in its discretion concludes—at this time—that defendants have not shown a clear case of hardship or inequity in being required to go forward. Further, the court concludes that there is at least a fair possibility that continuing the stay would work damage to movants. And the basis for the May 2016 stay no longer exists. The motion to lift the stay, (Doc. #165), is therefore **GRANTED**, and defendants' motion for a stay, (Doc. #175), is **DENIED**.

[7] The court notes that much might be gained by coordination of the WOTUS Rule litigation now pending in districts across the country.

That decision will, however, be subject to reconsideration upon significant developments in the pending administrative proceedings or in the litigation now pending in other districts.

Considerable time has elapsed since the motion concerning completion of the administrative record was submitted. (Doc. #104). In the event relevant facts have changed in the interim such that the parties believe supplemental briefing would be in order, the parties will be allowed until **April 9, 2018**, to submit supplemental briefs on the motion concerning completion of the administrative record. Supplemental briefs **are not**, however, required.

Similarly, in the event any party wishes to submit supplemental briefing concerning the pending motion of the Sierra Club to intervene as a defendant, (Doc. #111), that supplemental briefing must be filed by **April 9, 2018**. Supplemental briefing **is not** required.

The parties are directed to confer, within the **next ten days**, regarding a scheduling plan. If they cannot agree on a plan, each side is directed to submit a proposed plan no later than **April 9, 2018**.

IT IS SO ORDERED.

Dated this 23rd day of March, 2018.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge