

**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’ STATUS REPORT

Pursuant to this Court’s July 18 Order, ECF No. 151, Federal Defendants (“the Agencies”) submit this 45-day status report.

1. In this case, Plaintiffs (24 States) challenge the *Revised Definition of “Waters of the United States,”* 88 Fed. Reg. 3004 (“2023 Rule” or “Rule”).
2. On April 12, this Court granted Plaintiffs’ motion to preliminarily enjoin the Rule. ECF No. 131.
3. As a result of this Court’s April 12 Order, as well as the Southern District of Texas’ order in *Texas v. EPA*, No. 3:23-cv-17 (S.D. Tex.), ECF No. 60, and the Sixth Circuit’s order in *Kentucky v. EPA*, No. 23-5345 (6th Cir.), ECF No. 28, the 2023 Rule is currently enjoined in 27 states.

4. On May 25, the Supreme Court issued its ruling in *Sackett v. EPA*, 143 S. Ct. 1322 (2023), which addresses the standard for determining what constitutes “waters of the United States.” Shortly thereafter, the Agencies publicly stated that they are interpreting the phrase “waters of the United States” consistent with *Sackett*. See ECF No. 143-1, Declaration of Radhika Fox ¶¶ 7-8 (“Fox Decl.”); ECF No. 143-2, Declaration of Michael L. Connor ¶¶ 6-7 (“Connor Decl.”).

5. In June, the Agencies announced that they were developing a new rule to conform the definition of “waters of the United States” with *Sackett*, and that the Agencies intended to issue the rule on or before September 1, 2023. Fox Decl. ¶¶ 9-10; Connor Decl. ¶¶ 8-9; see also Corps, *UPDATED Supreme Court Ruling in Sackett v. Environmental Protection Agency*, <https://www.usace.army.mil/Media/Announcements/Article/3440421/27-june-2023-update-supreme-court-ruling-in-sackett-v-environmental-protection> (June 27, 2023).

6. The Agencies sought a stay of this case until after the new rule is published, ECF No. 143, which this Court granted, ECF No. 151.

7. While the stay motion was pending, Business Intervenors moved for summary judgment. ECF No. 144. The Agencies then moved for an extension of response deadlines, ECF No. 147, which this Court granted before granting a stay, ECF No. 150.

8. All litigation challenging the 2023 Rule is currently stayed until after the new rule is published. See ECF No. 151; *West Virginia v. EPA*, No. 23-2411, ECF No. 5296015 (8th Cir.); *Texas v. EPA*, No. 3:23-cv-17, consolidated with No. 3:23-cv-20, ECF No. 81 (S.D. Tex.); *Texas v. EPA*, No. 23-40306, ECF No. 29-2 (5th Cir.); *Kentucky v. EPA*, No. 23-5343, ECF No. 28, consolidated with 23-5345, ECF No. 32 (6th Cir.).

9. On August 29, the Agencies issued a final rule that amends the 2023 Rule to conform with *Sackett*. U.S. EPA, *Amendments to the 2023 Rule*, <https://www.epa.gov/wotus/amendments-2023-rule>. The Agencies have submitted the new rule for publication in the Federal Register, but the rule has not yet been published.

10. The Agencies will promptly notify the Court and the Parties when the new rule is published in the Federal Register. The Agencies will confer with the Parties to submit a proposal or proposals for further proceedings within 21 days after the new rule's publication.

11. The Agencies will submit a status report on or before October 16, 2023, if the new rule has not yet been published in the Federal Register, and every 45 days thereafter for the duration of the stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 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