IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, et al., Plaintiffs, v. MICHAEL REGAN,[1] as Administrator of the U.S. Environmental Protection Agency, et al., Defendants, AMERICAN FARM BUREAU FEDERATION, et al., Intervenor-Defendants.	No. 2:20-cv-01687-BHH

PLAINTIFFS' MOTION TO LIFT STAY OF PROCEEDINGS

Plaintiffs South Carolina Coastal Conservation League et al. respectfully request that the Court, under its inherent authority, lift the 60-day stay of proceedings entered on March 2, 2021, Doc. 106; set a schedule for the Parties to file or refile summary judgment motions and responses; and schedule a hearing on the motions at the nearest convenient date.

Since the entry of the stay, Michael Regan has been confirmed by the Senate as Administrator of the U.S. Environmental Protection Agency ("EPA")—a then-pending confirmation Defendants ("the Agencies") had pointed to in their motion as "[p]erhaps [the] most important[]" factor warranting a stay. Doc. 105 at 4. The need to move these proceedings forward is urgent, because the rule challenged here is causing irreparable harm to Plaintiffs'

[1] EPA Administrator Michael Regan is automatically substituted for former Acting Administrator Jane Nishida pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

interests in rivers, streams, and wetlands across the country. With leadership now in place, nothing prevents the Agencies from deciding how to proceed in this litigation, and there is no basis for further delay. The briefing schedule Plaintiffs seek would give the Agencies the full 60-day period they requested before any responsive summary judgment filing would be due, avoiding any prejudice to the Agencies.

For these reasons, as set forth more fully below, Plaintiffs ask the Court to grant this motion. Plaintiffs have conferred with the Parties, and the Agencies and Intervenors indicated that they oppose this motion.

PROCEDURAL HISTORY

Plaintiffs filed this action in April 2020 challenging "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("Replacement Rule" or "Rule"), which took effect on June 22, 2020, id. at 22,250.

Plaintiffs filed their motion for summary judgment on July 10, 2020. Doc. 58. The Agencies and Intervenors filed their responses and cross-motions for summary judgment on August 24, 2020. Docs. 68, 69, 70. Plaintiffs filed their combined response and reply to the Agencies' and Intervenors' cross-motions for summary judgment/responses on September 21, 2020. Doc. 73. The Agencies and Intervenors filed their reply briefs on October 19, 2020. Docs. 80, 81. A hearing on the Parties' motions for summary judgment was scheduled for December 1, 2020, before Judge Norton. Doc. 74. The Court cancelled that hearing, Doc. 82, and rescheduled it for February 4, 2021, Doc. 87. The case was subsequently reassigned to this Court on January 12, 2021, Doc. 88, which issued a notice that the hearing would proceed as planned, Doc. 91.

On January 26, 2021, in an effort to accommodate the Agencies as they underwent a change in administration, Plaintiffs joined a motion filed by all Parties for a 30-day continuance

of the summary judgment hearing and specifically "request[ed] that the Court reschedule the hearing to occur as soon as possible after the expiration of the 30-day period." Doc. 95 at ¶ 9. The Court granted the motion, continued the hearing for 30 days, and stated that "[t]he Court will reschedule the hearing to occur as soon as possible after the expiration of the 30-day period." Doc. 96.

On March 1, 2021, the Agencies again moved to stay the case, this time for 60 days and over the express opposition of Plaintiffs. Doc. 105. "Perhaps [the] most important[]" reason for the stay, the Agencies asserted, was the fact that EPA Administrator-designate Michael Regan had not yet been confirmed. Id. at 4. According to the Agencies, "[t]he requested period of 60 days will allow time for this confirmation process to conclude, and for EPA's new leadership to be briefed on this matter to decide the EPA's preferred path forward." Id. at 5.

The Court granted the Agencies' stay motion on March 2, 2021, before Plaintiffs filed a response. Doc. 106. In its order, the Court also denied the Parties' cross-motions for summary judgment without prejudice to refiling at the conclusion of the stay. Id.

STANDARD OF REVIEW

A district court "has broad discretion to stay proceedings as an incident to its power to control its own docket." Clinton v. Jones, 520 U.S. 681, 706 (1997) (citing Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)). The use of this authority "calls for an exercise of the district court's judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket." Maryland v. Universal Elections, Inc., 729 F.3d 370, 375 (4th Cir. 2013) (citation and quotations omitted).

The corollary to the court's power to stay proceedings is its ability to lift a stay previously imposed. A court may lift a stay when "circumstances have changed such that the

court's reasons for imposing the stay no longer exist or are inappropriate." Canady v. Erbe Elektromedizin GMBH, 271 F. Supp. 2d 64, 74 (D.D.C. 2002).

In deciding whether to stay a case, the court should consider "(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party." Cty. of Anderson v. Rite Aid of S.C., Inc., No. 8:18-CV-1947-BHH, 2018 WL 8800188, at *3 (D.S.C. Aug. 20, 2018) (Hendricks, J.) (citation and quotations omitted); accord Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, 141 F. Supp. 3d 428, 452 (E.D.N.C. 2015). Where "there is even a fair possibility" that the stay may cause harm to the other party, the movant "must make out a clear case of hardship or inequity in being required to go forward . . . ." Landis, 299 U.S. at 255. The "'party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative.'" Charleston Waterkeeper v. Frontier Logistics, L.P., No. 2:20-CV-1089-DCN, 2020 WL 7335408, at *4 (D.S.C. Dec. 14, 2020) (quoting Williford v. Armstrong World Indus., Inc., 715 F.2d 124, 127 (4th Cir. 1983)).

The Agencies' Motion to Stay Proceeding/Continue Hearing Date incorrectly cited Rule 6(b)(1)(A) of the Federal Rules of Civil Procedure as the authority for their motion. See Doc. 105 at 3. Rule 6(b)(1), which applies only to extensions of time, imposes a far lower burden on the movant ("good cause") than what must be shown to stay litigation: "'clear and convincing circumstances outweighing potential harm to the party against whom it is operative.'" Zipit Wireless Inc. v. Blackberry Ltd., No. 6:13-cv-02959-JMC, 2016 WL 3452735, at *2 (D.S.C. June 24, 2016) (quoting Williford, 715 F.2d at 127)); see also Zipit Wireless, 2016 WL 3452735, at *2 ("[A] motion to stay is not expressly addressed in the Federal Rules of Civil Procedure . . . ."). The Agencies never acknowledged, much less satisfied, their burden to justify a stay.

ARGUMENT

A. With EPA leadership now in place, the primary reason for the stay no longer exists.

Here, there can be no question that circumstances have significantly changed, and the stay is no longer appropriate. In their motion to stay the proceedings, the Agencies cited as "[p]erhaps [the] most important[]" factor warranting a stay that "the EPA Administrator-designate, Michael Regan, ha[d] not yet been confirmed by the Senate." Doc. 105 at 4. The Agencies sought a stay for the "requested period of 60 days [to] allow time for this confirmation process to conclude, and for EPA's new leadership to be briefed on this matter to decide the EPA's preferred path forward." Id. at 5. Administrator Regan has now been confirmed by the Senate, 167 Cong. Rec. S1456 (daily ed. Mar. 10, 2021), and ample time has passed since his confirmation on March 10, 2021, to allow for his briefing on this matter. With leadership in place, the circumstances that prompted the stay have changed significantly, and there is no basis for further delay. The Court should lift the stay and set a briefing schedule that, as proposed in Section D, below, would set a May 3, 2021 deadline for the Agencies' response—a date beyond the close of the Agencies' requested stay period of 60 days.

B. Plaintiffs will continue to suffer significant harm if the stay is not lifted.

The Replacement Rule strips Clean Water Act protections from millions of the nation's stream miles and wetland acres and eliminates safeguards for recreational lakes such as Lake Keowee. See, e.g., Doc. 58-1 at 8–9, 13–15. As Plaintiffs alleged in the complaint and established in their motion for summary judgment, the Rule is procedurally and substantively unlawful, id. at 12–39; Doc. 73 at 2–53, and significantly harms Plaintiffs and their members, who depend on affected waters across the country for swimming, boating, drinking, fishing, and business, Doc. 58-1 at 41–45; Doc. 73 at 56–60. The Agencies do not dispute these harms, nor

could they, since they refused to assess how the Rule would affect the nation's water quality. See Doc. 58-1 at 9–10, 19–23; Doc. 73 at 20–22. Indeed, the Agencies concede the precise risks that constitute injury to Plaintiffs. See, e.g., Doc. 58-1 at 22 (citing Agencies' concessions that Rule threatens "[g]reater waterbody impairments," "[d]egraded aquatic habitats," more "[d]redging/[f]ill in streams," "[i]ncreased flood risk," "[d]ownstream inundation damages," and "[g]reater drinking water treatment and dredging costs," among other harms).

In the months since the Rule took force, Plaintiffs' gravest concerns have been borne out. The U.S. Army Corps of Engineers ("Corps") has been flooded with requests to obtain "approved jurisdictional determinations" locking in the right to pollute or fill newly excluded streams and wetlands free of the Clean Water Act's permitting protections. See, e.g., Amena H. Saiyid, Companies Eager to 'Lock In' Trump-Era Water Rule Exemptions, Env't & Energy Report (Bloomberg Law), Sept. 10, 2020, https://perma.cc/8LU4-YM9G (Exhibit 1). Due to the Rule's express exclusion of prevalent streams and wetlands, the Corps has churned out thousands of findings of "no jurisdiction" under the Clean Water Act. Of the 9,187 waters for which the Corps has issued jurisdictional determinations under the Replacement Rule nationwide, the Corps has determined that 8,387—91 percent—are not jurisdictional under the Rule, leaving these wetlands and waterbodies open to pollution and destruction. See EPA, Clean Water Act Approved Jurisdictional Determinations, https://perma.cc/WZN8-BV9A ("EPA AJDs") (data as of Mar. 17, 2021).[2] In the Charleston District alone—a region flush with wetlands excluded by

[2] The EPA data can be downloaded in spreadsheet form from https://watersgeo.epa.gov/cwa/cwa-JDS/, an EPA website that "presents information on approved jurisdictional determinations (JDs) made by the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) under [section 404 of] the Clean Water Act since August 28, 2015." From this website, "[u]sers are able to search, sort, map, view, and download approved JDs from both agencies using different search parameters (e.g., by year, State, watershed)."

the Rule, see Doc. 58-1 at 42—the Corps has already evaluated 397 waters under the Replacement Rule and found 372—94%—not jurisdictional. See EPA AJDs. These findings stand in stark contrast to the outcome of the Corps' jurisdictional determinations under prior regulatory regimes. Since August 28, 2015 (the earliest date for which EPA's website contains data on jurisdictional determinations), the Corps found that only 58% of waters evaluated under the 2015 Clean Water Rule (3,747 of 6,468 waters) and 58% of waters evaluated under the preexisting regulations (32,043 of 55,010 waters) were not jurisdictional. See id. Plainly, additional harms to Plaintiffs and their members can and will occur during the 60-day stay granted by the Court, contrary to the Agencies' conclusory assertion of no prejudice to any party, see Doc. 105 at 6.

As one example, Plaintiff Defenders of Wildlife extensively commented on the Clean Water Act permit application of Twin Pines Minerals, LLC ("Twin Pines") to mine on the border of the iconic Okefenokee Swamp in southeast Georgia—a project that will destroy hundreds of acres of wetlands formerly protected under the Act. See Doc. 58-20 at ¶ 29. Shortly after the Replacement Rule took force, Twin Pines sought and quickly obtained a new jurisdictional determination; the new determination excluded over 370 acres of wetlands in the project area from Clean Water Act protections under the Rule's unlawful "adjacent wetlands" definition and found *zero* jurisdictional waters. See U.S. Army Corps of Eng'rs, Approved Jurisdictional Determination, Permit No. SAS-2018-00054 (Oct. 14, 2020) (Exhibit 2). As a result, Twin Pines withdrew its permit application, Letter from Christopher Terrell et al., TTL, Inc., to Holly Ross, U.S. Army Corps of Eng'rs (Oct. 21, 2020) (Exhibit 3), and may now destroy hundreds of acres of wetlands without federal protections. This will likely irreparably damage the hydrology and quality of the swamp and the plants and animals that rely on it. See Letter from William W.

Sapp, SELC, et al. to Col. Daniel Hibner, U.S. Army Corps of Eng'rs, at 16–18, 39–43 (Sept. 12, 2019) (Exhibit 4).

Here in South Carolina, Plaintiff South Carolina Coastal Conservation League has participated in the permitting process for the proposed Riverport Development, a major mixed-use development in Jasper County on the border of the Savannah National Wildlife Refuge. See Letter from Christopher K. DeScherer, SELC, to Richard L. Darden, U.S. Army Corps of Eng'rs, at 1, 5–7 (Mar. 1, 2021) ("Riverport Comment Letter") (Exhibit 5). The developer's initial permit application stated that the project would fill approximately 35 acres of wetlands protected under the Clean Water Act. U.S. Army Corps of Eng'rs, Charleston Dist., Joint Public Notice, Permit No. SAC-2010-00064, at 6 (May 27, 2020) (Exhibit 6). After the Replacement Rule was finalized, the developer requested a revised jurisdictional determination. U.S. Army Corps of Eng'rs, Approved Jurisdictional Determination, Permit No. SAC-2010-00064, at 33 (Oct. 5, 2020) (Exhibit 7) (stating that determination was supported by applicant's request for reassessment). Applying the Replacement Rule, the Corps determined that more than 200 acres of the wetlands within the project site were not jurisdictional, including about 11 acres of the original jurisdictional wetlands proposed to be filled. U.S. Army Corps of Eng'rs, Charleston Dist., Joint Public Notice, Permit No. SAC-2010-00064, at 6 (Jan. 29, 2021) (Exhibit 8). As a result, all 200 acres are left open to potential destruction without Clean Water Act protections. Moreover, because the project threatens to fragment other wetlands and the Rule generally requires that protected wetlands touch or possess a surface connection to another jurisdictional water, 85 Fed. Reg. at 22,338, the Riverport project may cause over 1,000 wetland acres to lose protection, another damaging facet of the Rule the Corps has thus far ignored. Riverport Comment Letter at 4.

The Twin Pines and Riverport examples underscore the need to protect Plaintiffs' members from "increased pollution and flooding downstream," Doc 58-48 at ¶ 10, and the water resources they use and cherish from degradation, see, e.g., id. at ¶¶ 6–9, 16; Doc. 58-49 at ¶¶ 5–11; Doc. 58-20 at ¶¶ 29–32. That protection will not occur as long as the Replacement Rule remains in effect.

C. No clear and convincing circumstances exist to outweigh the ongoing harm to Plaintiffs.

In the face of these significant, ongoing harms to the environment and to Plaintiffs, there is no "clear case of hardship or inequity" that would accompany proceeding expeditiously with the litigation. Landis, 299 U.S. at 255.

First, it is not true that a hearing on the Replacement Rule would be an inefficient use of resources in light of the Agencies' ongoing review of the Rule. See Doc. 105 at 5. The Agencies have given themselves no deadline for their review and an open-ended process could take years. Meanwhile, this case has progressed so far—with cross-motions for summary judgment having been fully briefed since October 2020—that the refiling of such motions and the holding of a hearing would pose little further strain on the Parties' resources.[3] Nor would further delaying a hearing necessarily conserve judicial resources, since many of the issues raised in this case are likely to be raised again in litigation over any revision to the Rule. The legal defects of the Replacement Rule need resolution now so that a more protective set of regulations defining "waters of the United States"—the pre-2015 regulations, until the Agencies issue a new rule—can better restore and maintain the integrity of the nation's waters.

[3] Resolving questions about the lawfulness of the Rule could also inform the Agencies' decision whether to modify or withdraw it and their consideration of specific regulatory changes.

Second, the Agencies' concern that they "could not state with any certainty either their plans regarding potential reconsideration of the rule or the current administration's position on many of the issues raised by this litigation," id. at 5, is insufficient to outweigh the severe and ongoing harm facing Plaintiffs as the Rule remains in place. The Agencies moved for, and the Court granted, a delay of 60 days. The relief Plaintiffs seek in this motion—lifting the stay and setting a briefing and hearing schedule for summary judgment motions—would not compel the Agencies to represent the administration's position before the expiration of that 60-day period. Plaintiffs seek only the ability to file or refile a motion for summary judgment and to establish a schedule for moving expeditiously towards a hearing on that motion. Plaintiffs request that the deadline for the Agencies' and Intervenors' responses to Plaintiffs' summary judgment motion be set for May 3, 2021—after the completion of the 60-day period.

Even after the expiration of the 60-day period—which would give the Agencies ample time to formulate a position on the issues raised in this litigation—recent history suggests that the Agencies would not be compelled to represent the administration's final position on the Replacement Rule. In 2018, the same agencies, facing a challenge to the prior administration's rule defining "waters of the United States," "[took] no position on the substantive issues" raised by that rule's challengers because the Agencies were in the process of reconsidering those issues. U.S.'s Resp. to Pls.' & Intervenor Pls.' Mots. for Summ. J. at 2, Georgia v. Wheeler, No. 2:15-cv-00079-LGW-BWC (S.D. Ga. Oct. 10, 2018) (Exhibit 9).

Third, the fact that "a number of other courts have considered and granted stays/continuances" in challenges to the Replacement Rule, Doc. 105 at 5–6 & n.4, reflects the materially different circumstances in cases that are in earlier stages of litigation than the instant

case. In nearly all of those cases, the stay or continuance was unopposed.[4] Courts reviewing challenges to this and other rules have proven less inclined to put the litigation on hold where briefing was fully or nearly complete and other parties objected. See Order, Colorado v. EPA, No. 20-1238 et al. (10th Cir. Mar. 1, 2021) (Exhibit 10) (denying Agencies' motion to hold appeals in abeyance); Order Denying Defs.' Mot. for Stay of Case, Wild Va. v. CEQ, No. 3:20CV00045 (W.D. Va. Feb. 19, 2021) (Exhibit 11) (denying Council on Environmental Quality's motion for stay). Here, where summary judgment motions were fully briefed nearly five months ago and Plaintiffs have identified concrete harms from a continued stay, lifting the stay is warranted.

D. The Court should set a briefing schedule for the filing or refiling of summary judgment motions and schedule a hearing at the nearest convenient date.

Plaintiffs propose that summary judgment motions and responses be filed or refiled, as appropriate, on or before the following deadlines and in accordance with the specified page limits:

[4] See Envtl. Integrity Project v. Wheeler, No. 1:20-cv-01734, Doc. 27 (D.D.C. Jan. 28, 2021); Conservation Law Found. v. EPA, No. 1:20-cv-10820, Doc. 99 (D. Mass. Feb. 10, 2021); Chesapeake Bay Found., Inc. v. Wheeler, No. 20-cv-1063, Doc. 48 (D. Md. Feb. 2, 2021); Navajo Nation v. Wheeler, No. 2:20-cv-602, Doc. 27 (D.N.M. Feb. 4, 2021); N.M. Cattle Growers' Ass'n v. EPA, No. 1:19-cv-00988, Doc. 59 (D.N.M. Feb. 10, 2021); Ore. Cattlemen's Ass'n v. EPA, No. 3:19-cv-00564, Doc. 113 (D. Or. Feb. 2, 2021); Puget Soundkeeper All. v. EPA, No. 2:20-cv-00950, Doc. 47 (W.D. Wash. Feb. 8, 2021); Waterkeeper All. v. Wheeler, No. 3:18-cv-03521, Doc. 103 (N.D. Cal. Feb. 16, 2021); Washington Cattlemen's Ass'n v. EPA, No. 2:19-cv-569, Doc. 95 (W.D. Wash. Feb. 8, 2021); Colorado v. EPA, No. 1:20-cv-01461, Doc. 96 (D. Colo. Mar. 11, 2021); but see California v. Wheeler, No. No. 3:20-cv-3005, Doc. 229 (N.D. Cal. Feb. 17, 2021) (granting stay motion consented to by plaintiffs but opposed by defendant-intervenors); Murray v. Wheeler, No. 1:19-cv-1498, Doc. 42 (N.D.N.Y. Feb. 2, 2021) (holding case in abeyance over plaintiffs' objection).

Filing	Deadline	Page Limit[5]
Plaintiffs' Motion for Summary Judgment	Apr. 19, 2021	45 pages
Defendants' Combined Response to Plaintiffs' Motion for Summary Judgment/Cross-Motion for Summary Judgment	May 3, 2021	45 pages
Intervenors' Combined Response to Plaintiffs' Motion for Summary Judgment/Cross-Motion for Summary Judgment	May 3, 2021	45 pages
Plaintiffs' Combined Response to Defendants' and Intervenors' Motions for Summary Judgment/Reply in Support of Motion for Summary Judgment	May 17, 2021	65 pages
Defendants' Reply in Support of Motion for Summary Judgment	June 1, 2021	30 pages
Intervenors' Reply in Support of Motion for Summary Judgment	June 1, 2021	30 pages

CONCLUSION

Plaintiffs fully support the Agencies' careful review of the unlawful and harmful Replacement Rule. But it is precisely because of the Rule's unlawfulness and harm to Plaintiffs during that review that this challenge to the Rule should proceed to a decision on the merits.

For the reasons set forth herein, Plaintiffs respectfully request that the Court lift the stay of proceedings; set the schedule proposed by Plaintiffs for the Parties to file or refile summary judgment motions and responses; and schedule a hearing on the motions at the nearest convenient date.

[5] The proposed page limits represent the limits previously agreed to by the Parties and adopted by the Court. See Docs. 57, 72 (scheduling orders issued by Judge Norton).

Respectfully submitted this the 18th day of March 2021.

s/ Frank S. Holleman III
Frank S. Holleman III
D.S.C. Bar No. 1911
Kelly F. Moser*
Geoffrey R. Gisler*
Nicholas S. Torrey*
Leslie A. Griffith*
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
Telephone: (919) 967-1450
Facsimile: (919) 929-9421
fholleman@selcnc.org
kmoser@selcnc.org
ggisler@selcnc.org
ntorrey@selcnc.org
lgriffith@selcnc.org

Mark Sabath*
Southern Environmental Law Center
201 West Main Street, Suite 14
Charlottesville, VA 22902-5065
Telephone: (434) 977-4090
Facsimile: (434) 977-1493
msabath@selcva.org

Attorneys for Plaintiffs
**Pro hac vice*