UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SOUTHEAST STORMWATER ASS'N, INC., *et al.*,

Plaintiffs,

v. Case No. 4:15-CV-579-MEW-CAS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants.
_____/

**REPLY IN SUPPORT OF MOTION TO LIFT ABEYANCE AND SET BRIEFING SCHEDULE**

The Municipal Interests ask this Court to lift the abeyance and set a briefing schedule to resolve their challenge to the 2015 Final Rule defining the phrase "waters of the United States" as used in the Clean Water Act. *See* 80 Fed. Reg. 37,054 (June 29, 2015).[1] Contrary to the Corps and EPA's assertions, prudential ripeness neither applies nor does the doctrine preclude this Court from considering

[1] This reply refers to (1) the Plaintiffs collectively as "Municipal Interests," (2) the U.S. Army Corps of Engineers as "Corps," (3) the U.S. Environmental Protection Agency as "EPA," (4) the 2015 final rule defining the phrase "waters of the United States" as the "2015 Final Rule," (5) the February 28, 2017 Executive Order directing reconsideration of the 2015 Final Rule as the "2017 Executive Order," (6) the 2018 final rule changing the applicability date of the 2015 Final Rule as the "2018 Applicability Rule," (7) the *proposed* rule repealing the 2015 Final Rule as the "Proposed Repeal Rule," and (8) the *proposed* rule replacing the 2015 Final Rule as the "Proposed Replacement Rule."

the merits of the 2015 Final Rule even if it did. Recent national developments also serve as reason to proceed—not delay.

***First***, in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014), the U.S. Supreme Court questioned the "continuing vitality of the prudential ripeness doctrine." Specifically, in rejecting nonjusticiability concerns about a pre-enforcement constitutional challenge to a state law prohibiting false statements during political campaigns, the U.S. Supreme Court stated that "[t]o the extent the respondents would have us deem petitioners' claims nonjusticiable 'on grounds that are prudential rather than constitutional' '[t]hat request is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.'" *Id.* (some internal quotations omitted) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). The U.S. Supreme Court went on to conclude that "the continuing vitality of the prudential ripeness doctrine"—although in tension with precedent and principle—need not be "resolve[d]" because the plaintiffs "easily satisfied" its two factors concerning (1) the "fitness" of issues for adjudication and (2) the "hardship" to the parties from withholding a decision. *Id.*

This Court has jurisdiction to hear this case. No one disputes that. Prudential ripeness should not serve as a bar to the exercise of that jurisdiction.

***Second,*** regardless of whether prudential ripeness survives the push and pull of precedent and principle, as in *Susan B. Anthony List*, the Municipal Interests easily satisfy the doctrine's two factors of fitness and hardship. As an initial matter, in the Eleventh Circuit, fitness and hardship are *not* independent factors. *See Harrell v. The Fla. Bar*, 608 F.3d 1241, 1259 (11th Cir. 2010). "[L]ack of hardship cannot tip the balance against judicial review." *Id.* (internal quotation marks omitted); *see also Rubenstein v. Fla. Bar*, 69 F. Supp. 3d 1331, 1344 (S.D. Fla. 2014). But where fitness is questionable, the presence of hardship weighs in favor of proceeding. *See, e.g., Eternal Word TV Network, Inc. v. Sebelius,* 935 F. Supp. 2d 1196, 1224 (N.D. Ala. 2013). Thus, the Corps and EPA are wrong in relying on the Eight Circuit decision in *Nebraska Public Power District v. MidAmerican Energy Company*, 234 F.3d 1032 (8th Cir. 2000) to suggest that one must independently satisfy the fitness and hardship factors. ECF 54 at 12. Fitness in itself or hardship with questionable fitness makes judicial review appropriate.

The first factor—fitness for judicial review—"is typically concerned with questions of finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." *Harrell,* 608 F.3d at 1258. The 2015 Final Rule reflects final agency action. It says so in the preamble to the 2015 Final Rule. *See, e.g.*, 80 Fed. Reg. at 37,055. No further factual development is necessary concerning this final agency action because, as

the Corps and EPA note, "the administrative record for the 2015 [Final] Rule has been electronically available since the Rule's promulgation in 2015" and used by all sides when briefing the merits before the Sixth Circuit. ECF 54 at 17. This record is "comprised of over 20,400 documents and 350,000 pages," containing comments, the federal response to comments, technical support materials, and economic and environmental assessments. *Id*. Most importantly, it is hornbook law that the 2015 Final Rule must rise or fall based only on this administrative record, making further factual development for *this* final agency action unnecessary. *See, e.g.*, *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

The Corps and EPA nevertheless question the definitiveness of their final agency action at issue by arguing that contingent agency actions *might* delay or *might* repeal or *might* replace the 2015 Final Rule. ECF 54 at 12-15. This is not enough to avoid judicial review of a final rule. As the D.C. Circuit explained in *GE v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002), "[t]he fact that a law [i.e., final rule] may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." The D.C. Circuit also admonished that "[i]f the possibility (indeed, the probability) of future review in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any

agency rule—and particularly one that must be updated periodically to reflect advances in science—would ever be final as a matter of law." *Id.* While the D.C. Circuit provided this admonition when deciding whether an EPA guidance document was final agency action, the admonition applies with equal force here. The promise of some later final agency action—or three final agency actions—should not shield an existing rule from review.

The Eleventh Circuit takes a similar view when considering "whether a future contingency creates fitness (and ultimately ripeness) concerns"—assessing "not merely the existence, but the *degree* of contingency" to see whether the "contingent event will deprive the plaintiff of an injury." *Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1291-92 (11th Cir. 2010) (citations omitted). Rulemaking with deadlines set through a settlement agreement, *see API v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012), or exigencies created because of the impending expiration of a safe harbor provision provide a more concrete contingency that allows litigants to ultimately avoid injury. *See Eternal Word*, 935 F. Supp. 2d at 1222-23. Three different but intertwined rulemakings intended to delay, repeal, and then replace the 2015 Final Rule create a less than firm contingency materially different from the ones in *API* and *Eternal Word*.

The 2018 Applicability Rule—the rule intended to delay the effective date of the 2015 Final Rule until February 2020—has already had its legality questioned,

been enjoined, and been vacated. *See* ECF 66, *South Carolina Coastal Conservation League, et al. v. Pruitt,* No. 2-18-cv-330-DCN, 2018 U.S. Dist. LEXIS 138595 (D.S.C. Aug. 16, 2018) (granting summary judgment to challengers, enjoining 2018 Applicability Rule nationwide, vacating that rule, and denying in ECF 89 of that docket a stay of the ruling); *Puget Soundkeeper Alliance, et al. v. Wheeler, et al.,* No. 15-cv-1342-JCC (W.D. Wash. Nov. 26, 2018) (vacating 2018 Applicability Rule in ECF 61 of that docket).[2]

The Proposed Repeal Rule—the rule intended to repeal the 2015 Final Rule—is just a proposal. The comment period for this proposed agency action ended August 13, 2018. *See* 83 Fed. Reg. 32,227 (July 12, 2018). Once the Corps and EPA review and consider comments, they might decide to change course.

The Proposed Replacement Rule—the rule intended to replace the 2015 Final Rule—is also a proposal. The Corps and EPA only recently published this proposed rule in the Federal Register, opening the comment period. *See* 83 Fed. Reg. 67,174 (Dec. 28, 2018). As with the Proposed Repeal Rule, once the comment period closes and the Corps and EPA complete their review and consideration of comments, they might decide to change course.

The contingency that the Corps and EPA rely on to avoid judicial review thus requires one to assume: (1) the effectiveness of the 2018 Applicability Rule,

[2] As of the date of this filing, no appellate court has stayed these rulings.

which has already been vacated; (2) the effectiveness of the Proposed Repeal Rule and Proposed Replacement Rule, which are almost certain to be challenged if ever the Corps and EPA finalize the rules; and (3) that there will be no further change in policy, resulting in recession of the 2017 Executive Order, which itself reflects changed policy after the 2016 General Election. It is no surprise then that the Corps and EPA's response in opposition speaks in the subjunctive, the mood of possibility, when discussing the possible resolution of "complex challenges" through rulemaking "if finalized," ECF 54 at 2, and describing a "possible replacement" for the 2015 Final Rule. ECF 54 at 14. The future contingency that the Corps and EPA cite appears more remote with each passing day.

The 2015 Final Rule is final, definitive, and fit for judicial review based on the already compiled administrative record.

The second factor—hardship to the parties from withholding review—is also met. "The hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are ideal." *Harrell,* 608 F.3d at 1258. This inquiry "turns on whether granting relief would serve a useful purpose, or, put another way, whether the sought-after declaration would be of practical assistance in setting the underlying controversy to rest." *Town of Barnstable v. O'Connor,* 786 F.3d 130, 143 (1st Cir. 2015). Here resolving the validity of a three-year old final rule, with the force of law, would provide practical

guidance to the Municipal Interests and their members, and may well guide the Corps and EPA in any future rulemakings by helping to delineate the appropriate scope of federal authority under the Clean Water Act; delay would only add to the uncertainty. *See id.* (concluding that challenge to approval of power purchase agreement was ripe for review, and satisfied hardship requirement, because defendants would act differently and be able to spend resources with less risk of waste "if they learned today that approval of the [agreement] [was] invalid").

In arguing otherwise, the Corps and EPA focus on the Municipal Interests' decision not to seek a preliminary injunction before this Court. ECF 54 at 15-16. Preliminary injunctive relief is rarely granted and presents a high bar for any movant to clear. *See, e.g.*, *Keister v. Bell*, 879 F.3d 1282, 1287 (11th Cir. 2018). But even the Eighth Circuit in *Nebraska Public Power District* recognized that one need only meet the factors for prudential ripeness to a "minimal degree" to proceed with a case. 234 F.3d at 1039. Thus, equating high bar for preliminary injunctive relief with the showing for prudential ripeness makes little sense.

Still, even when judged against the higher standard for preliminary relief, multiple courts on multiple occasions stayed the 2015 Final Rule. *See* ECF 54 at 7. The Sixth Circuit stayed the rule nationwide when it thought it had jurisdiction. *See In re U.S. Dep't of Def.,* 817 F.3d 261 (6th Cir. 2016) (regarding jurisdiction); *In re EPA*, 803 F.3d 804 (6th Cir. 2015) (regarding stay). The District Court of

North Dakota stayed the rule in 13 states, later including another state in the stay, and recognized that a delay in resolving the merits would prejudice the litigants. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055 (D.N.D. 2015). The Southern District of Georgia stayed the rule in 11 other states. *See Georgia v. Wheeler*, No. 2:15-cv-00079-LGW-BWC (S.D. Ga.). The Southern District of Texas stayed the rule in 3 states. *See Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex).

Stays of the 2015 Final Rule do not negate hardship either.[3] Even with a nationwide stay of the 2015 Final Rule, the rule would still remain on the books and still reflect an expansion of federal jurisdiction at odds with the U.S. Constitution and the Clean Water Act's statutory text. *See* ECF 1. This, in turn, would implicate issues of federalism. Because "[s]tates are not the sole intended beneficiaries of federalism," the Municipal Interests would continue having a concrete interest in delineating the appropriate state-federal balance under the U.S. Constitution and Clean Water Act. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011); *see also North Dakota*, 127 F. Supp. 3d at 1059 (noting 2015 Final Rule will cause states to lose sovereignty over interstate waters).

At the very least, delay, uncertainty, and leaving questions of federalism unanswered present a hardship that favors proceeding with judicial review.

[3] As of the date of this filing, the 2015 Final Rule still applies in Tennessee, a state where the Southeast Stormwater Association has members.

***Third,*** national developments favor proceeding as well. In 2018 the U.S. Supreme Court concluded that the federal district courts—not the circuit courts of appeal—have jurisdiction to consider challenges to the 2015 Final Rule and other similar rules. *Nat'l Ass'n of Mfrs. v. Dep't of Defense,* 138 S. Ct. 617 (2018). The U.S. Supreme Court decided the threshold jurisdictional question despite "a number of developments since the Court granted review" because the "[2015 Final] Rule remains on the books for now, [and so] the parties retain a concrete interest in the outcome of this litigation." *Id.* at 627 n.5. Notably, earlier in the proceeding, the U.S. Supreme Court rejected the Corps and EPA's request to stay the briefing in part because of the prospect of a repeal and replacement for the 2015 Final Rule. *See* Motion of Federal Respondents to Hold the Briefing Schedule in Abeyance (Mar. 6, 2017); Order List (Apr. 3, 2017) (denying same).

Other courts have followed suit. Briefing on the merits of the 2015 Final Rule is complete in North Dakota, Georgia, and Texas.[4] While "[t]he federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts," "each has an obligation to engage independently in reasoned analysis." *In re Korean Airlines Disaster of Sept. 1, 1983,* 829 F.2d 1171, 1176 (D.C. Cir. 1987). This Court's assessment of the 2015 Final Rule may prove especially helpful because this is the only case that focuses on the 2015 Final

[4] As of the date of this filing there has been no decision on the merits.

Rule's effect on municipal interests. *Cf. Gov't of the Virgin Islands, Div. of Banking & Ins. v. Needle*, 861 F. Supp. 1054, 1056 (M.D. Fla. 1994) ("[A]ny hardship a stay would cause for an opposing party thereby forced to stand by while its rights are determined by other litigation are to be considered in deciding whether to grant a stay.").

***Finally,*** the Municipal Interests note that "[w]e are not willing to stand on the dock and wave goodbye as EPA [continues] on this multiyear voyage of discovery," with uncertain and ever-diminishing chances of the 2015 Final Rule actually being delayed, repealed, and replaced with other rules. *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014). There exists an immediate and significant need to address whether a rule promulgated in 2015 is actually valid. Judicial decisions now may guide agency rulemaking later, and provide more certainty and clarity for all. Delay would have the opposite effect.

WHEREFORE the Municipal Interests ask that this Court lift the abeyance, set a briefing schedule, and resolve the merits of the 2015 Final Rule.

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**CERTIFICATE OF COMPLIANCE WITH LOCAL RULES**

The undersigned certifies that the foregoing complies with the size, font, and formatting requirements of the Local Rules. The foregoing contains 2,629 words.

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Respectfully submitted by:

*/s/ Mohammad O. Jazil*

MOHAMMAD O. JAZIL (FBN 72556)
mjazil@hgslaw.com
HOPPING GREEN & SAMS, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
(850) 222-7500 / (850) 224-8551 (fax)

***Counsel for Plaintiffs, Southeast Stormwater Association, Inc., et al.***

Dated: January 25, 2019

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served through the Court's CM/ECF system to all counsel of record on this 25th day of January 2019.

*/s/ Mohammad O. Jazil*
Attorney