

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON CATTLEMEN'S
ASSOCIATION,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Defendants.

And

PUGET SOUNDKEEPER ALLIANCE,
IDAHO CONSERVATION LEAGUE, and
SIERRA CLUB,

Defendant-Intervenors.

No. 2:19-CV-0569-JCC

AMENDED STIPULATED MOTION TO
STAY CLAIMS ONE THROUGH
EIGHTEEN AND FILE CERTIFIED INDEX
FOR THE ADMINISTRATIVE RECORDS;
[PROPOSED] ORDER

NOTE ON MOTION CALENDAR:
JULY 28, 2020

Amended Stipulated Motion to Stay Claims One
through Eighteen and File Certified Index for the
Administrative Records
2:19-CV-0569-JCC

U.S. Dept. of Justice/ENRD
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1806

Pursuant to L.R. 10(g) and 7(d)(1), Plaintiff Washington Cattlemen’s Association (“Plaintiff”); Defendants the United States Environmental Protection Agency (“EPA”), Andrew Wheeler, in his official capacity as Administrator of EPA, the United States Army Corps of Engineers, and R.D. James, in his official capacity as Assistant Secretary for Civil Works, Department of the Army (collectively, “the Agencies”); and Defendant-Intervenors Puget Soundkeeper Alliance, Idaho Conservation League, and Sierra Club (collectively “Defendant-Intervenors”)¹; hereby stipulate to and move for an order providing that Plaintiff’s claims concerning the 2015 Rule and 2019 Rule be held in abeyance and further providing that the Agencies be relieved of the requirement to file via ECF the administrative records in this case. In lieu of filing the full voluminous administrative records, the Agencies on July 3, 2020 filed a certified index that lists the documents that compose the administrative record for the 2020 Rule and provides their Regulations.gov document identification number and hyperlinks. *See* Dkt. No. 81.

Stipulation to Stay Claims One through Eighteen

Plaintiff filed its second supplemental complaint, which is the operative complaint in this case, on May 4, 2020. Dkt. No. 72. The Agencies’ and Defendant Intervenors’ responses to the second supplemental complaint are due July 3, 2020. Dkt. No. 75. Plaintiff’s second supplemental complaint alleges claims challenging three successive rules that define the phrase “waters of the United States” in the Clean Water Act. Claims One through Eight raise claims

¹ This Amended Stipulated Motion amends/supersedes the stipulated motion filed on June 26, 2020 (Dkt. No. 78).

1 against a rule entitled “Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed.
 2 Reg. 37,054 (Nov. 29, 2015) (“2015 Rule”). Claims Nine through Eighteen raise claims against
 3 a rule entitled “Definition of ‘Waters of the United States’—Recodification of Pre-Existing
 4 Rules,” 84 Fed. Reg. 56,626 (October 22, 2019) (“2019 Rule”). Claims Nineteen through
 5 Twenty Six raise claims against a rule entitled “Navigable Waters Protection Rule: Definition of
 6 ‘Waters of the United States,’” 85 Fed. Reg. 22,250 (April 21, 2020) (“2020 Rule”).

7 Currently, as of June 22, 2020, the 2020 Rule is in effect in Washington, and nationwide
 8 except for Colorado. *See Colorado v. EPA*, No. 20-cv-01461, Dkt. No. 61 (D. Colo. June 19,
 9 2020) (staying the 2020 Rule’s effective date in Colorado); *California v. Wheeler*, No. 3:20-cv-
 10 03005, Dkt. No. 171 (N.D. Cal. June 19, 2020) (declining plaintiffs’ request to preliminarily
 11 enjoin or stay the effective date of the 2020 Rule). Motions to preliminarily enjoin the 2020
 12 Rule are currently pending in this case and in two other courts. *See* Dkt. No. 72; *Or.*
 13 *Cattlemen’s Ass’n*, No. 19-cv-564, Dkt. No. 97; *N.M. Cattle Growers’ Ass’n*, No. 19-cv-988,
 14 Dkt. No. 30. Cases challenging the 2020 Rule are pending in multiple district courts across the
 15 nation. *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-00266 (D. Ariz.); *Chesapeake Bay Found., Inc.*
 16 *v. EPA*, No. 1:20-cv-01064 (D. Md.); *Conservation Law Found. v. EPA*, No. 1:20-cv-010820
 17 (D. Mass.); *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-01687 (D.S.C.);
 18 *California v. Wheeler*, No. 3:20-cv-03005 (N.D. Cal.); *Colorado v. EPA*, No. 20-cv-01461 (D.
 19 Colo.); *Navajo Nation v. Wheeler*, No. 2:20-cv-602 (D.N.M.); *N.M. Cattle Growers’ Ass’n v.*
 20 *EPA*, No. 1:19-cv-988 (D.N.M.); *Murray v. Wheeler*, No. 1:19-cv-1498 (N.D.N.Y.); *Or.*
 21 *Cattlemen’s Ass’n v. EPA*, No. 3:19-cv-564 (D. Or.); *Puget Soundkeeper All. v. EPA*, No. 2:20-

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1 cv-950 (W.D. Wash.).

2 The 2020 Rule replaces the 2019 Rule, which had been in effect nationwide since
 3 December 23, 2019. The 2019 Rule repealed and replaced the 2015 Rule, which had previously
 4 been in effect in Washington. The 2019 Rule is currently subject to a number of legal
 5 challenges, although some of those claims have been stayed, and those cases are still in early
 6 stages. *See, e.g., S.C. Coastal Conservation League v. Wheeler*, No. 2:19-cv-03006, Dkt. No. 54
 7 (D.S.C. May 29, 2020) (extending stay); *Murray v. Wheeler*, No. 1:19-cv-1498 (N.D.N.Y.)
 8 (response to amended complaint due July 10, 2020); *Chesapeake Bay Found., Inc. v. Wheeler*,
 9 No. 1:20-cv-1063 (D. Md.) (response to complaint due July 10, 2020). Claims challenging the
 10 2015 Rule have also been stayed pending the outcome of claims challenging the 2020 Rule
 11 and/or the 2019 Rule. *E.g., Waterkeeper All., Inc. v. Wheeler*, No. 3:18-cv-3521, Dkt. No. 87
 12 (N.D. Cal. May 27, 2020); *North Dakota v. EPA*, No. 3:15-cv-59, Dkt. No. 325 (D.N.D. June
 13 24, 2020); *Or. Cattlemen's Ass'n v. EPA*, No. 3:19-cv-564, Dkt. No. 94 (D. Or. May 6, 2020).
 14 Most cases challenging the 2015 Rule are in the early stages. Both district courts that ruled on
 15 the merits of plaintiffs' summary judgment motions concluded that the 2015 Rule was
 16 "unlawful" and remanded it. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1360 (S.D. Ga. 2019);
 17 *Texas v. EPA*, 389 F. Supp. 3d 497, 504-06 (S.D. Tex. 2019); *see also Puget Soundkeeper All.*
 18 *v. Wheeler*, No. 2:15-cv-1342, 2019 WL 6310562 (W.D. Wash. Nov. 25, 2019) (denying
 19 plaintiffs' motion for summary judgment for lack of standing).

20 The Parties support litigating Plaintiff's claims Nineteen through Twenty Six (the 2020
 21 Rule Claims) first and stipulate to staying Plaintiff's remaining claims until after the Court

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1 resolves the merits of the 2020 Rule Claims.

2 **Stipulation to File Certified Indexes of Administrative Records**

3 There is good cause for the Agencies to be relieved of strict compliance with Local Civil
 4 Rule 79(h) in this case. The administrative records for the three rules are publically available
 5 through Regulations.gov. See <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>
 6 (docket for 2015 Rule); <https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0203>
 7 (docket for 2019 Rule); <https://www.regulations.gov/docket?D=EPA-HQ-OW-2018-0149>
 8 (docket for 2020 Rule). Each rule's record consists of thousands of pages, and each contains
 9 some files that are not easily converted to PDF, including Excel spreadsheets with multiple tabs.
 10 Given the volume and complexity of the records, filing the records via ECF would be
 11 burdensome and time consuming. Some files would need to be provided in an alternative
 12 format, which would consume additional resources. Further, each party is likely to cite only a
 13 small percentage of the documents in the record to support its summary judgment arguments.

14 Given these considerations, the Parties support the Agencies filing a certified index of
 15 the records, instead of strictly complying with Local Civil Rule 79(h). Each rule's certified
 16 index of the administrative record will list the documents that compose the administrative
 17 record for that rule and provide their Regulations.gov document identification number and
 18 hyperlinks to their location on Regulations.gov. A significant portion of the administrative
 19 records can be directly accessed via hyperlink. This furthers the goals of transparency, allowing
 20 members of the public direct access to the record.

21 Additionally, because the Parties stipulate that the claims concerning the 2019 and 2015

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1 Rules should be stayed, the Parties further stipulate that the certified indexes of the
2 administrative records for the 2019 and 2015 Rules need not be filed until after the stay is lifted,
3 and depending on subsequent future events, may not be necessary to resolve this case.

4 The Parties stipulate that the certified index for the administrative record for the 2020
5 Rule will be due with the Agencies' answer to the second supplemental complaint. Within
6 fourteen days after the stay of Claims One through Eighteen or a portion of those claims is
7 lifted, the Parties will submit a proposal to govern further proceedings, including submission of
8 the certified indexes for the administrative records for the 2019 and 2015 Rules.

9 Dated: July 28, 2020

Respectfully submitted,

11 /s/ Hubert T. Lee

HUBERT T. LEE

12 SONYA J. SHEA

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[Proposed] Order

It is ordered that Plaintiff's claims One through Eighteen are stayed pending a decision on the merits of Plaintiff's claims Nineteen through Twenty Six.

It is further ordered that Defendants need not file the entire administrative records for the challenged rules. Defendants have instead submitted a certified index of the administrative record for the 2020 Rule. *See* Dkt. No. 81 (filed July 3, 2020).

It is further ordered that the deadline to file the certified indexes for the administrative records for the other challenged rules is stayed pending a decision on the merits of Plaintiff's claims Nineteen through Twenty Six. Within fourteen days after the stay of Claims One through Eighteen or a portion of those claims is lifted, the Parties shall submit a proposal to govern further proceedings, including submission of the certified indexes for the administrative records for the 2019 and 2015 Rules.

It is so Ordered,

Hon. John C. Coughenour
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

I certify that on June 26, 2020, the foregoing will be electronically filed with the Court's electronic filing system, which will generate automatic service upon on all Parties enrolled to receive such notice.

/s/ Hubert T. Lee

Hubert T. Lee

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