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13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE DISTRICT OF ARIZONA**

15 PASCUA YAQUI TRIBE, et al., )  
16 )  
17 *Plaintiffs,* )  
18 v. )  
19 UNITED STATES ENVIRONMENTAL )  
20 PROTECTION AGENCY, et al., )  
21 *Defendants.* )  
22 )  
23 )  
24 )  
25 )

No. CV-20-00266-TUC-RM

**DEFENDANTS’ MOTION TO  
HOLD CASE IN ABEYANCE  
FOR 90 DAYS**

26 Defendants United States Environmental Protection Agency, EPA Acting Administrator  
27 Jane Nishida, United States Army Corps of Engineers, and Senior Official Performing the Duties  
28 of the Assistant Secretary of the Army for Civil Works Vance F. Stewart, III<sup>1</sup> (“Defendants” or  
“Agencies”), move the Court to hold the above-captioned matter in abeyance for a period of 90  
days in order to provide the Agencies time for their review of the definition of “waters of the

<sup>1</sup> EPA Acting Administrator Jane Nishida is automatically substituted for Andrew Wheeler, and  
Vance F. Stewart, III, is automatically substituted for R.D. James, pursuant to Rule 25(d) of the  
Federal Rules of Civil Procedure.

1 United States” at issue in this case in light of the recent change in administration. Plaintiffs  
2 oppose the relief requested herein. As grounds for their motion, Defendants state as follows:

3  
4 **BACKGROUND**

5 Plaintiffs Pascua Yaqui Tribe, Quinault Indian Nation, Fond du Lac Band of Lake  
6 Superior Chippewa, Menominee Indian Tribe of Wisconsin, Tohono O’Odham Nation, and Bad  
7 Band of Lake Superior Chippewa filed their Complaint in this action on June 22, 2020. Dkt. 1.  
8 Plaintiffs are challenging two rules issued by the Agencies that define the phrase “waters of the  
9 United States” under the Clean Water Act. The first rule is entitled “Definition of ‘Waters of the  
10 United States’ – Re-codification of Pre-Existing Rules,” 84 Fed. Reg. 56,626 (Oct. 22, 2019)  
11 (“2019 Rule”), and the second is the “Navigable Waters Protection Rule: Definition of ‘Waters  
12 of the United States,’” 85 Fed. Reg. 22,250 (Apr. 21, 2020) (“2020 Rule”).

13  
14 The 2019 Rule went into effect on December 23, 2019. It repealed the rule entitled  
15 “Clean Water Rule: Definition of ‘Waters of the United States,’” (“2015 Rule”), and reinstated  
16 the pre-2015 Rule regulatory definition of “waters of the United States.” The 2020 Rule  
17 redefined “waters of the United States” and replaced the 2019 Rule. The 2020 Rule went into  
18 effect on June 22, 2020, in all states except Colorado.

19  
20 Plaintiffs claim that the issuance of the 2019 and 2020 Rules was arbitrary, capricious,  
21 and contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2). They  
22 are asking the Court to vacate the 2019 and 2020 Rules, and to reinstate the 2015 Rule.

23  
24 Complaint, Paragraphs 5 and 6.

25 Defendants answered on September 8, 2020, Dkt. 17. After the parties submitted a Joint  
26 Scheduling Report on October 9, 2020, Dkt. 19, the Court issued a scheduling Order on October  
27 28, 2020, Dkt. 20. The Order established the following litigation schedule for this case:  
28

- 1 • November 16, 2020: Defendants to submit certified indices for the 2019 Rule and 2020  
2 Rule administrative records.
- 3 • January 15, 2021: Motions to challenge or supplement the administrative record were  
4 due on or before this date.
- 5 • March 12, 2021: Plaintiffs to submit their motion for summary judgment motion on the  
6 later of this date or within 30 days after the Court’s resolution of any administrative  
7 record challenges.
- 8 • May 14, 2021: Defendants to submit their answer brief in opposition to Plaintiffs’  
9 motion for summary judgment and their cross-motion for summary judgment by the later  
10 of this date, or 60 days after Plaintiffs file their motion for summary judgment.
- 11 • July 2, 2021: Plaintiffs to submit reply brief in support of their motion for summary  
12 judgment and answer brief in opposition to Defendants’ cross-motion for summary  
13 judgment by the later of this date or 45 days after Defendants file their cross-motion for  
14 summary judgment.
- 15 • August 6, 2021: Defendants to file their reply brief in support of their cross-motion for  
16 summary judgment by the later of this date or 30 days after Plaintiffs file their answer  
17 brief in opposition to Defendants’ cross-motion for summary judgment.
- 18 • September 23, 2021: Parties to file a Joint Settlement Status Report by this date and  
19 every 90 days thereafter.

20 The Agencies filed a certified index to the 2019 Rule administrative record on November  
21 16, 2020, Dkt. 21, and a certified index to the 2020 Rule administrative record on the same day.  
22 Dkt. 22.

23 On January 4, 2021, the parties filed a Joint Motion for Extension of Time, requesting  
24 that all remaining deadlines be extended by 60 days. Dkt. 23. The Court granted the joint  
25 motion by Order of January 8, 2021. Dkt. 24. As a result, the remaining litigation deadlines  
26 were modified as follows:

- 27 • March 16, 2021: Motions to challenge or supplement the administrative record are due  
28 on or before this date.
- May 11, 2021: Plaintiffs to file their motion for summary judgment on the later of this  
date or within 30 days after the Court’s resolution of any administrative record  
challenges.

- 1 • July 13, 2021: Defendants to file their answer brief in opposition to Plaintiffs’ motion for  
2 summary judgment and their cross-motion for summary judgment by the later of this date  
3 or within 60 days after Plaintiffs file their motion for summary judgment.
- 4 • August 31, 2021: Plaintiffs to file a reply brief in support of their motion for summary  
5 judgment and their answer brief in opposition to Defendants’ cross-motion for summary  
6 judgment by the later of this date or within 45 days after Defendants file their cross-  
7 motion for summary judgment.
- 8 • October 5, 2021: Defendants to file their reply brief in support of their cross-motion for  
9 summary judgment by the later of this date or within 30 days after Plaintiffs file their  
10 answer brief in opposition to Defendants’ cross-motion for summary judgment.
- 11 • November 22, 2021: Parties to file a Joint Settlement Status Report by this date and  
12 every 90 days thereafter

13 Plaintiffs have supplied Defendants with correspondence indicating that Plaintiffs will  
14 likely file a comprehensive motion directed at the content of the 2019 Rule and 2020 Rule  
15 administrative records submitted by Defendants.

16 On January 20, 2021, President Biden issued Executive Order 13990, entitled “Executive  
17 Order on Protecting Public Health and the Environment and Restoring Science to Tackle the  
18 Climate Crisis.” 86 Fed. Reg. 7037 (Jan. 20, 2021). The Executive Order “directs all executive  
19 departments and agencies (agencies) to immediately review and, as appropriate and consistent  
20 with applicable law, take action to address the promulgation of Federal regulations and other  
21 actions during the past 4 years” that conflict with policies set forth in the Order. *Id.* The 2020  
22 Rule is on the list of regulations to be reviewed.<sup>2</sup> “For any such actions identified by the  
23 agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider  
24 suspending, revising, or rescinding the agency actions.” *Id.* at 7037, section 2(a).

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26 <sup>2</sup> See [https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-](https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/)  
27 [of-agency-actions-for-review/](https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/) (item No. 2 under Department of Defense, and item No. 31 under  
28 EPA).

1 The Executive Order also provides that the Attorney General “may, as appropriate and  
2 consistent with applicable law, provide notice of this order and any actions taken pursuant to  
3 section 2(a) of this order to any court with jurisdiction over pending litigation related to those  
4 agency actions identified pursuant to section 2(a) of this order, and may, in his discretion, request  
5 that the court stay or otherwise dispose of litigation, or seek other appropriate relief consistent  
6 with this order, until the completion of the processes described in this order.” *Id.* at 7039.

8 EPA has requested that the Justice Department seek an abeyance or stay of proceedings  
9 in pending litigation seeking review of any EPA regulation promulgated between January 20,  
10 2017, through January 20, 2021, to provide new EPA management with an opportunity to review  
11 the underlying rule or matter. Accordingly, the Agencies have sought abeyances and/or  
12 continuances based upon the need for additional time for review of the 2020 Rule in numerous  
13 district court cases and in one appeal in the Tenth Circuit Court of Appeals.<sup>3</sup>

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17 <sup>3</sup> Those cases include *Colorado v. EPA*, Nos. 20-1238, -1262, -1263, Doc. 010110474124 (10th  
18 Cir., Defendants’ motion to hold appeals in abeyance filed Feb. 2, 2021) (pending); *S.C. Coastal*  
19 *Conservation League v. Wheeler*, No. 2:20-cv-01687, Dkt. 96 (D.S.C. Jan. 27, 2021) (30 day  
20 continuance of summary judgment hearing date; hearing not yet rescheduled); *Envtl. Integrity*  
21 *Project v. Wheeler*, No. 1:20-cv-01734, Dkt. 27 (D.D.C. Jan. 28, 2021) (court ordered the case  
22 stayed indefinitely); *Conservation Law Found. v. EPA*, No. 1:20-cv-10820, Dkt. 99 (D. Mass.  
23 Feb. 10, 2021) (court granted consent motion to extend deadline for reply brief to May 10,  
24 2021); *Chesapeake Bay Found., Inc. v. Wheeler*, No. 20-cv-1063, Dkt. 48 (D. Md. Feb. 2, 2021)  
25 (court ordered case held in abeyance through July 29, 2021); *Navajo Nation v. Wheeler*, No.  
26 2:20-cv-602, Dkt. 27 (D.N.M. Feb. 4, 2021) (court granted joint motion to extend all deadlines  
27 by 30 days); *New Mexico Cattle Growers’ Ass’n v. EPA*, No. 1:19-cv-00988, Dkt. 59 (D.N.M.  
28 Feb. 10, 2021) (court ordered case held in abeyance until May 1, 2021); *Murray v. Wheeler*, No.

1 **ARGUMENT**

2 The courts have inherent power to hold their own proceedings in abeyance. “[T]he  
3 power to stay proceedings is incidental to the power inherent in every court to control the  
4 disposition of the causes on its docket with economy of time and effort for itself, for counsel, and  
5 for litigants.” *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936).  
6

7 In addition, agencies have inherent authority to review past decisions and to revise,  
8 replace, or repeal a decision to the extent permitted by law and supported by a reasoned  
9 explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle*  
10 *Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983); *Modesto Irrigation Dist.*  
11 *v. Gutierrez*, 619 F.3d 1024, 1034 (9th Cir. 2010). An agency’s interpretation of the statute it  
12 administers is not “carved in stone,” but must be evaluated “on a continuing basis,” for example,  
13 “in response to a change . . . in administrations.” *Nat’l Cable & Telecomm. Ass’n v. Brand X*  
14 *Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted).  
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16

17 As indicated above, the President has directed the Agencies to review the 2020 Rule.  
18 That review will necessarily take a certain amount of time to initiate and pursue, particularly  
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21 1:19-cv-1498, Dkt. 42 (N.D.N.Y. Feb. 2, 2021) (case held in abeyance until August 2, 2021);  
22 *Puget Soundkeeper All. v. EPA*, No. 2:20-cv-00950, Dkt. 47 (W.D. Wash. Feb. 8, 2021) (court  
23 ordered case stayed through May 1, 2021); *Oregon Cattlemen’s Ass’n v. EPA*, No. 3:19-cv-  
24 00564, Dkt. 113 (D. Or. Feb. 2, 2021) (court ordered case stayed through June 2, 2021);  
25 *Waterkeeper All. v. Wheeler*, No. 3:18-cv-03521, Dkt. 102 (N.D. Cal. Feb. 11, 2021) (parties  
26 filed stipulation to continue existing deadlines and stay proceedings for 60 days); and  
27 *Washington Cattlemen’s Ass’n v. EPA*, No. 2:19-cv-569, Dkt. 95 (W.D. Wash. Feb. 8, 2021)  
28 (court ordered case stayed through May 1, 2021).

1 because the administration is in the process of bringing new leadership to the Agencies and who  
2 must have sufficient time to review the Rules. For example, the EPA Administrator-designate  
3 has not yet been confirmed by the Senate.  
4

5 The Agencies' review of the 2020 Rule may ultimately lead to the modification or  
6 withdrawal of the rule, which could affect the issues and arguments at play in this litigation and  
7 other related legal challenges regarding the regulatory definition of "waters of the United States."  
8 If that occurs, briefing regarding the 2019 and 2020 Rules at this time would be a waste of the  
9 Court's and parties' time and resources, and any decision may ultimately be a nullity. In any  
10 case, under the current litigation schedule, no substantive motions have yet been filed in this case  
11 and no decision on cross-motions for summary judgment could be rendered before October 5,  
12 2021, at the very earliest, since that is the date by which Defendants are to file their reply brief in  
13 support of their cross-motion for summary judgment. Extensive briefing on the content of the  
14 administrative records and judicial resolution of such dispute is unnecessary at this time in light  
15 of the possibility that the 2020 Rule may be modified or withdrawn as a result of the ongoing  
16 review that is commencing. A 90-day abeyance of all deadlines in the case, followed by a status  
17 report with a proposal for further proceedings in the case at the end of that period, would  
18 recognize the potentially changing landscape and promote the interests of judicial economy and  
19 preservation of the parties' resources. The Court's Order of January 8, 2021, stated that "[t]he  
20 Court will grant the requested extension, but is not inclined to grant further extensions absent  
21 exceptional circumstances." Dkt. 24 at 1. The Defendants respectfully submit that the issuance  
22 of the Executive Order directing Defendants to review the 2020 Rule constitutes exceptional  
23 circumstances.  
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