

Nos. 20-1238, 20-1262, 20-1263

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF COLORADO,
Plaintiff/Appellee,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants/Appellants,

CHANTELL and MICHAEL SACKETT; and
AMERICAN FARM BUREAU FEDERATION, et al.,
Intervenor-Defendants/Appellants.

Appeal from the United States District Court for the District of Colorado
No. 1:20-cv-01461-WJM-NRN (Hon. William J. Martinez)

MOTION TO HOLD APPEALS IN ABEYANCE FOR 60 DAYS

JEAN E. WILLIAMS
Deputy Assistant Attorney General
JENNIFER SCHELLER NEUMANN
ROBERT J. LUNDMAN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-2496
robert.lundman@usdoj.gov

Defendants/Appellants U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, and agency officials (collectively, the Agencies) have appealed a preliminary injunction prohibiting implementation in Colorado of the Agencies' Navigable Waters Protection Rule (NWPR), 85 Fed. Reg. 22,250 (Apr. 21, 2020). For the reasons set forth below, the Agencies respectfully ask this Court to hold these consolidated appeals in abeyance for 60 days because of the change in presidential administrations and the recent Executive Order directing the Agencies to review certain rules, including the NWPR. At the end of the 60 days, the Agencies will update the Court on the status of their review and ask the Court to continue or end the abeyance or to take other action.

Plaintiff/Appellee State of Colorado supports the requested abeyance and will be filing a response supporting the motion. Intervenor-Defendants/Appellants Chantell and Michael Sackett and American Farm Bureau Federation et al. oppose this motion and will be filing responses.

BACKGROUND

The key phrase defining the reach of the Clean Water Act is “waters of the United States.” Specifically, the Act prohibits “the discharge of any pollutant by any person” without a permit or other authorization, 33 U.S.C. § 1311(a), to “navigable waters,” defined as “the waters of the United States,” *id.* § 1362(7).

In 2015, the Agencies comprehensively revised the regulatory definition of “waters of the United States” during President Obama’s administration. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015). Then in 2019, the Agencies repealed the 2015 revisions during President Trump’s administration. 84 Fed. Reg. 56,626 (Oct. 22, 2019). In 2020, the Agencies again revised the definition of “waters of the United States” in the rule at issue in these appeals, the Navigable Waters Protection Rule or NWPR. 85 Fed. Reg. 22,250, 22,261 (Apr. 21, 2020). *See* Agencies Opening Brief at 5-12, 22 (detailing regulatory history and extensive litigation relating to these rules).

Before the NWPR went into effect, Colorado brought this case in district court and sought to preliminarily enjoin the rule. The district court entered a preliminary injunction on June 19, 2020. Appendix 94-120 (filed with Agencies’ opening brief). The Agencies appealed, as did intervenors American Farm Bureau Federation et al. and intervenors Chantell and Michael Sackett, and this Court consolidated the appeals. The parties briefed the consolidated appeals on an expedited schedule, and the Court held oral argument on November 18, 2020.

President Biden was sworn in on January 20, 2021. That same day, he signed an Executive Order directing federal agencies to review rules issued in the prior four years that are or might conflict with the policy stated in the order. The order provides that “[i]t is, therefore, the policy of my Administration to listen to

the science; to improve public health and protect our environment; to ensure access to clean air and water; . . . [and] to bolster resilience to the impacts of climate change.” Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Executive Order 13990, 86 Fed. Reg. 7037, § 1 (published Jan. 25, 2021, signed Jan. 20, 2021). The order “directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.” *Id.* at 7037, § 2(a). “For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions.” *Id.*

Pursuant to the order, the Agencies are to submit a list of actions that they are considering pursuant to Section 2(a) to the Office of Management and Budget within 30 days if the action would be completed by December 21, 2021, and within 90 days if the action would be completed by December 31, 2025. *Id.* at 7038, § 2(b) (applying to actions that are subject to review by the Office of Management and Budget). The order provides that the “Attorney General may, as appropriate and consistent with applicable law, provide notice of this order and any actions taken pursuant to section 2(a) of this order to any court with jurisdiction over

pending litigation related to those agency actions identified pursuant to section (2)(a) of this order, and may, in his discretion, request that the court stay or otherwise dispose of litigation, or seek other appropriate relief consistent with this order, until the completion of the processes described in this order.” *Id.* at 7039, § 2(d). In conformance with the Executive Order, the Agencies are reviewing the NWPR. *See* Fact Sheet: List of Agency Actions for Review, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/> (last visited on Feb. 2, 2021).

ARGUMENT

The Agencies ask the Court to hold the consolidated appeals in abeyance for 60 days in order to allow the Agencies to review the NWPR and assess potential next steps in this litigation. Because the appeals have been briefed and argued, the Agencies are asking the Court to hold off on issuing a ruling. The Agencies will make another filing before the end of the 60 days updating the Court on the status of the Agencies’ review and will propose that the Court continue or end the abeyance or that the Court take some other action.

This Court has the inherent authority to hold its own proceedings in abeyance. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of

time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

Exercising that discretion to hold the appeals in abeyance is fully warranted here because of the change in administrations and because the Agencies are reviewing the NWPR. When an agency seeks to determine whether it wants to reconsider an action or position taken by the agency, the proper course is to seek an abeyance. *See, e.g., AnchorLine Ltd. v. Fed. Maritime Comm’n*, 299 F.2d 124, 125 (D.C. Cir. 1962) (“[W]hen an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency.”); *Catawba County v. EPA*, 571 F.3d 20, 29 (D.C. Cir. 2009) (noting that the court stayed proceedings while agency considered petitions for reconsideration). The Agencies have the inherent authority to reconsider their past decisions and to revise, replace, or repeal a regulatory action to the extent permitted by law and supported by a reasoned explanation. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). An agency’s interpretation of a statute it administers is not “carved in stone” but must be evaluated “on a continuing basis,” for example, “in response to . . . a change in administrations.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted).

The Agencies have begun review of the NWPR pursuant to the Executive Order. A 60-day abeyance will allow the Agencies to continue reviewing the NWPR and then update the Court on the status of that review, without an intervening ruling from this Court addressing the NWPR. While this is the only pending challenge to the NWPR in a court of appeals, the Agencies are also seeking abeyances or stays in the many pending district court challenges to the NWPR. *See* Agencies Opening Brief at 11 n.1 (listing cases).

As noted above, Plaintiff/Appellee State of Colorado supports the requested abeyance and will be filing a response supporting the motion. Intervenor-Defendants/Appellants Chantell and Michael Sackett and American Farm Bureau Federation et al. oppose this motion and will be filing responses.

CONCLUSION

For the foregoing reasons, the Agencies ask the Court to hold the appeals in abeyance for 60 days.

Respectfully submitted,

s/ Robert J. Lundman

JEAN E. WILLIAMS

Deputy Assistant Attorney General

JENNIFER SCHELLER NEUMANN

ROBERT J. LUNDMAN

Attorneys

Environment and Natural Resources Division

U.S. Department of Justice

Post Office Box 7415

Washington, D.C. 20044

(202) 514-2496

robert.lundman@usdoj.gov

February 2, 2021
90-5-1-4-21720

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts of the document exempted by Rule 32(f), this document contains 1,325 words.

2. As incorporated by Federal Rule of Appellate Procedure 27(d)(1)(E), this document complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

s/ Robert J. Lundman
ROBERT J. LUNDMAN

Counsel for Federal Appellants

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; and
- (3) the digital submissions have been scanned for viruses with the most re-cent version of a commercial virus scanning program, Windows Defender Antivirus (updated February 2, 2021), and according to the program are free of viruses.

s/ Robert J. Lundman
ROBERT J. LUNDMAN

Counsel for Federal Appellants

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2021, I electronically filed the foregoing using the court's CM/ECF system, which will send notification to counsel of record.

s/ Robert J. Lundman

ROBERT J. LUNDMAN

Counsel for Federal Appellants