

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

SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE, *et al.*,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and JANE
NISHIDA, in her official capacity as the
Administrator of the United States
Environmental Protection Agency,¹

Defendants,

AMERICAN PETROLEUM INSTITUTE, *et
al.*,

Defendant-Intervenors,

NATIONAL HYDROPOWER
ASSOCIATION,

Defendant-Intervenors,

STATE OF LOUISIANA, *et al.*,

Defendant-Intervenors.

Civil Action No. 2:20-cv-03062-BHH

**JOINT MOTION TO HOLD THESE PROCEEDINGS IN ABEYANCE AND PROPOSED
BRIEFING SCHEDULE**

¹ Pursuant to Fed. R. Civ. P. 25(d), Andrew R. Wheeler's successor, Jane Nishida, in her official capacity as Acting Administrator of the United States Environmental Protection Agency, is automatically substituted as a defendant.

Plaintiffs South Carolina Coastal Conservation League, South Carolina Native Plant Society, Amigos Bravos, Natural Resources Defense Council, Savannah Riverkeeper, and Waterkeeper Alliance, and Defendants United States Environmental Protection Agency and Jane Nishida, in her official capacity as Acting Administrator of the United States Environmental Protection Agency (collectively, “EPA”), by and through their counsel, hereby move to hold these proceedings in abeyance for 60 days, until April 12, 2021. In support of this Motion, the Parties state:

1. Plaintiffs in this action challenge an EPA final rule under the Clean Water Act, entitled the Clean Water Act Section 401 Certification Rule (the “Certification Rule”) (codified at 40 C.F.R. § 121).

2. On January 20, 2021, President Biden signed Executive Order 13,990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 25, 2021), directing federal agencies to review certain actions taken between January 20, 2017, and January 20, 2021. The Certification Rule was specifically listed in a subsequent White House Statement as one of the agency actions to be reviewed pursuant to the Executive Order for potential suspension, revision or rescission.

3. Pursuant to the Executive Order, EPA officials are now reviewing the Certification Rule. Holding this case in abeyance will allow EPA additional time to brief new administration officials with decision-making responsibility about the Certification Rule.

4. EPA submits that, as to the many issues presented in this case, it would be exceedingly difficult for litigation counsel for EPA to represent EPA’s conclusive position as to these issues while EPA is in the process of reviewing the Certification Rule. Similarly, it would be improper for counsel for EPA to speculate as to the likely outcome of the review on any particular issue.

5. It is EPA’s position that:

a. Agencies have inherent authority to review past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC*

v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“*State Farm*”).

b. EPA’s interpretations of statutes it administers are not “carved in stone” but must be evaluated “on a continuing basis,” for example, “in response to . . . a change in administrations.” *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted). *See also Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038, 1043 (D.C. Cir. 2012) (a revised rulemaking based “on a reevaluation of which policy would be better in light of the facts” is “well within an agency’s discretion,” and “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations”) (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)).

6. EPA submits that it expects to be able to provide further information about the status of its review of the Certification Rule within 60 days. At the end of the 60-day period, EPA will confer with Plaintiffs and intervening parties to provide a status report where EPA may request additional time.

7. For the foregoing reasons, abeyance of all proceedings in this Court for 60 days is warranted. If additional time beyond April 12, 2021 is not granted by the Court, the parties request the following briefing schedule, which would supersede the deadlines contained in the Court’s scheduling order of December 2, 2020 (ECF No. 44):

- (1) May 11, 2021 – Intervenors to file motion for summary judgment (25 pages combined)
- (2) June 3, 2021 – Plaintiffs to file opposition and cross-motion for summary judgment (55 pages)
- (3) June 10, 2021 - Amicus briefs to be filed in support of Plaintiffs
- (4) August 2, 2021 – Defendant EPA to file response/reply in support of EPA’s motion for summary judgment (35 pages)
- (5) August 9, 2021 - Intervenors to file response/reply in support of EPA’s motion for summary judgment (25 pages combined)

(6) August 30, 2021 – Plaintiffs to file reply in support of Plaintiffs’ motion for summary judgment (40 pages)

8. Intervening parties consent to the relief requested.

9. Nothing in this Joint Motion shall prejudice any Party’s ability to seek additional relief, including an extension of the abeyance period.

WHEREFORE, the Parties respectfully request that the Court issue an order holding all proceedings in this case in abeyance for 60 days, until April 12, 2021, and entering the above briefing schedule to govern absent an additional stay. EPA will confer with Plaintiffs and intervening parties and provide a status report regarding its review of the Certification Rule by April 12, 2021.

Respectfully submitted this 11th day of February, 2021.

/s/ Frank S. Holleman III

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing Motion for Summary Judgment to be filed with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

Date: February 11, 2021

s/ Elisabeth Carter