

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

_____)	
NEW MEXICO CATTLE GROWERS’)	
ASSOCIATION,)	
)	
Plaintiff,)	
)	
v.)	
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
)	
Defendants,)	
)	Case No. 1:19-cv-00988-RB-SCY
and)	
)	
AMIGOS BRAVOS, NEW MEXICO)	
ACEQUIA ASSOCIATION, and GILA)	
RESOURCES INFORMATION)	
PROJECT,)	
)	
Intervening Cross-Claimants-Defendants,)	
)	
v.)	
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
)	
Cross-Defendants.)	
_____)	

JOINT/UNOPPOSED MOTION TO FURTHER EXTEND STAY

Pursuant to this Court’s October 5, 2021 Order directing the Parties to “file either a joint motion or separate proposals to further govern proceedings no later than April 1, 2022,” Dkt. No. 73, and D.N.M.LR-Civ 7.2, Defendants/Cross-Defendants (the “Agencies”) and Plaintiff jointly propose that the case remain in abeyance pending issuance by the Agencies of a final rule

regarding the definition of “waters of the United States” within the meaning of the Clean Water Act, 33 U.S.C. § 1362(7), or a determination by the Agencies that they will no longer proceed with the rulemaking. Intervening Cross-Claimants-Defendants (“Intervenors”) do not object to this motion. The Agencies and Plaintiff have good cause for this request:

PROCEDURAL BACKGROUND

1. In this proceeding, Plaintiff challenges two rules promulgated by the Agencies that define the phrase “waters of the United States” in Section 1362(7) of the Clean Water Act: the Definition of “Waters of the United States” – Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (“2019 Rule”), and the Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020) (“2020 Rule”). Intervenors challenge the 2020 Rule.

2. Plaintiff initiated this lawsuit on October 22, 2019, first challenging the 2019 Rule. Dkt. No. 1. On April 27, 2020, Plaintiff filed its Supplemental Complaint, which challenges both the 2020 Rule and the previous 2019 Rule. Dkt. No. 26. The Agencies answered on June 29, 2020. Dkt. No. 36.

3. Intervenors filed their Cross Complaint on June 30, 2020. Dkt. No. 38. The Agencies answered on August 31, 2020. Dkt. No. 53.

4. On May 26, 2020, Plaintiff moved to preliminary enjoin portions of the 2020 Rule. Dkt. No. 30. Briefing on that motion was completed on July 14, 2020. *See* Dkt. No. 45. On February 10, 2021, the Court denied Plaintiff’s preliminary injunction motion without prejudice and granted the Parties’ joint motion to stay proceedings. Dkt. No. 59.

5. Since then, the Court has maintained the stay in this proceeding. Unless extended, the stay expires on April 1, 2022. *See* Dkt. No. 73.

6. There are no other outstanding motions or deadlines before the Court in this matter.

REGULATORY BACKGROUND

7. On January 20, 2021, President Biden issued an Executive Order entitled “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.” 86 Fed. Reg. 7037 (Jan. 25, 2021). In conformance with the Executive Order, the Agencies began reviewing a number of regulations promulgated in the prior four years, including the 2020 Rule at issue in this case.

8. On June 9, 2021, the Agencies issued a press release stating that, after reviewing the 2020 Rule, they have decided to initiate new rulemaking to revise the definition of “waters of the United States.” See <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus> (last accessed March 13, 2022). In light of this new rulemaking, on June 30, 2021, the Agencies filed a motion to continue the stay in this proceeding until October 1, 2021. Dkt. No. 67. On July 7, 2021, the Court granted the motion. Dkt. No. 67. On September 30, 2021, the Agencies and Plaintiff filed another motion to continue the stay in this proceeding until April 1, 2022. Dkt. No. 72. This motion was granted on October 5, 2021. Dkt. No. 73.

RECENT DEVELOPMENTS

9. There have been a number of developments regarding both the rulemaking process and litigation in other courts with respect to the 2020 Rule.

10. On December 7, 2021, the Agencies issued a proposed rule entitled “Revised Definition of ‘Waters of the United States.’” 86 Fed. Reg. 69,372 (Dec. 7, 2021). The comment period closed on February 7, 2022.

11. Following the Agencies’ review of the 2020 Rule pursuant to Executive Order 13990, the Agencies moved to remand the 2020 Rule in a number of courts where litigation challenging the rule was pending. Although the Agencies asked for remand without vacatur, two courts remanded the 2020 Rule with vacatur. See *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-00266, 2021 WL 3855977, at *6 (D. Ariz. Aug. 30, 2021); *Navajo Nation v. Regan*, No. 2:20-

cv-602, 2021 WL 4430466, at *5 (D.N.M. Sept. 27, 2021). As a result of those orders, “the agencies have halted implementation of the 2020 Rule and are interpreting ‘waters of the United States’ consistent with the pre-2015 regulatory regime until further notice.” See U.S. EPA, *Current Implementation of Waters of the United States*, <https://www.epa.gov/wotus/current-implementation-waters-united-states> (last accessed March 13, 2022). The Agencies have not appealed the orders.

12. On October 25, 2021, intervenors in *Pascua Yaqui Tribe* filed a notice of appeal and moved to stay the Arizona district court’s order pending their appeal. See *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv00266 (D. Ariz.) Dkt. Nos. 104-106; see also *Pascua Yaqui Tribe v. Ariz. Rock Prods. Assoc.*, No. 21-16791 (9th Cir.). The intervenors, however, subsequently moved to voluntarily dismiss their appeal, which was granted on February 3, 2022. See *Pascua Yaqui Tribe v. Ariz. Rock Prods. Assoc.*, No. 21-16791 (9th Cir.) Dkt. No. 23.

13. Several other district courts have remanded the 2020 Rule either without vacatur or without addressing vacatur. See, e.g., Order at 4, *Pueblo of Laguna v. Regan*, No. 1:21-cv-00277 (D.N.M. Sept. 21, 2021), Dkt. No. 40 (declining to reach issue of vacatur in light of the *Pascua* decision); Order, *California v. Regan*, No. 3:20-cv-03005 (N.D. Cal. Sept. 16, 2021), Dkt. No. 271 (same); Order at 1, *Waterkeeper All. v. Regan*, No. 3:18-cv-03521 (N.D. Cal. Sept. 16, 2021), Dkt. No. 125 (same); Order at 2, *Conservation L. Found. v. EPA*, No. 1:20-cv-10820, (D. Mass. Sept. 1, 2021), Dkt. No. 122 (same); Order, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687 (D.S.C. July 15, 2021), Dkt. No. 147 (remanding without vacating); Order, *Murray v. Regan*, No. 1:19-cv- 01498 (N.D.N.Y. Sept. 7, 2021), Dkt. No. 46 (same).

JOINT PROPOSAL TO GOVERN THIS PROCEEDING

14. Because many courts have already addressed the substance of the Agencies' motion for remand, and the Agencies are no longer applying the 2020 Rule, continuing to litigate this case at this time does not serve the interest of judicial economy.

15. Indeed, multiple courts have stayed related litigation challenging the 2020 Rule, as well as litigation challenging the 2019 Rule. *See, e.g.*, Minute Order, *State of Colorado v. E.P.A.*, No. 1:20-cv-01461-WJM-NRN (D. Colo. Jan. 18, 2022) (holding case in abeyance until the Agencies publish a final rule defining “waters of the United States” or decide not to do so); Order, *Chesapeake Bay Found., Inc. v. Wheeler*, No. 20-cv-1063 (D. Md. Nov. 29, 2021), Dkt. No. 63 (same); Minute Order, *Env't Integrity Project v. Regan*, No. 1:20-cv-01734 (D.D.C. Oct. 30, 2021) (holding case in abeyance through April 29, 2022); Order at 6, *Or. Cattlemen's Ass'n v. EPA*, No. 3:19-cv-00564 (D. Or. Sept. 22, 2021), Dkt. No. 124 (continuing stay until April 1, 2022); Order at 2, *Puget Soundkeeper All. v. EPA*, No. 2:20-cv-00950 (W.D. Wash. Sept. 29, 2021), Dkt. No. 54 (same); Order at 2, *Wash. Cattlemen's Ass'n v. EPA*, No. 2:19-cv-00569 (W.D. Wash. Sept. 29, 2021), Dkt. No. 107 (same); *see also* Order at 3, *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-00266 (D. Ariz. Dec. 6, 2021), Dkt. No. 116 (staying challenge to 2019 Rule until the Agencies publish a final rule defining “waters of the United States” or decide not to do so); Order at 1, *Navajo Nation v. Regan*, No. 2:20-cv-00602 (D.N.M. Oct. 28, 2021), Dkt. No. 45 (same).

16. Accordingly, the Agencies and Plaintiff jointly propose that the case remain in abeyance pending issuance by the Agencies of a final rule regarding the definition of “waters of the United States” within the meaning of the Clean Water Act, 33 U.S.C. § 1362(7), or a determination by the Agencies that they will no longer proceed with the rulemaking. The Agencies and Plaintiff further propose to file a proposal or proposals for further proceedings within 21 days after either event occurs.

17. The Agencies and Plaintiff further propose that the Agencies will file a status report every six months beginning from the date this Court issues its order regarding the Parties' proposal to govern proceedings.

18. Intervenors do not object to this motion.

Dated: March 25, 2022

Respectfully submitted,

/s/ Hubert T. Lee
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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2022, I electronically transmitted the foregoing to the Clerk of Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to registered counsel for all parties.

/s/ Hubert T. Lee