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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

OREGON CATTLEMEN'S
ASSOCIATION,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Defendants.

No. 3:19-cv-00564-AC

**JOINT STATUS REPORT/STIPULATED
MOTION TO FURTHER EXTEND STAY;
[PROPOSED] ORDER**

Pursuant to this Court’s September 22, 2021 Order (Dkt. No. 124), Defendants United States Environmental Protection Agency (“EPA”), EPA Administrator Michael Regan, United States Army Corps of Engineers, and Acting Assistant Secretary of the Army for Civil Works, Jaime Pinkham (“Defendants” or “Agencies”);¹ Plaintiff Oregon Cattlemen’s Association, and Defendant-Intervenor Columbia Riverkeeper (collectively, the Parties), hereby submit this joint status report and motion to keep this proceeding 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 Parties have good cause for this request:

PROCEDURAL BACKGROUND

1. In this proceeding, Plaintiff is challenging 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 Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed. Reg. 22,250 (Apr. 21, 2020) (“2020 Rule”), and “Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed. Reg. 37,054 (June 29, 2015) (“2015 Rule”).

2. Plaintiff initiated this lawsuit on April 16, 2019, first challenging the 2015 Rule only. Dkt. No. 1.

3. On May 1, 2020, Plaintiff was granted leave to supplement its complaint, adding challenges to portions of the 2020 Rule. Dkt. Nos. 89, 90.

¹ EPA Administrator Michael Regan and Acting Assistant Secretary of the Army for Civil Works Jaime Pinkham are automatically substituted for their predecessors in office pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

4. On May 6, 2020, Columbia Riverkeeper was granted the right to intervene in this proceeding. Dkt. No. 93.

5. Also on May 6, 2020, the Court agreed to stay Plaintiff's claims against the 2015 Rule until either after the Court resolved Plaintiff's claims against the 2020 Rule on the merits "or until another federal court enters an order with the effect of reinstating the 2015 regulations in Oregon." Dkt. No. 93.

6. On June 8, 2020, Plaintiff filed a motion to preliminarily enjoin the portions of the NPWR it is challenging as unlawful. Dkt. No. 97. After Plaintiff's motion was fully briefed, the Court on August 6, 2020 held an oral hearing on the motion for preliminary injunction. Dkt. No. 108. At the hearing, the parties agree that the Court denied Plaintiff's motion for preliminary injunction and dismissed without prejudice Plaintiff's claims against the 2020 Rule for lack of standing. *Id.*; *see also* Dkt. No. 110 at pp. 30-31. Intervenor-Defendant maintains that all other claims were also dismissed without prejudice due to lack of standing. Plaintiff's position is that the court only dismissed Plaintiff's claims against the 2020 Rule. The Agencies agree that at a minimum, Plaintiff's claims against the 2020 Rule were dismissed without prejudice.

7. On February 2, 2021, the Court held a telephonic status conference, where the Court ordered the proceeding stayed until June 2, 2021. Dkt. No. 113. The Court instructed Plaintiff to file "Status Reports no later than 3/1/2021 and 5/28/2021." *Id.*

8. On February 26, 2021, Plaintiff filed its first status report. Dkt. No. 114. Plaintiff's status report noted that the 2020 Rule may be subject to review by the Agencies in accordance with 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) ("EO 13990"). Dkt. No. 114.

9. On May 26, 2021, the Parties filed a status report and a stipulated motion to continue the stay until July 1, 2021. Dkt. No. 115. The Agencies noted that “Agency officials are currently reviewing the 2020 Rule to determine whether the rule should be maintained, modified, or otherwise reconsidered. The Agencies are expecting to complete their review of the 2020 Rule and announce next steps by June 9, 2021.” *Id.* That same day, the Court granted the stipulated motion to continue this proceeding until July 1, 2021. Dkt. No. 116.

10. Since then, the parties have filed two additional motions to continue the stay in this proceeding, which were both granted. *See* Dkt. Nos. 117, 118, 123, 124. Unless extended, the stay expires on April 1, 2022. *See* Dkt. No. 124.

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

REGULATORY BACKGROUND

12. On January 20, 2021, President Biden issued EO 13990. In conformance with the Executive Order, the Agencies began reviewing a number of regulations promulgated in the last four years, including the 2020 Rule at issue in this case.

13. 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 July 1, 2021, the Parties stipulated to continue the stay in this proceeding until October 1, 2021. Dkt. No. 117. The same day, the Court granted the stipulated motion. Dkt. No. 118.

RECENT DEVELOPMENTS

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

15. 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.

16. 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.

17. 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.

18. 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

19. 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.

20. Indeed, multiple courts have stayed related litigation challenging the 2020 Rule, as well as litigation challenging the 2015 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 2, *Puget Soundkeeper All. v. EPA*, No. 2:20-cv-00950 (W.D. Wash. Sept. 29, 2021), Dkt. No. 54 (holding 2020 Rule claims in abeyance until April 1, 2022); Order, *N.M. Cattle Growers’ Ass’n v. EPA*, No. 1:19-cv-00988 (D.N.M. Oct. 5, 2021), Dkt. No. 73 (holding 2019 and 2020 Rule claims in abeyance until April 1, 2022); Order at 2, *Wash. Cattlemen’s Ass’n v. EPA*, No. 2:19-cv-00569 (W.D. Wash. Sept. 29, 2021), Dkt. No. 107 (continuing stay of claims against

2015, 2019, and 2020 Rules until April 1, 2022); Order, *Southeast Stormwater Assoc. v. EPA*, 4:15-cv-00579-MW-MAF (N.D. Fla. Sept. 23, 2021), Dkt. No. 110 (keeping proceeding re: 2015 Rule administratively closed); Order at 1, *Southeastern Legal Foundation, Inc. v. EPA*, 1:15-cv-02488-TCB (N.D. Ga. Oct. 14, 2021), Dkt. No. 37 (staying litigation against 2015 Rule until Oct. 14, 2022 or until the 2015 Rule become effective again); Minute Order, *North Dakota v. EPA*, 3:15-cv-00059 (D.N.D. March 22, 2022), Dkt. No. 350 (staying 2015 Rule claims); *but see* Order, *State of Ohio v. EPA*, 2:15-cv-02467-EAS-KAJ (S.D. Ohio Mar. 23, 2022), Dkt. No. 126 (dismissing claims against the 2015 Rule as moot in light of the Agencies’ December 7, 2021 proposed rule defining “waters of the United States”).

21. Accordingly, the Parties 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 Parties further propose to file a proposal or proposals for further proceedings within 21 days after either event occurs.

22. The Parties further propose that the Agencies will file a status report every six months beginning from the date this Court issues its order regarding this motion.

Respectfully submitted this 25 day of March, 2022:

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**Pro hac vice*

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[PROPOSED] ORDER

Based upon the foregoing, and good cause appearing, it is ORDERED that the above-captioned proceeding remain in abeyance pending either 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.

It is further ORDERED that the Parties shall file a proposal or proposals for further proceedings within 21 days after either of the above events occur.

It is further ORDERED that the Agencies will file a status report every six months beginning from the date of this Court’s order granting this proposal to govern proceedings.

IT IS SO ORDERED.

Dated:

Hon. Jeffrey J. Armistead, Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that the foregoing filing was electronically filed with the Clerk of the Court on March 25, 2022, using the CM/ECF system, which will send notification of said filing to the attorneys of record.

/s/ Hubert T. Lee

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