

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 20-cv-01461-WJM-NRN

THE STATE OF COLORADO,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL REGAN, in his official capacity as Administrator of the U.S. Environmental
Protection Agency;
U.S. ARMY CORPS OF ENGINEERS; and
JAIME PINKHAM, in his official capacity as Acting Assistant Secretary of the Army for
Civil Works,

Defendants.

CHANTELL SACKETT and
MICHAEL SACKETT,

Intervenor-Defendants.

AMERICAN FARM BUREAU FEDERATION;
AMERICAN PETROLEUM INSTITUTE;
AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION;
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA;
LEADING BUILDERS OF AMERICA;
NATIONAL ALLIANCE OF FOREST OWNERS;
NATIONAL ASSOCIATION OF HOME BUILDERS;
NATIONAL CATTLEMEN'S BEEF ASSOCIATION;
NATIONAL CORN GROWERS ASSOCIATION;
NATIONAL MINING ASSOCIATION;
NATIONAL PORK PRODUCERS COUNCIL;
NATIONAL STONE, SAND, AND GRAVEL ASSOCIATION;
PUBLIC LANDS COUNCIL; and
U.S. POULTRY & EGG ASSOCIATION,

Intervenor-Defendants.

JOINT STATUS REPORT AND PROPOSAL FOR FURTHER PROCEEDINGS

Plaintiff the State of Colorado; Defendants United States Environmental Protection Agency (“EPA”), EPA Administrator Michael Regan, the United States Army Corps of Engineers (“Corps”), and Acting Assistant Secretary of the Army Jaime Pinkham (collectively, the “Agencies”); Intervenor-Defendants Chantell and Michael Sackett; and Intervenor-Defendants American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Chamber of Commerce of the United States of America, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Cattlemen’s Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand, and Gravel Association, Public Lands Council, and U.S. Poultry & Egg Association hereby provide this joint status report and propose that the case remain in abeyance and administratively closed pending issuance by the Agencies of a new 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 pending rulemaking.

BACKGROUND

Plaintiff Colorado filed its initial complaint on May 22, 2020, challenging a rule issued by the Agencies entitled “Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed. Reg. 22,250 (Apr. 21, 2020) (“2020 Rule”). The 2020 Rule defines the phrase “waters of the United States” in Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7).

On June 19, 2020, the Court granted Colorado’s motion for a preliminary injunction and stayed the rule prior to its taking effect in Colorado. Dkt. No. 61. The Agencies and Intervenors appealed. Colorado subsequently amended its complaint, Dkt. No. 81, and Defendants and Intervenors filed answers. Dkt. Nos. 85, 86, 88. The Court entered a Joint Case Management Plan on August 6, 2020. Dkt. No. 92. Among other things, that plan established a briefing schedule with deadlines starting 14 days from the date of the Tenth Circuit’s decision on the preliminary injunction appeals. *Id.* ¶ 6 at 3-4.

While the appeal was pending, President Biden issued Executive Order 13990, 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 many rules promulgated in the last four years, including the 2020 Rule. 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 January 6, 2022) (item No. 2 under Department of Defense, and item No. 31 under EPA). The Executive Order directs the Agencies to “consider suspending, revising, or rescinding” such actions “that conflict with [the] important national objectives” listed therein. 86 Fed. Reg. 7037, sections 1 & 2(a).

On March 1, 2021, the Tenth Circuit denied the Agencies’ request (opposed by Intervenors) to hold the appeals in abeyance. See *Colorado v. EPA* (10th Cir.), Nos. 20-1238, 20-1262 & 20-1263, ECF No. 010110486364 (Doc. 10811133). The Tenth Circuit

decided the preliminary injunction appeals on March 2, 2021. See Dkt. No. 93.

Since then, this Court granted three requests to extend the briefing schedule. See Dkt. Nos. 94, 96, 99, 101, 107, 109. 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 visited January 6, 2022). On July 12, 2021, the Parties requested that the case be held in abeyance until January 14, 2022. Dkt. No. 110. The Parties also proposed that they would file a status report and proposal(s) to govern further proceedings by the same date. *Id.* On July 14, 2021, the Court granted the Parties’ motion and administratively closed the case. Dkt. Nos. 111, 112.

STATUS OF RULEMAKING AND OTHER CASES

On August 4, 2021, the Agencies issued a Federal Register notice announcing that they intend to undertake two rulemakings. 86 Fed. Reg. 41,911. The Agencies stated that the first rule will propose to restore the regulations defining “waters of the United States” in place for decades until 2015, with amendments to reflect the Agencies’ interpretation of the statutory limits on the scope of the “waters of the United States” informed by Supreme Court case law. The Agencies then anticipate proposing a second rule that builds upon that regulatory foundation with the benefit of additional stakeholder engagement. On December 7, 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 for that rulemaking closes February 7, 2022.

Following the Agencies' review of the 2020 Rule pursuant to Executive Order 13990, the Agencies moved to remand the 2020 Rule in numerous courts where litigation challenging the rule was pending. Although the Agencies asked for remand without vacatur, two courts have 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 visited January 6, 2022). The Agencies have not appealed the orders. Intervenors in *Pascua Yaqui Tribe* filed a notice of appeal and moved to stay the Arizona district court's order pending their appeal, but recently moved to dismiss their appeal, and the district court granted their request to withdraw the stay motion. See *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-00266 (D. Ariz.), Dkt. Nos. 104-106, 117-118; *Pascua Yaqui Tribe v. Ariz. Rock Prods. Assoc.*, No. 21-16791 (9th Cir.), Dkt. No. 12330684.

Several other district courts 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).

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. Indeed, multiple courts have stayed related litigation challenging the 2020 Rule, as well as litigation challenging a 2019 rule that defined "waters of the United States." See, e.g., Order, *Chesapeake Bay Found., Inc. v. Wheeler*, No. 20-cv-1063 (D. Md. Nov. 29, 2021), Dkt. No. 63 (holding case in abeyance until the Agencies publish a final rule defining "waters of the United States" or decide not to do so); 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, *N.M. Cattle Growers' Ass'n v. EPA*, No. 1:19-cv-00988 (D.N.M. Oct. 5, 2021), Dkt. No. 73 (continuing stay until April 2022); Order at 6, *Or. Cattlemen's Ass'n v. EPA*, No. 3:19-cv-00564 (D. Or. Sept. 22, 2021), Dkt. No. 124 (same); 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).

Accordingly, the Parties jointly propose that the case remain in abeyance and administratively closed pending issuance by the Agencies of a new 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 pending rulemaking.

Dated: January 14, 2022

Respectfully submitted,

s/ Carrie Noteboom

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CERTIFICATE OF SERVICE

I hereby certify that, on January 14, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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I hereby certify that I have mailed or served the foregoing document or paper to the following non-CM/ECF participants in the manner (mail, hand-delivery, etc.) indicated by the non-participant's name:

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