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The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON CATTLEMEN’S
ASSOCIATION,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Defendants.

And

PUGET SOUNDKEEPER ALLIANCE,
IDAHO CONSERVATION LEAGUE, and
SIERRA CLUB,

Defendant-
Intervenors.

No. 2:19-CV-0569-JCC

DEFENDANTS’ MOTION TO EXTEND
STAY

NOTE ON MOTION CALENDAR:
MAY 14, 2021

1 Pursuant to Local Rule 7(d)(3), defendants United States Environmental Protection
 2 Agency (“EPA”), EPA Administrator Michael Regan, United States Army Corps of Engineers,
 3 and Acting Assistant Secretary of the Army for Civil Works, Jaime Pinkham (“Defendants” or
 4 “Agencies”),¹ hereby move to extend the stay in the above-captioned proceeding until July 1,
 5 2021. While Plaintiff indicated it opposes the relief requested herein, the Defendant-Intervenors
 6 have noted that they do not oppose an extension of the stay in litigation. As grounds for their
 7 motion, the Agencies state as follows:

8 BACKGROUND

9 **I. Regulations Defining “Waters of the United States” Under the Clean Water Act.**

10 Under the Clean Water Act, “the discharge of any pollutant by any person”
 11 to “navigable waters” is prohibited. 42 U.S.C. §§ 1311(a), 1362(12). The Act defines “navigable
 12 waters” to mean “waters of the United States, including the territorial seas.” *Id.* § 1362(7). Since
 13 2015, the Agencies have promulgated three regulations in an effort to define “waters of the United
 14 States.” In 2015, the Agencies revised the regulatory definition of “waters of the United States”
 15 in the Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June
 16 29, 2015) (“2015 Rule”). Then in 2017, the Agencies began reconsidering the 2015 Rule. They
 17 conducted a notice-and-comment rulemaking process, which resulted in the Agencies issuing a
 18 final rule repealing the 2015 Rule and reinstating the pre-2015 Rule regulatory definition of
 19 “waters of the United States.” *See* 84 Fed. Reg. 56,626, 56,626 (Oct. 22, 2019) (“Repeal Rule”).
 20 The Repeal Rule went into effect on December 23, 2019. *Id.* at 56,626. Then on January 23, 2020,
 21 the Agencies signed a final rule—the Navigable Waters Protection Rule (“NWPR”)—that revised
 22 the definition of “waters of the United States.” The NWPR was published in the Federal Register
 23
 24

25 ¹ EPA Administrator Michael Regan and Acting Assistant Secretary of the Army for Civil Works
 26 Jaime Pinkham are automatically substituted for their predecessors in office pursuant to Rule
 27 25(d) of the Federal Rules of Civil Procedure.

1 on April 21, 2020, and went into effect on June 22, 2020, 85 Fed. Reg. 22,250 (Apr. 21, 2020).
2 The NWPR replaces the Repeal Rule.

3 On January 20, 2021, President Biden issued Executive Order 13990, entitled “Executive
4 Order on Protecting Public Health and the Environment and Restoring Science to Tackle the
5 Climate Crisis.” 86 Fed. Reg. 7037 (Jan. 25, 2021). The Executive Order “directs all executive
6 departments and agencies (agencies) to immediately review and, as appropriate and consistent
7 with applicable law, take action to address the promulgation of Federal regulations and other
8 actions during the past 4 years” that conflict with policies set forth in the Order. *Id.* The NWPR
9 is on the list of regulations to be reviewed.² The Executive Order further states, “[f]or any such
10 actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with
11 applicable law, consider suspending, revising, or rescinding the agency actions.” Executive
12 Order, Section 2(a), 86 Fed. Reg. at 7037. Heads of agencies were directed, within 30 days of the
13 date of the Executive Order, to submit to the Director of the Office of Management and Budget
14 (“OMB”) a list of any actions being considered under Section 2(a) that would be completed by
15 the end of 2021 and which would be subject to OMB review, and within 90 days to submit to
16 OMB an updated list of actions that that would be subject to OMB review that would be completed
17 by December 31, 2025. *Id.*, Section 2(b), at 7038.

18 The Executive Order also provides that the Attorney General “may, as appropriate and
19 consistent with applicable law, provide notice of this order and any actions taken pursuant to
20 section 2(a) of this order to any court with jurisdiction over pending litigation related to those
21 agency actions identified pursuant to section 2(a) of this order, and may, in his discretion, request
22 that the court stay or otherwise dispose of litigation, or seek other appropriate relief consistent
23 with this order, until the completion of the processes described in this order.” *Id.* at 7039.

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26 ² See <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/> (item No. 2, under Department of Defense; item No. 31, under
27 EPA) (last accessed Apr. 29, 2021).

1 Accordingly, in a number of cases where the NWPR is being challenged, the Agencies
2 have sought and been granted abeyances and/or continuances based upon the need for additional
3 time to review the Rule pursuant to the Executive Order. *See, e.g., State of Colorado v. EPA*, No.
4 20-cv-01461, Dkt. No. 101 (D. Colo. Apr. 21, 2021) (granting second 45-day extension of
5 briefing schedule); *State of California v. Regan*, No. 3:20-cv-3005, Dkt. No. 241 (granting
6 opposed motion to stay proceedings for an additional 60 days after initial 60-day stay) (N.D. Cal.
7 Apr. 16, 2021); *Waterkeeper All. v. Wheeler*, No. 3:18-cv-03521, Dkt. No. 105 (N.D. Cal. Apr.
8 14, 2021) (granting the Agencies' request for a 60-day extension to file an answer to an amended
9 complaint after initial 60-day stay); *Navajo Nation v. Wheeler*, No. 2:20-cv-602, Dkt. No. 27
10 (D.N.M. Feb. 4, 2021) (extending all deadlines by 30 days); *Murray v. Wheeler*, No. 1:19-cv-
11 1498, Dkt. No. 42 (N.D.N.Y. Feb. 2, 2021) (holding case in abeyance until August 2, 2021); *New*
12 *Mexico Cattle Grower's Ass'n v. EPA*, No. 19-cv-0988 RB/SCY, Dkt. No. 64 (D.N.M. Apr. 29,
13 2021) (granting opposed request to continue existing stay in the case until June 1, 2021); *Env'tl.*
14 *Integrity Project v. Wheeler*, No. 1:20-cv-01734, Dkt. No. 27 (D.D.C. Jan. 28, 2021) (staying case
15 indefinitely).³

16 II. Status of This Litigation.

17 Plaintiff Washington Cattlemen's Association initiated its lawsuit on April 16, 2019, first
18 challenging the 2015 Rule. Dkt. No. 1. Plaintiff then moved to preliminarily enjoin the 2015 Rule.
19 *See* Dkt. No. 15. On December 30, 2019, the Court denied Plaintiff's motion on the grounds that
20 the Repeal Rule rendered the motion "moot." Dkt. No. 61.

21 Plaintiff then filed two supplemental complaints. First, on December 20, 2019, Plaintiff
22 added claims challenging the Repeal Rule. Dkt. No. 60. Second, on May 4, 2020, Plaintiff added
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26 ³ Only one court has denied such a request. *See Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-00266,
27 Dkt. No. 32 (D. Ariz. Apr. 12, 2021). In that case, the Agencies had requested a 90-day stay,
which was opposed by the plaintiffs.

1 claims challenging portions of the NWPR. Dkt. No. 72. On July 31, 2020, this Court stayed
 2 Plaintiff's claims with respect to the 2015 Rule and Repeal Rule. Dkt. No. 86.

3 Plaintiff filed a motion to preliminarily enjoin, in part, the NWPR on June 15, 2020. Dkt.
 4 No. 77. That motion is still pending. Then, on August 27, 2020, the Agencies filed a motion to
 5 consolidate this case with *Puget Soundkeeper Alliance, et al. v. United States Environmental*
 6 *Protection Agency, et al.* (2:20-CV-0950-JCC). Dkt. No. 87. That motion is also still pending.
 7 There are no other outstanding motions or deadlines before the Court in this matter.

8 On February 2, 2021, in light of Executive Order 13990, the Parties filed a stipulated
 9 motion to stay the proceeding until May 1 to provide the Agencies the opportunity to review the
 10 NWPR in accordance with the Executive Order. Dkt. No. 94. The motion was granted on February
 11 8. Dkt. No. 95. In light of the ongoing review of the NWPR, in the interest of judicial economy
 12 and conserving the Parties' and the Court's limited resources, and to avoid prejudice to the Parties,
 13 the Agencies hereby move to further extend the stay of this proceeding until July 1, 2021.

14 ARGUMENT

15 The courts have inherent power to hold their own proceedings in abeyance. "[T]he power
 16 to stay proceedings is incidental to the power inherent in every court to control the disposition of
 17 the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."
 18 *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

19 In addition, agencies have inherent authority to review past decisions and to revise,
 20 replace, or repeal a decision to the extent permitted by law and supported by a reasoned
 21 explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle*
 22 *Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983). An agency's
 23 interpretation of the statute it administers is not "carved in stone," but must be evaluated "on a
 24 continuing basis," for example, "in response to a change . . . in administrations." *Nat'l Cable &*
 25 *Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks
 26 and citations omitted).

1 As indicated above, the President has directed the Agencies to review recent regulations
2 promulgated in the last four years, including the NWPR. The Agencies' review will necessarily
3 take time to complete. Accordingly, this Court stayed this proceeding until May 1. Dkt. No. 95.

4 Indeed, there has been continued progress in the Agencies' review process. On March 10,
5 2021, the new EPA Administrator, Michael Regan, was sworn in. 167 Cong. Rec. S1456 (daily
6 ed. Mar. 10, 2021). The new Administrator and his staff have since been briefed on the NWPR,
7 and the new administration is currently weighing its options regarding the Rule. Recently,
8 Administrator Regan pledged to "begin a stakeholder engagement process involving our AG
9 community, Farm Bureau or AG CEOs, our environmental community, to look at the lessons
10 learned and how we can move forward." *Hearing on Fiscal 2022 Budget Requests for EPA*
11 *Before the H. Appropriations Subcomm. on Interior & Env't*, 117th Cong. 4 (Apr. 21, 2021)
12 (statement of Michael Regan, EPA Administrator). While the Agencies have not yet made a final
13 decision regarding the NWPR, Administrator Regan has expressed his intent to "chart a path
14 forward on waters of the U.S. that will be inclusive and forward-looking." *Id.* at 5. The Agencies
15 ask for a brief extension of the stay to allow time for the new Administrator to make an informed
16 decision regarding which direction it will take with respect to the Rule. *See Fox Television*, 556
17 U.S. at 515 (holding Agencies have inherent authority to review past decisions and to revise,
18 replace, or repeal a decision to the extent permitted by law and supported by a reasoned
19 explanation).

20 Moreover, apart from Plaintiff's fully briefed and undecided motion to preliminarily
21 enjoin portions of the NWPR, no substantive motions have been filed in this case. In fact, the
22 Court has not yet set a summary judgment briefing schedule in this proceeding. The Agencies'
23 review of the NWPR may ultimately lead to the modification or withdrawal of the NWPR. If that
24 occurs, Plaintiff's pending motion to preliminarily enjoin the NWPR would become moot. And
25 any substantive briefing regarding the NWPR would be a waste of the Court's and parties' time
26 and resources. In other words, the Parties would be prejudiced if they were required to expend
27 resources litigating a rule that the Agencies may ultimately revise. In light of the advancing and

1 ongoing review process, allowing for a short 60-day extension of the existing stay period would
2 be the most efficient path forward in this litigation.

3 Additionally, as explained above, *supra* at 3-4, a number of other courts across the
4 country have considered and granted stays/continuances of existing deadlines in other
5 proceedings involving the NWPR in light of the Agencies’ ongoing review of the Rule. *E.g.*,
6 *New Mexico Cattle Grower’s Ass’n v. EPA*, No. 19-cv-0988 RB/SCY, Dkt. No. 64 (D.N.M. Apr.
7 29, 2021) (granting opposed request to continue existing stay in the case until June 1, 2021);
8 *State of California v. Regan*, No. 3:20-cv-3005, Dkt. No. 241 (granting an opposed motion to
9 extend a stay in the proceedings for an additional 60 days after initial 60-day stay). Granting the
10 Agencies’ proposed 60-day extension of the stay period to account for the Agencies’ review of
11 the Rule would be in line with the various stays and extensions granted in other suits involving
12 the NWPR.

13 WHEREFORE, Defendants request that the Court in this case extend the stay in this
14 proceeding until July 1, 2021.

15 Dated: April 29, 2021

Respectfully submitted,

16
17 /s/ Hubert T. Lee

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2021, I filed the foregoing using the Court’s CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Hubert T. Lee

Hubert T. Lee