

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

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

JOINT STATUS REPORT AND
STIPULATED MOTION TO FURTHER
STAY PROCEEDING

NOTE ON MOTION CALENDAR:
August 30, 2022

1 Pursuant to Local Rules 7(d)(1) and 10(g) and in accordance with this Court’s Order,
2 Dkt. No. 111 (April 4, 2022), Plaintiff, Defendants (“the Agencies”),¹ and Intervenor-Defendants
3 hereby submit this joint status report and jointly propose that the case remain in abeyance until
4 January 20, 2023. The Parties have good cause for this request:

5 **PROCEDURAL BACKGROUND**

6 1. In this proceeding, Plaintiff is challenging three rules promulgated by the
7 Agencies that define the phrase “waters of the United States” in Section 1362(7) of the Clean
8 Water Act: the Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg.
9 37,054 (June 29, 2015) (“2015 Rule”), the Definition of “Waters of the United States” –
10 Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (“2019 Rule”), and
11 the Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg.
12 22,250 (Apr. 21, 2020) (“2020 Rule”).

13 2. Plaintiff initiated this lawsuit on April 16, 2019, first challenging the 2015 Rule.
14 Dkt. No. 1. Plaintiff then moved to preliminarily enjoin the 2015 Rule. *See* Dkt. No. 15. On
15 December 30, 2019, the Court denied Plaintiff’s first motion for preliminary injunction on the
16 grounds that the 2019 Rule rendered the motion “moot.” Dkt. No. 61.

17 3. Plaintiff then filed two supplemental complaints. First, on December 20, 2019,
18 Plaintiff added claims to its complaint, challenging the 2019 Rule. Dkt. No. 60. Second, on May
19 4, 2020, Plaintiff added claims challenging portions of the 2020 Rule. Dkt. No. 72.

20 4. On July 31, 2020, this Court stayed Plaintiff’s claims with respect to the 2015
21 Rule and 2019 Rule. Dkt. No. 86. The Court noted that the Parties “may move to lift the stay
22 following the Court’s ruling on the merits of Plaintiff’s claims regarding the 2020 Rule.” *Id.*

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 5. Plaintiff filed a motion to preliminarily enjoin, in part, the 2020 Rule on June 15,
2 2020. Dkt. No. 77. That motion is still pending.

3 6. On August 27, 2020, Defendants filed a motion to consolidate this case with
4 *Puget Soundkeeper Alliance, et al. v. United States Environmental Protection Agency, et al.*
5 (2:20-CV-0950-JCC). Dkt. No. 87. That motion is also still pending.

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

8 8. On January 20, 2021, President Biden issued an Executive Order entitled
9 “Executive Order on Protecting Public Health and the Environment and Restoring Science to
10 Tackle the Climate Crisis.” 86 Fed. Reg. 7037 (Jan. 25, 2021) (“EO 13990”). In conformance
11 with the Executive Order, the Agencies began reviewing a number of regulations promulgated
12 in the last four years, including the 2020 Rule at issue in this case.

13 9. In light of this directive, on February 2, 2021, the Parties filed a stipulated motion
14 to stay the proceeding for 90 days to accommodate the Agencies’ review of the 2020 Rule. Dkt.
15 No. 94. The Court granted the motion on February 8, 2021, staying the case until May 1, 2021.
16 Dkt. No. 95. The Parties filed four additional motions to stay the proceeding, which were all
17 granted by this Court. Dkt. Nos. 99, 101, 107, 111. The proceeding has been stayed until
18 September 1, 2022, and the Parties were directed to “file a joint status report and proposal to
19 further govern proceedings on or before September 1, 2022.” Dkt. No. 111 at 2.

20 **RECENT DEVELOPMENTS AND PROPOSAL TO GOVERN PROCEEDINGS**

21 10. Following the Agencies’ review of the NWPR pursuant to EO 13990, the
22 Agencies moved to remand the NWPR in numerous courts where litigation challenging the rule
23 was pending. Although the Agencies asked for remand without vacatur of the NWPR, two courts
24 remanded the rule with vacatur. *See Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 956-57
25 (D. Ariz. 2021), *appeal dismissed sub nom. Pasqua Yaqui Tribe v. EPA*, No. 21-16791, 2022
26
27

1 WL 1259088 (9th Cir. Feb. 3, 2022); *Navajo Nation v. Regan*, No. 2:20-cv-602, 2021 WL
2 4430466, at *5 (D.N.M. Sept. 27, 2021).²

3 11. As a result of those orders, “the agencies have halted implementation of the
4 Navigable Waters Protection Rule (‘NWPR’) nationwide and are interpreting ‘waters of the
5 United States’ consistent with the pre-2015 regulatory regime until further notice.” *See* U.S.
6 EPA, Current Implementation of Waters of the United States,
7 <https://www.epa.gov/wotus/current-implementation-waters-united-states> (last visited Aug. 24,
8 2022).

9 12. The remaining cases challenging the NWPR, as well as cases challenging the
10 2019 Rule, have been held in abeyance.³

11 13. On December 7, 2021, the Agencies issued a proposed rule entitled “Revised
12 Definition of ‘Waters of the United States.’ ” 86 Fed. Reg. 69,372 (Dec. 7, 2021). The comment
13 period for that proposed rule closed on February 7, 2022. The Agencies are reviewing and
14

15 ² Multiple other courts granted the Agencies’ motion for remand, either without vacatur or
16 without addressing vacatur. *See, e.g., Pueblo of Laguna v. Regan*, No. 1:21-cv-00277, 2021 WL
17 4290179, at *2 (D.N.M. Sept. 21, 2021) (declining to reach issue of vacatur in light of the
18 *Pascua* decision); 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).

19 ³ *See* Order, *Env’t Integrity Project v. Regan*, No. 1:20-cv-01734 (D.D.C. Apr. 15, 2022),
20 Dkt. No. 40 (continuing abeyance pending issuance of a final rule regarding the definition of
21 “waters of the United States” or a determination that the Agencies will no longer proceed with
22 rulemaking); Order at 2, *N.M. Cattle Growers’ Ass’n v. EPA*, No. 1:19-cv-00988 (D.N.M. Mar.
23 29, 2022), Dkt. No. 75 (same); Order at 9, *Or. Cattlemen’s Ass’n v. EPA*, No. 3:19-cv-00564
24 (D. Or. Mar. 25, 2022), Dkt. No. 127 (same); Order, *Colorado v. EPA*, No. 1:20-cv-01461
25 (D. Colo. Jan. 18, 2022), Dkt. No. 118 (same); Order at 2, *Puget Soundkeeper All. v. EPA*,
26 No. 2:20-cv-00950 (W.D. Wash. Apr. 4, 2022), Dkt. No. 56 (continuing stay until September 1,
27 2022); Order, *Chesapeake Bay Found. v. Regan*, No. 20-1063 (D. Md. Nov. 29, 2021) Dkt, No.
63 (holding consolidated cases in abeyance pending publication of a final rule regarding the
definition of “waters of the United States” or a decision that the Agencies will no longer proceed
with rulemaking); *see also* Order at 3, *Pasqua 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).

1 responding to the comments submitted on the proposed rule and completing other necessary
2 components of the rulemaking process. The Agencies currently expect to issue a final regulation
3 by the end of this year.

4 14. This proceeding has been stayed until September 1, 2022. Dkt. No. 111. In light
5 of the Agency's expectation that a final regulation will be issued by the end of this year, the
6 Parties respectfully request that the proceeding be further stayed until January 20, 2023. The
7 Parties will submit a proposal or proposals for further proceedings by no later than January 31,
8 2023.

9 Dated: August 30, 2022

Respectfully submitted,

10
11 /s/ Hubert T. Lee

12 HUBERT T. LEE
13 SONYA J. SHEA
14 *Trial Attorneys*
15 Environmental Defense Section
16 U.S. Department of Justice
17 P.O. Box 7611
18 Washington, DC 20044
19 (202) 514-1806 (Lee)
20 (303) 844-7231 (Shea)
21 Hubert.lee@usdoj.gov
22 Sonya.Shea@usdoj.gov

COUNSEL FOR DEFENDANTS

23 /s/ Ethan W. Blevins
24 ETHAN W. BLEVINS, WSBA # 48219
25 Pacific Legal Foundation
26 255 South King Street, Suite 800
27 Seattle, Washington 98104
Telephone: (206) 619-8944
Email: EBlevins@pacificlegal.org

CHARLES YATES
DANIEL M. ORTNER
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Telephone: (916) 419-7111
Fax: (916) 419-7477
Email: Cyates@pacificlegal.org
Email: DOrtner@pacificlegal.org

COUNSEL FOR PLAINTIFF

/s/ Janette K. Brimmer
JANETTE K. BRIMMER
Earthjustice Northwest Office
705 2nd Ave., Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340
Email: jbrimmer@earthjustice.org

COUNSEL FOR DEFENDANT-
INTERVENORS

[Proposed] Order

It is ORDERED that the above-captioned proceeding remain in abeyance until January 20, 2023.

It is further ORDERED that the Parties shall file a proposal or proposals for further proceedings by no later than January 31, 2023.

IT IS SO ORDERED.

Hon. John C. Coughenour
UNITED STATES DISTRICT JUDGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, 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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27