

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

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NEW MEXICO CATTLE GROWERS’)
ASSOCIATION,)
)
Plaintiff,)
)
v.)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, et al.,)
)
Defendants,)
)
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.)
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Case No. 1:19-cv-00988-RB-SCY

JOINT PROPOSAL TO GOVERN PROCEEDINGS/MOTION TO CONTINUE STAY

Pursuant to this Court’s March 29, 2022 Order directing the Parties to “file a proposal or proposals for further proceedings within 21 days after” the Agencies issue 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), Dkt. No. 75, the parties submit the following proposal to govern proceedings:

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. Since February 10, 2021, the Court has maintained the stay in this proceeding. Dkt. No. 59. The stay expires when either the Agencies issue 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 the Agencies determine that they will no longer proceed with the rulemaking, whichever comes first. *See* Dkt. No. 75.

5. On December 29 and December 28, 2022, respectively, the Administrator of EPA and the Assistant Secretary of the Army for Civil Works signed a final rule entitled “Revised Definition of ‘Waters of the United States.’ ” The rule revises the definition of “waters of the United States” under the Clean Water Act. On January 3, 2023, the Agencies filed a notice of final rule with the Court notifying the Court and the Parties that this rule has been signed. Dkt. No. 77.

6. On January 18, 2023, the final rule entitled “Revised Definition of ‘Waters of the United States,’ ” was published in the Federal Register. See 88 Fed. Reg. 3004 (Jan. 18, 2023). The final rule is scheduled to go into effect on March 20, 2023.

7. On January 18, 2023, the final rule was challenged in two separate lawsuits filed in the Southern District of Texas. See *Texas v. EPA*, 3:23-cv-00017 (S.D. Tex. Jan. 18, 2023); *Am. Farm Bureau Fed’n v. EPA*, No. 3:23-cv-00020 (S.D. Tex. Jan. 18, 2023). Those lawsuits seek declaratory and injunctive relief against, and vacatur of, the final rule. See *Texas*, No. 3:23-cv-00017, ECF No. 1 at 28–29; *Am. Farm Bureau Fed’n*, No. 3:23-cv-00020, ECF No. 1 at 41–42.

8. In light of the publication of, and the pending legal challenges to, the new regulation defining “waters of the United States,” the Parties respectfully request that the proceeding be held in continued abeyance.¹ The Parties will submit a status report and proposal or proposals for further proceedings by no later than July 31, 2023. Any party may move to lift the stay if subsequent developments lead to the reinstatement of the prior rule(s) defining “waters of the United States” under the Clean Water Act. And each party reserves its right to oppose such a motion.

Dated: February 1, 2023

Respectfully submitted,

/s/ Hubert T. Lee
HUBERT T. LEE
SONYA J. SHEA
United States Department of Justice
Environment and Natural Resources Division
Environmental Defense Section

¹ Two courts have agreed to hold challenges to the prior “waters of the United States” rules in abeyance in light of the publication of, and the pending legal challenges to, the new regulation defining “waters of the United States.” *Washington Cattlemen's Association v. U.S. E.P.A. et al.*, 2:19-cv-00569-JCC, Dkt. No. 120, (W.D. Wash. January 23, 2023); *Oregon Cattlemen's Association v. U.S. E.P.A. et al.*, 3:19-cv-00564-AR, Dkt. No. 135, (D. Ore. January 24, 2023).

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2023, 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